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IN THE SUPERIOR COURT IN THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF NAVAJO

GORDON GROSS & LILLIANA GROSS, husband & wife, et al.,	)	CASE NUMBER CV202200042
Plaintiffs,	)	
vs.	)	ORAL ARGUMENT RE MOTION SUMMARY JUDGMENT & CROSS MOTION
THE SHORES AT RAINBOW LAKE COMMUNITY ASSOCIATION, AN ARIZONA NONPROFIT CORP.	)	
Defendants.	)	

TRANSCRIPT OF DIGITALLY TAPED PROCEEDINGS OF THE COURT

BEFORE THE HONORABLE JUDGE RUECHEL,
JUDGE OF THE SUPERIOR COURT, DIVISION IV

JULY 18, 2022
Holbrook, Arizona

TRANSCRIBED BY:

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A P P E A R A N C E S

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P R O C E E D I N G S

THE COURT: We are on the record in Case Number CV2022-00042, in the matter of Gross, et. al, vs. The Shores at Rainbow Lake, et. al. This is the date and time set for the oral argument on the motion and cross motion for summary judgment. The Court has reviewed the motion, the cross motion, the replies, and the responses. Mr. Klopp is present on behalf of the plaintiffs, and Mr. Csontos is present on behalf of the defendants.

Okay, I'm going to go ahead and just start with a couple of quick questions, and then I'll let both of you speak and tell me everything that I need to know, but I want to start with a couple of questions for the plaintiff because I think it might narrow things down a little bit.

Are you claiming, if I understand your argument, you're basically claiming there wasn't sufficient notice in the original CC&Rs to put the parties on notice that this is -- this kind of amendment could come later; is that correct?

MR. KLOPP: Yes, Your Honor. And you know after your questions I can go through it because the analysis has become slightly different for each one of the restrictions in the indictment, but generally speaking, yes, the dispute, at least at this phase, there's no factual dispute. We'll assume all is true, that they had the requisite number of votes, there could

be a factual dispute about that later, but plaintiff's position is this could be resolved as a matter of law therefore the Kalway (indiscernible) foreseeable (indiscernible.)

THE COURT: That was sort of my next question. For the purposes of these motions, the motion for summary judgment and cross motion for summary judgment, you're not claiming any specific issues regarding the number of votes or the propriety of the way that the votes were taken; is that correct?

MR. KLOPP: That is correct.

THE COURT: And, again, just for purposes of this?

MR. KLOPP: Correct.

THE COURT: Okay. So defendant's raised, I think several different issues, but if I understand correctly you're saying that you are entitled to summary judgment versus their summary judgment, just based upon the one issue?

MR. KLOPP: Correct, Your Honor.

THE COURT: Okay, make sure I understood that. And then the other question that I will expect the parties to answer, and I'll start with plaintiffs, the prior CC&Rs put the homeowners on notice that there would be some limitations on leases, correct; is that correct?

MR. KLOPP: No, Your Honor. Our position would be there were no limitations on leases in the existing CC&Rs.

THE COURT: Well, I guess, I think there was one that said, if I remember correctly, there's one that said they had

to lease out the whole parcel.

MR. KLOPP: Yes, Your Honor, that remains the same.

THE COURT: And notify the homeowner's association?

MR. KLOPP: Yes.

THE COURT: Okay. But you are saying that's the only restriction that was at the time?

MR. KLOPP: Yes.

THE CLERK: Judge, co-counsel Stockton Banfield is holding.

THE COURT: Oh, we should put him through then.

For the record, Mr. Banfield is also appearing telephonically on behalf of plaintiffs. And just to let you know, Mr. Banfield, we started a couple of minutes early, I apologize for that, I was simply asking your co-counsel a few questions that I would like to see addressed in the arguments, but we haven't officially started the oral arguments yet.

And then my question for the defendant is, one, how does passing the amendment by supermajority change the analysis? I wasn't clear on that. And then the other issue that I assume you'll be addressing is how does merely saying that you misled us, know when you've leased the entire parcel, put someone on notice that in the future they may not be able to do short-term leases? So I think that's sort of the crux of the issues. And then also, and how that put them on notice that they would limit the number of household members that it

could be leased to? Okay, given that, I believe that the defendants were the first ones to file the motion for summary judgment -- sorry, plaintiffs, thank you. So I'll allow you to begin. Are you going to make the argument or is Mr. Banfield?

MR. KLOPP: I will, Your Honor.

THE COURT: Okay, thank you, please proceed.

MR. KLOPP: I apologize I (indiscernible.)

THE COURT: I have those too.

MR. KLOPP: The first issue I want to touch upon, and Your Honor asked defendant about it, and that is the statute here, the Planned Community Act doesn't have any effect under the analysis under Kalway. The Arizona Supreme Court made that clear in Kalway. I know the defendant has raised an issue suggesting that analysis doesn't apply where the Planned Community Act applies. Supreme Court clearly took that up. Not entirely clear from the Supreme Court opinion whether that was a Planned Community Act subdivision, but the Supreme Court is clear, Arizona law permits an amendment of CC&Rs by majority law if that's allowed under the declaration, that's the Planned Communities Act. But they go on to state that section of the Planned Community Section Act does not (indiscernible) the common law. So you know the 20,000 foot view is, and this is expressed in the Dreamland decision, that's affirmed in Kalway, there has to be some minimal protections for homeowners. We recognize CC&Rs are contracts. It's something that you are

bound by when you purchase. There will be an amendment provision often times in there. There is here. And I think the common law is recognizing, the Supreme Court recognizing it, I think by affirming Dreamland, and Dreamland certainly recognized it because they state it. There is a potential that a majority or supermajority, it doesn't matter how many, it could be 99 percent that that majority can trample the important rights of minority, and here we're talking about property rights, one of the most sacrosanct in our system of law. So I think it's important, while the Planned Community Act applies, it does apply, and I'll touch on one item that is very important here, but it doesn't effect and does not displace the foreseeability analysis. And the other thing, that Kalway makes clear, and this is not really been briefed by the parties, but what they are clarifying is to the extent there was any question from the Supreme Court's prior decision in (indiscernible) Washburn, we are suppose to resolve all doubts as to the meaning and enforceability of deed restrictions, shall, we're suppose to resolve those against the validity of the restriction, so in favor of the use of property.

So it's with that backdrop, what I would like to do, Your Honor, is just address these, and I apologize because I don't remember if it's Exhibit B or A, but attached to the statement of facts with our motion was the amendment, and I

think it's easiest to just walk through these and quickly discuss how Kalway would apply.

So Section A states that no lot may be leased for a term less than 30 days, so this is the, you know, from my client's perspective, the most offensive, and I think it's really the driving force for defendants in passing this, this is to put this temporal restriction on leasing. Never existed. There is no such restriction at all in the, we call them original declaration, the 2001 declaration that's being amended, it's technically not the original, there's one even earlier than that, but all of that, all of that declaration states under 2.30 with respect to leasing is you have to lease the entire lot and then certain notice given. Nothing about restriction on the time whatsoever. If you look at the Kalway decision, and we discuss this in the motion, and I don't want to belabor it, but the Supreme Court takes up several different restrictions with the amendment in that case. One, for instance, is with respect to how much of the home could be a garage versus the living space. And the Supreme Court noted that wasn't in there originally, that becomes problematic, nothing on notice that would put these sorts of restrictions on the size of the living space versus the garage. Additionally, there was an amendment that put limits on the number of non-dwelling structures you could have on a lot, sheds, guest houses, things of that nature, and the Supreme Court said, and

that's paragraph 35 in Kalway, you know, nothing in the original declaration that would put you on notice at all that there would be any limitations. You can't just create one from whole cloth in your amendment. Defendant has raised an issue here suggesting that because of original declaration essentially mentions leasing at all, that's sufficient to put you on notice that there could be a temporal restriction on leasing.

A note from the Kalway decision, the phrase "non-dwelling structure" appeared to have existed in their original declaration, but without limitation, so the Supreme Court really had a problem with imposing the limitation. If you want to take an approach that has broad, as defendant is suggesting, you might as well not have a foreseeability analysis, because you could take it to the most extreme and say the declaration talks about your property, therefore we can make any amendment we want that affects your property. So with respect to A, that would be generally the Kalway analysis, no restrictions before this is also noted in the Horton vs. Hartsook. I don't want to go too far into the weeds on that, because the Court picked up on it, from the briefing there's kind of a long history of litigation with respect to different sections of this overall Master Community, but they did note in that case that the intent all along was short-term leasing, and there were no limits on that. One other thing that's

interesting and the defendant raised this I believe in their last briefing, they raised 33-1806.01. And that statute, among other things, states you can lease provided you are following the durational restrictions in your declaration. And the defendant's point is that's right, and we've amended it and now we've forced one upon you, but really we should look at that through the lens of Kalway.

So prior to this amendment, if I'm purchasing property in the Shores, there's nothing in the declaration that says anything about a restriction on the time of the lease, and the statute that exists would suggest that, and now I can lease it for whatever duration I want because I'm only limited if it's in the declaration itself. Before I move to the next one, does Your Honor have any questions or --

THE COURT: No.

MR. KLOPP: All right. 2.30(b) from the amendment, the first sentence exists in the original declaration, can't lease less than the entire lot. We don't have a problem with that. Second sentence states, for purposes of this Section 2.30, a single family may not consist of more than four individuals who are unrelated by blood, marriage, or legal adoption. Now, first that is not in 2.30 from the existing declaration, but as I just read, Your Honor, you know they have changed the definition of the phrase single family, and it only applies evidently with respect to the leasing, and for leasing -- or

for the short-term leasing that they will allow the 30 days, but if I purchase the property and live in it and use it for a single family residential use, which is contemplated by 2.18, I can have as many people who are not related living there, provided that we live together as a single household unit.

So the problem you get here is, I mean, I'm sure defendant will note that because the phrase single family exists, it could be amended. The problem becomes now what would put me on notice that it's going to be amended in a way that's different with respect to this particular use versus any other use? Additionally, defendant raised -- I believe defendant's argument is the phrase, single family residential use, which is in 2.18, residential use isn't defined, so we needed to -- I'm not entirely following the argument, but we needed to define it. I'm somewhat confused because that phrase pops up in Section 2.18. The amendment isn't to 2.18, the amendment is 2.30. From a Kalway perspective, I'm not sure what is going to put me on notice? Is not that single family, the definition would be changed, but that it's only going to be changed with respect to this particular use, which can be problematic under the general law of restrictive covenants, which requires that board members, among other things, treat members fairly and equally.

Additionally, you know Kalway decision speaks quite a bit about things being defined. Again, defendant is arguing

that it was necessary to define single family in this way for 2.302, somehow clarify the meaning of residential use in 2.18. I respectfully suggest, as Kalway discusses, if a phrase is not defined, we just rely on the dictionary definition. Kalway goes through that analysis with respect to livestock, which was at issue there, but it's curious that defendant has attempted to define that phrase by not defining that phrase at all.

Now, Subsection C of the amendment requires that an owner who leases the lot provide certain information to the association at least ten days before the commencement of the lease term. Now, the existing -- the original declaration required that that information be provided promptly. Now, the problem with this is it essentially is going to eliminate some leases because before -- if I, Your Honor wants to rent my house in the Shores tomorrow, we could enter into that lease today. I would promptly notify the association, everything is fine. Now I wouldn't be able to do that. There was nothing in the existing declaration that would tie my hands as the property owner with respect to leasing and giving that prior notice, and if it isn't far enough in advance, eliminating my lease right. Now then under C there are three things that are suppose to be provided, and defendant's point is, you know, you would always provide these things. It's partly true and partly not. One, commencement date and expiration date of lease term. That was required before and that's contemplated by the

statute, 33-1806.01, same with (C)2, names and contact information of adults occupying the lot during the lease term. But three is entirely new, the address and telephone number at which the owner or owner's agent can be contacted by the association during the lease term. Now, that wasn't provided before, and you know there might be reasons why the association would want that, there's a problem, statute doesn't allow you as the association to require that. 33-1806.01 has very limited things that you are allowed to require to be provided, one and two fit, three does not. So that has to be blue penciled out regardless, because it's a violation of the statute.

Now part statute, now part does. The second sentence, the first half of it anyway, existed before: Any owner who leases a lot must provide the lessee with copies of the declaration, the architectural committee rules, and the association rules. That didn't exist in 2.30 before, but it seems to be contemplated in other existing sections of the existing declaration. But the remainder of D, again, wholly created new here. First sentence: Any agreement for the lease of lot shall provide the terms of the lease, shall be subject in all respects to the provisions of the project documents, that's the CC&Rs, amendments to them, the rules, et cetera, and any failure by the lessee to comply with the terms of the project documents shall be a default under the lease. Now the

first part of that, as a consequence of real property law, I believe that would be the effect. If my property that I own is governed by CC&Rs and rules, and I lease it to Your Honor, you are still governed by them, they are the rules of the property, but not -- there was no affirmative obligation on us to provide anything to anybody. But the second part is more problematic because the association is interjecting itself into the private lease contract between the owners and their lessee. There's nothing in the existing declaration that dictates that there would be a default of the lease if there's a violation of any rules of the CC&Rs. Owners may or may not have very good reasons why they want that to constitute a default of the lease. There could be something minor, you are going to put somebody into a default of a lease because of that? But, again, nothing in the existing declaration that would put you on notice that you are obligated to put particular terms into your lease document. And that really comes up with the back half of this, which is creating an enforcement stand. So this is requiring that, one, the owner is responsible for assuring lessee compliance. There's nothing in the existing declaration that makes the owners of grantor of anybody's compliance; in fact, there's contemplation there could be times where rules are violated, either assessments are not paid or there's some other violation of the rules under the existing declaration, it's 6.1 and 6.2. The next part of D, I'm not sure how that

even squares with 6.1 and 6.2. The owner shall be liable for any violation of this declaration, rules, and in the event of such violation the owner upon demand of the association shall immediately take all necessary actions to correct any such violations. If you read 6.2 of the original declaration, and that's the one that contemplates violations of the rules, it's not what it's contemplating at all. In the event the owner is failing to perform its obligations under the project documents, they have to give notice to the owner that unless corrective action is taken within 14 days, the board may cause such action to be taken at said owner's expense, and the board may make a finding to such effect.

So there's two things going on in this amendment that are different, very different, and in conflict then with this amendment, because the amendment is saying the association will just demand, the board is not making a finding. The association is going to make the demand, and I'm not sure if Your Honor is, not part of the record, but the association can acts through the board but the association typically acts through property management companies. So this amendment would seem to suggest something different is happening but, in any event, there's a finding by the board. Board is typically going to have some sort of process, a meeting. Boards can't meet in secret, so for the board to make a finding the documents are not being complied with, that's going to have to

require some sort of meeting, so that's different than the association making a demand. Additionally, 6.2 is contemplating then a 14 day cure period. 2.30 you have to immediately take action.

Now the other issue that goes on here is that, I suppose violation can happen a lot of ways, to the extent defendant's concern here is a short-term, they call them transient renters. They are borrowing a phrase out of title 42 of the revised statutes, the tax code, not entirely sure what that phrase has to do here, other than it sounds bad. If there's damage caused by somebody, it's a short-term renter, I don't know if the concern is somebody who is renting a short-term isn't going to care very much. Well, 6.1 and 6.2 work together, they allow the association to repair things, and then there's assessments, assessment lease. So it's not entirely clear what this even is, other than when you marry it with the prior section, (C)3, the one that is requiring information, that's not permitted by the statute. It appears that the association, if they see somebody renting short-term, their hope is to start calling the owner, owner's agent, the owner is allowed to have a property manager, that's contemplated by statute, to notify them there's something going on and essentially, I guess, bother them and tell them to go kick people out of their house, or to otherwise act differently, and that's not the scheme that's envisioned under

the existing declaration. So again, you know, Your Honor, I think the backdrop on all of this, to the extent there's any confusion or question, we fall back under Kalway, it's paragraph 16 in Kalway. Any doubt with respect to these things resolved in favor of invalidity.

Another thing I wanted to address quickly, Your Honor, is defendant has raised this Nicdon case, defendant has raised this Nicdon case, and has argued it pretty extensively as applying a few things there; one, unpublished Court of Appeals case. It came out prior to Kalway. Not -- and defendant has made quite a big deal out of the fact that the Supreme Court denied review. Not going to make any effort to claim I understand why the Supreme Court takes or doesn't take anything it takes or doesn't take, and I could probably tell you why it doesn't take things, because I have been on the receiving end of that a lot, but we have Kalway, and it's the published authority on these issues, but the one thing to note on Nicdon that's interesting, that distinguished it, the Nicdon case, the Court of Appeals makes a big deal there the amendment provision at issue there specifically stated that there would be amendments to the use, and they said that's different than Dreamland, where it's just a generic amendment provision. Well, if you look at our amendment provision, 9.2, it's a generic amendment provision. And so Nicdon is a very particular situation, and Nicdon makes sense there because,

why? You purchased -- you are not just purchasing a generic amendment provision out there, but you were specifically put on notice it would be used against you to change the use. Additionally, Nicdon notes -- that community was in Scottsdale, evidently there's a municipal ordinance in Scottsdale that dealt with short-term leasing, don't pretend to know the ins and outs of that, other than the Court of Appeals makes note of it, but that amendment provision is very different than here, and that's really the dispositive fact in that case. So unless you have any questions, Your Honor, I will reserve anything further for rebuttal.

THE COURT: Let me go back over my notes real quick. On the term single family, as I think you mentioned, Kalway allows for clarifications. And it's my understanding in the original there was no definition of that term, so what would you say is the definition of the term?

MR. KLOPP: Well, single family -- and the problem here now becomes we have two different definitions of single family. The existing declaration defines single family, and it's 1.47: A group of one or more persons each related to the other by blood, marriage, or legal adoption, or a group of persons not so related who may maintain a common household in a residential unit. So that definition will still exist post amendment if the amendment is allowed to stand. It's just for Section 2.30, it has a slightly different definition now. If you had notice

that the definition of single family could change, okay, but I'm not sure how that puts you on notice that it could be different within the same document depending upon the context.

THE COURT: Okay. And then just I guess a real-life application question, because you start off by talking about the importance of the right to control your property, could the argument be made that your client's use of the property has diminished everyone else's expected use of the property? And does that even come into play here?

MR. KLOPP: I don't believe it comes into play, Your Honor, because just as my client's purchased, you know, without notice that this could be changed, everybody else purchased knowing this is out here, and this is how things operate. I can understand the real-world end of it, that you know ten years ago, 20 years ago, 40 years ago, AirBnB and VRBO, those things, and electronic websites to lease, these didn't exist, but short-term leasing existed. As discussed in Horton vs. Hartsook, it was occurring out here as early as three properties being sold, the second developer owning it in the 1980s. But Kalway makes clear, at the end of Kalway where it's discussing there's a restriction there that was put in place that the Supreme Court shot down, that with respect to clearing brush off of the property, and this is in Pima County, Pima County had a horrific fire two years ago, I believe in Catalina Mountains, Supreme Court said it might be advisable to

have this. Again, nothing is putting people on notice. So it doesn't matter how great of an idea it is, if it makes sense and all the sense in the world, I mean, preventing wildfires, I can't think of anything that makes more sense, but if there's nothing in there that's putting you on notice then you can't do it.

THE COURT: All right, thank you.

MR. KLOPP: Thank you.

THE COURT: Mr. Csontos.

MR. CSONTOS: Thank you, Your Honor. Your questions about, you know, property rights, here the association is the owner of property, they own the boat docks, the trails, the roads, the guard gate, all the nice fancy improvements of this private gated community, and the association has the same property rights that the owners, any of the owners would have too, because they have to maintain and repair the property. Now, where do they get their funding? Of course they get it from all the owners, and they tax it, if you will, by association dues and membership requirements, but it's still the association as the owner and person in charge of the maintenance and repair of the boat docks, and trails, and other community common areas, it's what makes it completely different from Dreamland. And when the Supreme Court adopted Dreamland, they didn't adopt it in part, they didn't just disapprove Dreamland in part, they just wholeheartedly adopted it and

applied it to their set of facts, and Dreamland made a big deal, but they are important. It was noteworthy that there was no common area in Dreamland. This was all about how each person uses their particular lot and nothing else.

Here of course what we're talking about is how each person uses their own lot, but how their lot and their use also involves use of common areas, use of the boat docks, use of the guard gates, use of all of the other facilities that the association owns, that's the owner of property and the property rights they have there. In Kalway you won't see one mention or any discussion of whether the Planned Community Act applies or not, and you won't find that in the Court of Appeals decision or even in the trial Court's decision. I don't know whether those five lots or five owners in Kalway were part of a planned community or not, I can't tell, but I do know why there's a lack of decision, and why the Court said, well, common law would still apply even if there's a statute that exists that says planned communities can amend their statute by passing an amendment that complies with the covenants, and that's because in the trial Court they reached an agreement. I didn't know this when I was briefing this, I had to dig a little bit deeper, you know, and then the trial Court, the Superior Court Judge noted in the supplemental briefing the parties had filed, the parties essentially agree that retroactive is not an issue, and that the 2016 amendment to 33-1817, that's the statute that

says if you pass an amendment in accordance with your declarations it's valid, does not supersede common law. So they agreed that ARS Section 33-1817 does not supersede common law, and that's where -- and, Your Honor, I'm handing you a copy of the Superior Court decision in Kalway.

THE COURT: Thank you.

MR. CSONTOS: Sorry, I don't have one that -- I can transmit on my phone.

MR. KLOPP: That's alright.

MR. CSONTOS: Now, on top of the third page of the decision, so once I see that, now I understand why the without any great discussion or anything the Supreme Court just simply says, yeah, 33-1817 does not supersede common law. It was not an issue being contested. It is here. It was in the Desert Mountain decision, and was addressed, specifically addressed by the Court in Desert Mountain as opposed to specifically not mentioned at all in the Kalway decision, and, again, Dreamland said it was very noteworthy that their case only involved how each person uses their own property and does not impact others. Here everybody's use impacts everybody else's because every time somebody comes in, the guard gate opens, adds to the maintenance repair. The shores get used, the recording requirements of the association are triggered, so somebody at the association has to take a report. Obviously the more times that they have to take a report, the greater cost and expense

to them, and it goes without saying that people that have not read or spent the time to read the covenants before they appear on site, don't strictly comply with them very well, because how could you anticipate what the covenants say unless you have time to read them? So there's a course of increase in violations that occur when we see short-term rentals, and that's just not here, it's everywhere, and I've even cited how (phonetic) Eric Dee is taking actions because of all the rule violations, just to eliminate a certain aspect of their business model.

Let me march through some of the specifics. First of all, by law when the association receives an amendment that passes they are required to record it. It's mandatory obligation of them, they have no discretion. And as we've discussed here today, the board received an amendment that had 67 percent approval rate of both classes. Your Honor asked the question, well what does that matter? How come I'm making a big deal about a 67 approval method as opposed to the minority vote that Kalway was concerned about? First, Kalway -- Mr. Kalway, as the Supreme Court says, doesn't know about the amendment until it was recorded. It was sprung upon him by, you know, the other two or three lot owners as kind of a surprise. And the Court specifically says that the reason why they are using this common law approach is because the law will not subject a minority of land owners to unlimited and

unexpected amendments. When we have a supermajority it's no longer the majority that's in control, it's the minority. We have a constitutional provision in Arizona that requires supermajority for a revenue increasing, tax statute, you know, and what that means is that those who are in the minority have the absolute right to block that, other than playing a little bit of horse trading for, well, I'll join the improvement if you give me this under my particular needs for my constituents, and Arizona legislature has found that it's virtually impossible now to pass a tax increase without also bargaining to the minority and granting their wishes to get at least a couple of them to jump ship and step over to the side of the majority. So when we have that, I mean let me give a 99 percent example. Imagine if there's a supermajority of 99 percent, that means no covenant can pass if there's one person that says no. So who is in charge there? Whose interest needs to be protected in that? Does the minority's interest need to be protected in that? No, they have veto power. The same thing is here. Any time you go to a supermajority, what you are really doing is granting the minority the veto power over any kind of change or any amendment, and that is a distinction. And if you count the number of times Kalway or Dreamland uses the word simple majority to describe, you know, the vote going on, you can see it was important to them. They weren't just glossing over

that, it was something that made it important in that particular case, under those particular set of facts. I don't think Kalway applies. I think all the common area that this association owns gives them the right to have amendments passed that would protect their ownership interest in the boat docks, the trails, and the roads, and the guard gate, and all the other common areas. I don't believe Kalway specifically addressed the Planned Community Act, and the statute that says if an amendment passes by the number of votes required by the covenant, it's valid. But even if Kalway applies, or if I can echo the Desert Mountain case, even if Dreamland applies, it does not matter here because everyone has sufficient foreseeability under a scheme that we have in place where we have this long list of covenants and restrictions. We have a board that's elected by majority vote. We give notice, opportunity to communicate, to offer your side of the view, long before the votes are started to be counted, and in this particular case we didn't -- we're not talking about a 67 percent of the votes that were cast, we're talking about 67 percent of all owners. The covenants only require 67 percent of those who cast a vote. The owners who vote, I think is the term. And Desert Mountain says that means 67 percent of the voters, not 67 percent of the owners. But here we have a supermajority, receive a 67 percent of all owners. That means if we count those that don't even vote at

all because they forgot or those that voted no, the minority couldn't achieve the two to one ratio they needed to achieve. More than two to every one of the people who didn't vote or voted no, voted yes. Now, is it foreseeable? Well, I mean it's hard to deny that the Desert Mountain Court said, of course it is. And we have the same thing here. So I'm asking you to decide it similarly.

In Desert Mountain they say the existing limits put them on notice that rentals were subject to limitation; for example, the use restriction said you had to rent out the entire dwelling. The covenants here on the Rainbow Lake, you have to rent out the entire dwelling. Rentals can only be made to single family. Here rentals can only be made to single family under the 2001 original covenants, if you will. And in Desert Mountain they said that -- they had a provision that says the lease should include a provision that violating declarations is a fault on your lease. Here we don't have that expressed provision, but we do make all tenants liable for, you know, compliance with the covenants. So I mean if that's read into your lease contract, because it's incorporated by reference, if you will, then, yes, if you violate the covenants, you violate your lease. I mean it's just all part of a reading into a contract, and the Court then concluded, given these provisions, as well as the comprehensive nature of the declaration is, and its amendment procedures, a prospective

purchaser would be reasonably on notice that their property would be regulated by expansive use restrictions, including restrict limitations on renting of home subject to amendment in accordance with provision of their declaration. They could reasonably anticipate further restriction or expansion on matters within the scope of the declaration. In addition, the time -- oh, they did mention that there was a time when Scottsdale ordinance used to ban 30 days or less rentals. It wasn't in play then, and they said that also gave them extra notice of the possibility that a prior city ordinance used to ban it. I don't know whether a prior city ordinance gives you notice that something else could come in the future, but it's no different than what we have here, where we have the legislature under 33-1806.01, stating that associations can limit the duration of your leases, so we have legislative notice to parties that durational limits are something that could be imposed in the future, or in Desert Mountain it was something that had been imposed in the past.

Now, primarily though one of the issues of foreseeability comes down to some of the definitions and the terms that are being used. First of all, the reason why plaintiffs don't want to admit that there were many restrictions other than the entire lot, and you have to give notice to the, you know, proper notice to the association, because they can't deal with the other restriction. They can't

deal with the fact that the declaration expressly limits leases to those used exclusively for single family use. They can't deal with that, and it's right there in section -- the same section that says leases are not a business for purposes of the prohibited business activity. That's in the section of the covenants.

THE COURT: So when you say, they can't deal with it?

MR. CSONTOS: That's when they said, Judge, there were no other restrictions other than lot, and we got to give notice. There are other restrictions. They don't want to sit there and look you in the eye and say they were and then deal with them. They want to say there are no other restrictions, and I think that's not accurate. There are many other restrictions on the tenant's use of the property, and the owner's use of the property, including but not limited to every tenant has to be a single family, as defined, and their use shall be limited to single family residential use, exclusively, shall not be nonresidential as well, and shall not be business. Again, for the purposes of the original covenants, they said leases won't be called businesses, but they didn't say all leases are therefore residential. So comes down to what you shall not use the property as nonresidential, and you should use it exclusively as residential use. It dictates as residential single family. Covenants describe this -- let me get to the section so I don't tell you something wrong.

Section 2.18 of the original covenants, it says, well, you know, nonresidential use shall have its ordinary generally accepted meanings. And the word meanings is plural. In the Horton case the Judge selected, because there was no evidence of the drafter's intent, the Judge selected the less restrictive meaning, that's because these words and these terms have multiple meanings, or can have multiple meanings.

If you were purchasing property subject to restrictions under a word that has multiple meanings, you are on notice that one or more of those meanings could apply to you, and the fact that by amendment the association selected one of those meanings as opposed to what a Judge might have defaulted to, without that type of extra direction or extra supplemental information, all which is allowed by Kalway, doesn't mean that you have no notice. It just means that you guessed wrong, and there's multiple meanings of a phrase. Even under Kalway you can pass an amendment that refines, that defines that definition, or defines that term. They give you some extra guidance and some more clarity as to what the current intent was, even if somebody was trying to guess what the original drafter's intent was and selected a different term.

So we have foreseeability because we have the ordinary generally accepted meanings under 2.18, and we have Horton having to select between meanings and selecting the least restrictive as opposed to the most restrictive, although they

went through the analysis how some Courts do find residential use and leasing less than 30 days, they are not the same. I cited in my own response cross motion a couple of authorities from other states that say, yeah, 30 days is not considered residential, that's considered nonresidential in use. So the Courts have different ways of looking at this. There are multiple meanings, and all the amendment does is select one of the multiple meanings and say, this is now what we mean, this is refined, the definition of how we are going to treat this going forward.

Going one-by-one through the amendments, basically, if I understand it correctly, there is no amendment that's allowed, because everyone is different from the original. Well, it's hard to have an amendment that isn't different, and according to the plaintiffs they had no notice that there would be anything different. You can define single family in an awkward way, saying it means this or that, people related by blood or not related, living as a family group, but you can't ever say they are not related, then just four people that show up playing golf, we'll call that a family for the purposes of your short-term rental or for the purposes of rentals, and there's nothing wrong with defining or redefining a single family. Sure, it's different, it applies, uniformly applies to every owner who rents, no matter how long. It could be a ten-year rent, it could be a 30-day lease, it applies to

everyone that choose to lease this property, and allows the association, if you will, to govern the number of guests that are onsite. The association already has the right to govern, yes, it's a guest. It's hard to understand what a guest is when just four people show up to play golf for a week or eight or 18, which one is the tenant, which one is the guest? So by limiting single family for a rental to, well, you were either actual family related by blood, or just a group of unrelated people no larger than four who helps define who are tenants, if you will, and who the family group, and who are the guests? Under the existing covenants the association has the absolute right to limit the number of guests that tenant or owner has on the property, and that's under -- have that in front of me as well. That's under Section 3.0(B) and 3.0(C), where the current, under the prior or existing covenants the association has the right to limit the rights of number of guests and invitees that use the common areas. And until we know who the tenant is, we can't know who their guests are or their invitees. So we have this comprehensive set of covenants, describing all sorts of lease restrictions, other than the ones they are willing to concede exist, and under the comprehensive section, it's foreseeable, at least according to some groups of three Judges on the Court of Appeals, it's foreseeable that other restrictions can follow or expansion of rights can follow as well. The 30-day or less was -- 30 days or greater, less,

is a way to redefine what is considered to be the exclusive use for single family residential use, or, to, if you will, to exclude that from the nonresidential use which shall have its common meanings, which some Courts say exclude short-term rentals to begin with.

Going through each amendment, the one that stuck out to me is that they object to the fact that we asked that the owners or their managing agents, their people that run their short-term rental programs, provide a phone number that the association can reach them at. They said that is statutorily prohibited. They are talking about what information the association can require from the tenants. There's no limit on what information the association can require from the owners of the lot, and being able to contact them when a group of short-term renters comes in for the weekend and leaves before you can write a letter, is important. That is not a contradiction to any statute, and since that was their only objection to that, I think that should deal with that.
30 days, they object to that, saying we have no notice that could ever be a durational limit on what constitutes a lease. Yes, they do. For the same reasons we just discussed, leasing is already highly restricted, it impacts the common areas that the association owns and controls. It requires reporting, which by itself impacts the association on how many times they have to listen to a report. It also impacts the association's

ability to monitor the owner's use, which is not allowed during the tenant's use of any of the common areas, and it comports with -- well, we've already talked about that residential use can have multiple meanings, and that was foreseeable, that the association could by 67 percent majority vote define that in such a way now to limit it to 30 days greater or less for all owners, uniformly, across the board.

They claim that the definition, single family, can't be redefined because how horrible is it that a group of unrelated people of four or more -- or more than four people, five or more people would not be considered a family group? I mean, family group isn't defined at all in the covenant beforehand, and again, just like garage wasn't defined, and family group isn't defined, then Kalway says it would be reasonable to expect the definition by amendment, what a family group is for unrelated by blood individuals taken and using the place as a tenant, and the fact that it's a tenant definition as opposed to owner definition, applies uniformly to everyone, so I can't see any reason why you can't have tenants treated a little bit differently than true fee owners, especially since it does impact how the association has to monitor and control and maintain and repair the common areas.

The ten-day notice theory, they say, holy smokes, we're required to give not just prompt notice but now just ten-day prior notice. They say we've never, the original covenants

didn't ever say that. Well, they said -- they did have a duration, they had prompt, and now it's defined better as ten days beforehand to allow the association to know who is coming and to be prepared to start monitoring when the lease starts and when the lease ends, and make sure of the owner's use of the common areas is excluded. The tenants use would have the exclusive use of the common areas under the existing lease. So how can you do it with notice that comes after they've already moved out? Giving notice two days after a two day renter moved out is not notice at all to the association. The association wants pre-notice, and that makes adequate sense and, again, it's contemplated if you have to give notice, and you have to give prompt notice, it's contemplated that someone might say later, yes, how about before the lease starts so I can at least start monitoring it before the lease has ended? I already spoke about how giving the owner or the owner's management information is not contrary to the statutes. The owners are always required to notify the association of their contact information under the current covenants, and that's especially needed when a tenant is living there, and so it's not the owner, so you can't just knock on the door and expect the owner to answer it. You have to contact by phone or email.

Enforcement provisions, they say they don't like the fact that the owner shall take immediate action to correct any violation. Well, first of all, the owners already have the

burden of not violating the covenants. It's clear, it's right there. And the letter also means any tenant, so the owner and their guests, and their tenants cannot violate the covenants, and they shall take immediate corrective action. There's nothing wrong with that, especially if the lease is only two days long, you can't wait 14 days to correct it when the lease, the tenants are going to be gone so, yes, imposing an obligation to do what you are already obligated to do is not unforeseeable amendment.

What happened in the 14-day notice, well, by the time the association can take charge of repair, and provide notice, now the association is spending its own dollars, but the whole key about the owner should be taking immediate responsibility for the owner or their invitees or their tenants own violations means that the association should never spend a dollar in the first place. If the owner or their tenant or their guest breaks the guard gate, I don't know that the owner can fix it themselves, but the owner can certainly immediately notify the association that something is wrong and they do something, they can repair on their own by replacing it with a new part or whatever it might be, whether they should do it immediately, and if it's some other violation, such as a noise violation or a parking violation, well then stop doing it. You don't have to wait for 14-day notice before you do that. The association shouldn't have to become involved in time, effort, and money or

incur its own repair bills first, that should be the secondary level. So here the association still will give 14 days notice before the association spends its own money, but that doesn't mean that the owner shouldn't have taken their own action, if at all possible, to remedy the default. So all-in-all, I mean we can go through each of these, but I think the plaintiff's position is this, there is no amendment that would possibly pass muster because everything is different, and how could we ever foresee that anything would change? Any term that is defined can never change, is their position, because once defined it can never be redefined. Any new restriction would be a new restriction and would therefore be unforeseeable, unless you can point to specifically some word that's a, like a search in general warning, warning this provision can be changed by amendment. Kalway didn't require that. Dreamland didn't require that. Desert Mountain didn't require that. Just as long as you know it's restricted, that is all that you need to know.

In fact, the Kalway Court really, I mean if you read the actual, just the holding of what they said, the one that we are applying here, the restriction itself does not have to necessarily give notice of the particular details of a future amendment that would really happen. Instead it must give notice that a restriction or an affirmative covenant exists and the covenant can be amended to refine it, correct an error,

fill in a gap, or change it in a particular way. But future amendments cannot entirely new and different in character and untethered to an original covenant. Otherwise such an amendment would infringe upon property owner's expectation of the scope of the covenants.

Now, one of the changes untethered to the prior restrictions, and if it accomplishes the goal that the prior restrictions perhaps originally sought to accomplish, or at least under one or more of the alternative meanings of some of the terms could have accomplished, they just merely redefined, refined, rather, the words, and they may have made a change in a particular way, but that is what the Kalway Court says refine, because, you know, not literally would it happen that would tell them that each one could be changed, it can be amended to refine it, to correct an error, to fill in a gap, or to change it in a particular way. Each of the amendments here have done that, and none of them are entirely new, untethered to the original covenants, and that's why I believe Your Honor should grant summary judgment in favor of the association on the, at least on the technical enforceability of what has been done.

If they want to raise issues about what somebody said during the pre-vote campaign, they are free to do that, or there were other defenses as well that are factual in nature, but the association follows the covenants, they followed the

Planned Community Act, they were statutorily mandated to record an amendment if it passed 67 percent of the owners, and it did. So they can't be faulted for having complied with their statute, nor can they be required to try to nitpick as to which amendments are valid or not valid, or tethered or untethered. They are required by statute to go through this procedure, and they've complied with their statutory obligations. That might be different than whether the amendments are valid, but it does apply to the issue of law of, whether or not an association is liable for damages arising out of their recording and amendment that passed by a sufficient number of votes. That's all I had, Your Honor. Oh, let me make sure I answered your question that you had for me. I think I did. I hope I did.

THE COURT: Let me ask you, sort of the same real-life application, and I don't know anything about why people purchased the property, where they did, or anything else, but at least foreseeability, people could make decisions about purchasing property in a specific planned community based upon the fact that they believed at the time they purchased it they can do short-term rentals. Why would it then be appropriate for people to change that?

MR. CSONTOS: Well, that's easy. If you buy something that says I have to paint my house white, and I love white but the amendment, the covenant also included these can be changed by amendment or the architectural committee has the right to

grant exceptions and exclusions, by the way, that's in here too, including anything in Article 2, which is a short-term rental, so the architectural committee through the board can grant exceptions, if needed. So when you buy something that says it's going to be all white, but subject to amendment, what are you really buying? Something that could be changed in the future. And is your job then, when you buy it, to get on the board or to become a loud voice and make sure that you keep having your voice heard? In this case if you can gather 65 of the 188 owners, that's a little too simplistic. There's really just two classes. So just one-third of either class. You could have one-third of one class, and nobody in the other class, and you've blocked the amendment; but if you can get one-third of the members to block any amendment, that would change the rental duration, or that would change the color of the homes, then you've protected your interest. So all you are doing is following the contract. A lot of contracts are subject to amendment.

THE COURT: Let's go along with that, except it's kind of flipped a little bit, where it says you could paint it red, white, or blue, okay, so you come in and you paint your house blue, and then they say, no, you can do your house red or white, they've already painted it blue, does that change the analysis? And then going to your second part, where you said, you know, because it says subject to change, essentially, and

where in this particular one did it give sufficient notice that we change that, which I guess is the underlying issue?

MR. CSONTOS: Well, it's in two places. First of all, the board members can, by rule, make changes that have the impact as a change in the covenants, that's under -- let me get the right section so everybody knows that all of these things are subject to change. Section 4.2 states that the board may adopt, amend, and repeal rules and regulations. These rules may restrict and govern the use of any area by any member, lessee, or resident, or family member. The rule shall have the same force and effect as if they were set forth in and part of this declaration.

So, first of all, everybody knows that even by rule you may restrict and govern the use of any area by any member, including a lessee, and then we have Section 9.2, the amendments that say that, one, the board can amend without permission from the owners to comply with certain statutes and other requirements, but the one that applies here, the declaration may only be amended by the written approval, or permanent vote, or any combination thereof of owners representing not less than 67 percent of the votes in each class of membership. So there's clear notice that amendments can be made, that restrictions can be had, either by rule and, furthermore, there's plenty of notice that they are already monitoring the duration by requiring report. It's got to be a

reason why they are monitoring duration, but if nothing else, the cost and impact of having to monitor short-term rentals increases the number of reports the association has to deal with. So just by the increase in the number of reports to the association by something that could happen as frequently as once every week, once every day, as opposed to less frequently, once every month, puts everybody on notice that restrictions can be had, that the cost and duty of monitoring leasing is a duty that the association has taken upon itself, and I mean that they are excluding owners at the same time, that they are allowing tenants to use common areas, because they have to make sure they don't get double used by any particular person. There is sufficient information there for someone to see that further restrictions, or not even restrictions, just a change in one of the definitions of some of the words and phrases used in the covenants.

I'm sorry, and I'm being reminded that of course, in Duffy vs. Sunburst Farms, 124 Ariz. 413, 1979 Supreme Court decision, talks about how when declarations are accepted, as they are here by anybody who purchases the property, it includes properly adopted amendments. So people know that going in, people know that going out. We don't have the facts in front of you today, as to how many of the plaintiffs here actually are at this point ownership of the property, after the straw vote, and while the process of voting for the amendments

was in place, several did, and they all took ownership of the property, I believe after 33-1806.01, allowing declaration to provide duration limitations were in effect. So they've all had this notice of possibility of changes coming towards them, and it certainly isn't notice that there won't be any change. That's just not the case here.

THE COURT: And then I printed out several of the cases that were cited and read those, but I didn't print out Desert Mountain, is that an unpublished opinion as well?

MR. CSONTOS: Yes, Your Honor. I'm sorry, that is the unpublished decision that was a petition for review deny, and attorney fees, ordered by the Arizona Supreme Court on exactly this, planned community, limiting short-term rentals of 30 days or more.

THE COURT: I thought I remembered that but I wanted to double check.

MR. CSONTOS: And I know it's an unreported decision, I don't know that it's authoritative, but it gives you a pretty good idea, gives me a pretty good idea --

THE COURT: What they might do next time.

MR. CSONTOS: You know, I'm not here to tell what the law is. I don't care what the law is. I'm here to give you my best sensei guess as to what the Court of Appeals will say the law is. In this case I believe they'll say similarly to what they said in Desert Mountain, that there was enough restriction

overall in the leasing to give everybody proper notice that it was foreseeable of other restrictions could be imposed.

THE COURT: Anything else?

MR. CSONTOS: No. Thank you, Your Honor.

THE COURT: Your last opportunity. Go ahead.

MR. KLOPP: Yes, Your Honor. I'm going to do my best to look you in the eye when I speak. If I happen to look down it's not that I'm avoiding looking you in the eye.

THE COURT: Okay.

MR. KLOPP: So, number one, there is nothing in the original declaration that limits the duration of leases, nothing, that's noted in Horton vs. Hartsook, and in that case there is some discussion about what the trial Court in that case had found, and they found -- I'm looking down because I need to read this off the page. It's undisputed that short-term, paren, one, we can leasing began, quote, in the mid 1990s, and various owners of the residential units have engaged in renting, leasing their units for shorter terms, one week or lease, closed paren, over a period of at least ten years. The plaintiffs themselves engaged in this practice, the practice of leasing units began with the second developer of the cove, and near in time when only three residential units existed. So with respect to what plaintiffs or anybody else had purchased, what they had notice of on the ground is discussed in Horton vs. Hartsook, that's what is actually happening. Now where are

we at procedurally? There's been no disclosure notice given, that actual record will be developed if we need to, but there's nothing in the original declaration that imposes a durational restriction under Kalway, that's fatal. The fact that the lease or the declaration discusses leases doesn't allow you to just regulate them however you wish. Now, Desert Mountain is Nicdon, those are the same cases. I refer to it as Nicdon so I apologize if there's any confusion though. Now, Nicdon or Desert Mountain, that case the Court of Appeals makes express note that its amendment provision is not a generic one, like we have in 9.2, that any of these can be amended by supermajority vote. They specifically note the amendment provision there noted, and put people on notice that the uses will be amended, and that's a critical distinction. They called it automatic for a reason. So with respect to defendant's argument that plaintiffs are claiming you could never amend them, no, not what plaintiffs are stating. This amendment is a problem. There are amendments that could work, certainly, but we're not here to pontificate on what amendments could work. This amendment doesn't work, there is nothing that puts you on notice that this is going to happen.

Now, with respect to the definition of single family. I want to make something clear because, again, I'm looking you in the eye when I say this, 2.18 does not limit leasing to single family. It limits all use to single family residential

use. So the problem with 2.30 is that is different. If I'm using it for a lease, single family means something different than if I'm using it for my home. Now I heard some discussion about what is a family unit? I don't know, the world is changing faster than I can handle, trying to understand that. We're not here to figure all of that out, but there is already a definition here, and if people went to rent and they live in, I guess what some people would refer to as a nontraditional family household unit, they can't lease it now. They could buy it. They could buy and live there, more than four that want to live as a household unit -- my younger cousin says that's polygamy, I don't really know -- but if they want to, they can buy there, but they can't lease it. That's a problem under Kalway, that's the issue that plaintiffs are raising, not that single family couldn't be changed, it's now that you have inconsistent definitions based on use, and 2.18 limits single family residential use, so that's a -- it's a subtle nuance, I agree, but that's a difference.

You know, with respect to Dreamland, there's a lot of discussion about that. Kalway has to apply here. Kalway expressly takes up the Planned Communities Act, 33-1817, that is the Planned Communities Act. The issue in the trial Court decision that Mr. Csontos provided, what they are noting is that because there was a change in that statute during the life of their deed restrictions. We don't have to talk about was

this intended to be retroactive or not. Sometimes when the legislature amends things they expressly say it's retroactive, if they don't there's a common law analysis that, I can't remember off the top of my head, Your Honor, but that will govern whether something will be retroactive. The point there is we don't -- everybody agrees we don't have to get into that, Judge, and Kalway leads off with 1817, allow for amendments, but it doesn't displace the common law, it's not the end of the inquiry. We have to go into this analysis.

With respect to Dreamland, you know, there was no common area in that case. My recollection in that case the amendment forced people to join what was previously a private nonprofit association that owned a clubhouse in the middle of a 55 and over community that had 18 different sections in it. The language of the deed restrictions with respect to Section 1 through 18 was slightly different. I remember because you'll notice I was one of the counsel of record, Your Honor, so the amendment forced everybody to join the association and forced them to own common areas. The point though, from that case, is do you have notice that this sort of thing is going to come down the pike? And, again, plaintiff's position is not that you can't have an amendment, you can definitely have an amendment, amendments are allowed. Is it foreseeable? And I heard Mr. Csontos read Kalway, and he's absolutely correct, and we cited it as well. It's rare that it's going to say, hey,

2.30 could be amended in this way, and 4.5 could be amended in this way, but the distinction in what Dreamland talks about, and what Kalway talks about, and what we've in Section 9.2 here is just a generic contractual amendment provision. Anything here can be amended. Nicdon gets a different result because its contract, its amendment provision is different, and it specifically says the uses are going to be amended. And I also heard defendant mention, make this final point, unless Your Honor has any final questions, that will be it for me talking today, but if there's a concern about regulating the common areas, the association, as noted by Mr. Csontos, has the ability to pass rules with respect to the common area, but that doesn't mean you get to regulate how I use my property that I own, and just as a forewarn, in case anybody thinks they are going to get cute, under the existing declaration tenants are allowed to use common areas. So you couldn't have a rule that just eliminates it, because under, I believe it was Section 4.2 that Mr. Csontos referenced, that allows the association to pass rules to govern the use of areas, like common areas and things, but they have to be consistent with the declaration. The declaration is the constitution when you are dealing with a community. That, Your Honor, unless you have any further questions, I'm done.

THE COURT: Just a moment, please. Okay, couldn't the argument be made that, by what was in the original declaration,

that basically the association or the board was retaining some control over how leases could be done, period, and then the amendment does that, similar to the use argument that you just made?

MR. KLOPP: Respectfully, Your Honor, no.

THE COURT: Okay.

MR. KLOPP: There's no limitation on leasing here, and in fact the existing declaration, and it's 2.18 where there's the discussion about the use shall be single family residential use, goes on to expressly bless leasing, and leasing is not a business, because businesses otherwise prohibits, but leasing doesn't count as a business. The only restriction, and there was some discussion in the briefing on this, and I guess we could, perhaps a little pedantic to carve out the difference between a restriction and covenant, but there are not restrictions on leasing other than you can't lease less than the whole lot, giving notice isn't a restriction. And I know that Judge Kessler in Horton vs. Hartsook kind of referred to them as that, and next time I see Judge Kessler, which I don't anticipate any time soon, I can talk to him about whether restrictions and covenants are the same thing, but they are not.

So notice had to be provided, but other than that, the existing declaration is quite clear, you are allowed to lease. And if we are going to allow, just reference to leasing, to

put -- that puts you on notice because we talk about leasing, we allow you to lease, we allow you to lease without duration, and that's sufficient for you to know we could in fact dial that all back later, prohibit your leasing, or put a durational restriction that is such that you could never lease. They may have five years. It's not there. You can't create it, that's Kalway. The existing declaration in Kalway references non-dwelling units, but the Supreme Court says, yeah, but there was no restriction on that before, and by putting a restriction now, there wasn't notice. And just referencing the topic of leasing, if that's enough to put you on notice, well then the existing declaration talks about my property, so am I on sufficient notice that they could just regulate it any way they want? Of course not, then that would just swallow the entirety of the analysis under Kalway.

Again, Your Honor, with respect to defendant really wants Nicdon to be the result here, deed restrictions are a contract so just like any other contract dispute, it's governed by the terms of the contract. Nicdon gets a very particular result because Nicdon had a very particular amendment provision, one that doesn't exist here, one that doesn't exist in Kalway. Didn't exist in Dreamland. With respect to Kalway or Dreamland saying majority versus supermajority, all that matters under the Planned Communities Act, 1817, is you follow the percentage that's in the contract. Those contracts were

simple majority, this contract is supermajority. It doesn't matter, the result becomes the same. Does that answer your question? Before I veered off.

THE COURT: Yes.

MR. KLOPP: Thank you.

THE COURT: All right. Thank you all very much. I'll take this matter under advisement. I'll let everybody know that between and 30 and 60 days before my ruling comes out, so don't call your attorney every day to find out if the ruling has come out, because they are going to charge for it. All right, thank you very much. We stand adjourned.

C E R T I F I C A T E

STATE OF ARIZONA

COUNTY OF NAVAJO

I, Kelly Palmer, Official Reporter, in and for the State of Arizona, do hereby certify that the foregoing pages, numbered 2 through 50, inclusive, constitute a full, true and accurate transcript of all proceedings the Court had on the 18th day of July, 2022, in the above-entitled matter. All done to the best of my knowledge, skill and ability, and in compliance with ethical obligations.

Dated this 8th day of September, 2022.

Kelly Palmer, RPR
Certified Reporter
AZ #50298