

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

GORDON GROSS and LILIANA
GROSS, husband and wife; et al.,

Plaintiffs/Appellees/
Cross-Appellants,

vs.

THE SHORES AT RAINBOW LAKE
COMMUNITY ASSOCIATION, an
Arizona nonprofit corporation,

Defendant/Appellant/
Cross-Appellee.

1 CA-CV 23-0394

NAVAJO COUNTY SUPERIOR
COURT

CASE NO. S0900CV202200042

TRIAL JUDGE: The Honorable
Michala M. Ruechel

**APPELLANT'S REPLY BRIEF AND
ANSWERING BRIEF ON CROSS APPEAL**

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I. INTRODUCTION

Appellees (the short-term rental owners also referred to herein as Plaintiffs) like all other owners in The Shores' community, received or have constructive notice of The Shores' CC&Rs when they purchased their lots. Plaintiffs concede the 2001 Covenants includes provisions permitting or restricting lot use, use of common areas, business activity, and leasing of lots. *See* Opening Brief, pp. 8-10; Answering Brief, pp. 3-4 (pdf 9/39- 10/39), ¶ 6. Plaintiffs acknowledge the 2001 Covenants limit the use of lots in the community to homes "devoted exclusively to Single Family residential use" and places significant restrictions on use of lots for commercial activity. Answering Brief, ¶ 8. Plaintiffs' Brief did not object to the description found in the Opening Brief, page 16 (citing Complaint, RA 1, para. 31-35) that they "consider The Shores to be a commercial business opportunity to license out their homes on national web platforms to unknown groups of people to enjoy their homes and The Shores' common amenities."

Plaintiffs do not dispute the 2001 Covenants allow for amendments. *See* 2001 Covenants, Sections 1.2, 1.3, 1.17, 4.2, 9.1 and 9.2. Plaintiffs do not claim the amendment provisions contained in the 2001 Covenants limit amendments to only certain of the existing covenants, conditions, and restrictions. By dismissing with prejudice (RA 71), all other claims alleged in their Complaint and Amended Complaint (RA 1 and 27) but not resolved on summary judgment (RA 32), Plaintiffs concede the 2021 Amendment to the leasing provisions of the 2001 Declaration are both reasonable and properly approved by the necessary 67% of each class of owners within The Shores after abundant notice and discussion.

These acknowledgments and concessions extinguish any argument that the 2021 amendment to the 2001 Covenants' leasing provisions is unenforceable against Plaintiffs. Nevertheless, Plaintiffs contend: (1) The Shores' 2001 Covenants authorize each of the owners of The Shores 188 lots, all of which are "devoted exclusively to single family residential use," to rent their lots at nightly rates as many as 365 times a year; and (2) The Shores 2001 Covenants' provisions on amendment cannot authorize an open campaign leading to a vote by which 67% or greater of each class of owners at The Shores' owners agree to additional lease restrictions within The Shores' community such that leases of a Single Family residence must be for a minimum of 30 days to qualify for the "leasing" exception to the restriction on commercial uses of lots.¹

Plaintiffs' contentions rest on a single sentence that exempts "leasing of a residence" from provisions that prohibit the use of lots for "trade or business." [See The Shores 2001 Declaration, art. 2.18, fourth of five sentences.] Because this sentence does not mention lease term, Plaintiffs argue the length of a lease term is of no concern, as a matter of law, to The Shores' community. Answering Brief, ¶26. Their focused argument neglects the entirety of the 2001 Covenants that restricted lots to be "devoted exclusively to Single Family residential use," always

¹ Plaintiffs couch these contentions in the rhetoric of "protecting minority rights," as though they are protecting a vacation-rental privilege bestowed only on them. See Answering Brief, at pages 1-2. However, The Shores 2001 Covenants, in its amendment provisions, promises that a minority of its member-owners -- one-third of either class of owners, or as few as eight of the cluster homeowners -- will be sufficient to thwart any amendment. See Opening Brief, pp. 15 and 44. Plaintiffs are instead contending that The Shores must forever allow its 188 owners to compete for transient business under the cover of "leasing" for "Single Family residential use" of their residences.

prohibited the use of lots for "gainful occupation, profession, trade, business or other nonresidential use" with well-defined exceptions, always required owners to lease their entire lot (and not rent a room or guest house to a boarder), always required owners to report to the Association the duration of any planned rental along with other information about the tenants and the lease, and always prohibited owners from using common areas if their property was leased. The required disclosure of lease duration (2001 Covenants, Art. 2.30) must serve at least the purpose of providing information to Association members under the 2001 Covenants' provisions that duration was being monitored and could be amended in some way.

Instead of providing argument in support of their contentions, Plaintiffs offer conclusory descriptions that the 2001 Declarations provisions on amendment are "generic" and "general," mischaracterize Arizona law, as applied to planned communities like The Shores, displace factual and legal analysis with unsupported arguments of "intent of the declaration" and "[un]foreseeability." This Court should reject both their contentions, affirm the enforceability of the lease-term limitation in the 2021 Amendment, and reverse the trial court's summary judgment to the contrary.

II. LEGAL ANALYSIS

A. Arizona's Planned Communities Act authorizes the 2021 amendment to the 2001 Declaration's leasing provisions.

Owners of lots in The Shores, including Plaintiffs, purchased lots devoted exclusively to Single Family residential and became members of The Shores at Rainbow Lake Association, a planned community governed by Arizona's Planned

Communities Act, A.R.S. §§ 33-1801 through 1818. The Shores' original declaration, recorded in 1987, has been amended several times since then, without objection, according to the procedure specified in the declaration. *See* The Shores 2001 Covenants, second and fourth recitals. Twenty years after The Shores' Declaration was completely amended and restated, the 2021 Amendment at issue in this appeal amended The Shores 2001 Declaration.

As discussed in the Association's Opening Brief (e.g., pages 19-25), planned communities serve important statutory and public purposes. Regulation qualifies the privileges of an Arizona planned community. *See* [A.R.S. § 33-1802\(1\)](#) and (2). The Planned Communities Act requires a "nonprofit corporation or unincorporated association" of owner-members with obligations to the community and membership -- to maintain common areas such as the roads and "for the purpose of managing, maintaining or improving the [real] property" within the community's boundaries. The Association has the power to assess members with the costs of performing those obligations. [A.R.S. §§ 33-1802\(1\), \(4\)](#).

The Planned Communities Act requires a planned community to have a declaration of covenants, conditions and restrictions. *See* [A.R.S. § 33-1802\(2\)](#). The Act's definition of "declaration" is "any instruments, however denominated, that establish a planned community *and any amendment to those instruments*." [A.R.S. § 33-1802\(3\)](#). The Arizona legislature explicitly determined planned communities like The Shores can establish rental duration restrictions, and if desirable, amend their declarations to do so. A.R.S. §§ [33-1806.01\(A\)](#), [33-1817\(A\)](#). The Arizona legislature allows for fair notice to owners under the Planned Communities open meeting requirements. [A.R.S. 33-1804](#).

Plaintiffs' Answering Brief did not describe the legislative intent behind this empowerment. They believe that, by quoting a passage from the [Kalway](#) decision - - "[§ 33-1817\(A\)](#) does not displace the common law, which prohibits some amendments even if passed by a majority vote" (Answering Brief at ¶15 [quoting [Kalway v. Calabria Ranch HOA, LLC](#), 252 Ariz. 532, 537 (2022)]) -- they have made the *entire* Planned Communities Act shrivel into irrelevance.

Despite the allusion to [A.R.S. § 33-1817\(A\)](#), however, Plaintiffs fail to establish the Planned Communities Act applied to the facts or was raised in the arguments considered in [Kalway](#). See Opening Brief, pp. 36-37 (discussing [Kalway](#) and Planned Communities Act). Nor did the Arizona precedents to which the [Kalway](#) court mentions in support of its "displace the common law" statement. See [Kalway](#) ¶ 10, 252 Ariz. at 537-38 [citing [Dreamland Villa Community Club, Inc. v. Raimey](#), 224 Ariz. 42 (App. 2010); [Shamrock v. Wagon Wheel Park Homeowners Ass'n](#), 206 Ariz. 42 (App. 2003); and [Wilson v. Playa de Serrano](#), 211 Ariz. 511 (App. 2005)]. [Dreamland](#) was not a Planned Community and did not discuss displacement of the Planned Communities Act. [Dreamland](#), [Shamrock](#) and [Wilson](#) were all decided prior to the amendment to [A.R.S. § 33-1817](#). See [2016 Ariz. Sess. Laws 254](#) (adding current subsection (A) to A.R.S. § 33-1817).

B. Arizona planned communities law validates the 2021 restriction on short-term rentals.

The pertinent appellate decisions dealing with the Planned Communities Act and its provisions on the regulation of leasing are recent and unpublished. See this Division's decisions in [Nicdon 10663 LLC v. Desert Mountain Master Association](#), 2021 WL 1691532, 2021 Ariz.App. Unpubl LEXIS 489 (April 29, 2021), *pet. for*

rev. denied January 4, 2022; [Preston v. Las Sendas Community Association, Inc.](#), 2023 WL 7139326, 2023 Ariz. App. Unpub. LEXIS 917 (October 31, 2023).

1. In [Desert Mountain](#), the association of a planned community approved an amendment to its declaration restricting the rentals of lots to nonmembers of not less than 30 days and of lots to members of not less than 7 days.² Nicdon, who had been engaged in short-term rentals with his lot, attacked this amendment on various grounds. In affirming summary judgment for the association, the Court of Appeals (District 1) held:

a. "By accepting a deed in the Desert Mountain planned community, Nicdon became bound by the Declaration, including properly adopted amendments." [Id.](#) at ¶11 (citation omitted).

b. The amendment limiting rentals was properly adopted according to the declaration and conformed to the Arizona Planned Communities Act [Id.](#) at ¶20 (citing [A.R.S. §§ 33-1801 to 1818](#) and quoting portions of [A.R.S. § 33-1806.1](#)).

c. Assuming the *Dreamland* decision had any application to planned communities, the amendment did not offend *Dreamland* because it did not "unreasonably alter the nature of the covenants." [Id.](#) at ¶23 (quoting [Dreamland](#), 224 Ariz. at 51).

The [Desert Mountain](#) Court concluded, "Nicdon argues it lacked notice Desert Mountain might add rental time restrictions. Although no such restrictions

² In response to Nicdon's contention that the amendment applied non-uniformly to all association members [citing [A.R.S. § 33-1817](#)], the Court concluded ([id.](#) at ¶22): "Arizona law requires uniform application, not uniform effect. [citation omitted.] Because the Amendment applies uniformly, the general rule only requiring compliance with the governing documents applies."

explicitly appeared in the Declaration when Nicdon's principals purchased their home, *they could have reasonably anticipated further restriction or expansion on matters within the scope of the Declaration's regulation.*" *Id.* at ¶25 (emphasis added).

Like Nicdon, Plaintiffs assert they lacked notice that their fellow owners may amend the 2001 Covenants to add rental duration restrictions. If there was a reason why *Desert Mountain* is not persuasive, Plaintiffs would have said so in their Answering Brief. They said nothing. *See, generally*, Answering Brief (no mention of *Desert Mountain*). The Court should conclude Plaintiffs "could have reasonably anticipated further restriction or expansion on matters within the scope of the Declaration's regulation."

2. In *Las Sendas*, owners of single-family residences in a planned community sued to enjoin its association from enforcing an amendment to its declaration that restricted the rental of residences to a minimum of 31 days. The association's declaration referred to leasing but did not have any lease-duration restriction on the community's single-family residences. Owners approved the amendment to the declaration in accordance with the declaration's amendment procedure. In affirming summary judgment for the association, this Court cited *Kalway* in stating the doctrine it would be applying (*id.* at ¶ 11):

"We generally enforce contracts 'as written.' But when construing CC&Rs -- a 'special type' of contract -- we will not enforce an amendment, even if properly adopted under A.R.S. § 33-1817(A)(1) (providing that CC&Rs may be amended by a majority vote if such a voting scheme is specified in the CC&Rs) and the CC&Rs' amendment procedure, unless the original CC&Rs 'provided sufficient notice' of the possibility of the amendment."

The [*Las Sendas*](#) Court's analysis of notice in the association's declaration takes up nearly all the "Discussion" section of the Court's memorandum decision (see [*id.*](#), ¶¶ 12-19), and concludes ([*id.*](#), ¶ 19):

*"Viewed in their entirety, the original CC&Rs provided sufficient notice of the possibility of the short-term rental amendment. **The existing use restrictions-- limiting residential units to single family, residential use -- are inconsistent with short-term rentals. And the existing limits on business and trade reasonably placed prospective purchasers on notice that any commercial activity would be extensively regulated and even curtailed in the Board's discretion.** Given these substantial use restrictions on residential units and the express durational limit on apartment rentals, we conclude that upholding the short-term rental amendment does not alter the original CC&Rs in any substantial and unforeseen way. In other words, prospective purchasers would have reasonably anticipated the possibility of further restrictions on leases as falling within the scope of the original CC&Rs' regulation.*

Plaintiffs, in different context, have asserted "[common] sense suggests that the [amendment limiting the duration of leases entitled to the 2001 Declaration's exemption from commercial operations] was far from foreseeable." Answering Brief, at page 14. The [*Desert Mountain*](#) and [*Las Sendas*](#) decisions, however, completely contradict their assertion. The Arizona Supreme Court denied a petition for review in [*Desert Mountain*](#) during its deliberations in [*Kalway*](#). The Association believes it did so in respect of common sense -- the same common sense, informed by the authorization of the Planned Communities Act, the [*Las Sendas*](#) Court displayed in its understanding of [*Kalway*](#), the Planned Communities Act, and the planned community's governing documents in that case.

Plaintiffs' contention the Arizona's Planned Communities Act requires the invalidation of short-term rental restrictions has no basis in statute or case law. The decisions in *Desert Mountain* and *Las Sendas* comport fully with the tests articulated in *Powell v. Washburn*, 211 Ariz. 553 (2006) and *Kalway* for the treatment of amendments to planned-community declarations. This Court should follow the directions and analysis that are set forth in *Desert Mountain* and *Las Sendas*.

C. The "general amendment power" in the 2001 Declaration, having been exercised properly by The Shores' owners, should be respected.

Apparently, Plaintiffs believe that, by labeling provisions in a planned community's declaration as "generic" and "general," they can succeed in dissolving their importance to Plaintiffs' benefit. *See* Appellees' Brief, at pages 1, 6, 13 ("generic"); at pages 11, 13, 14, 15, 17 ("general"). Their belief is unfounded.

As for "generic," research in Arizona's case law on amendment provisions found in other declarations reveals that the amendment provisions in The Shores 2001 Declaration are not only quite unique, but also extraordinarily stacked against the passing of an amendment.

For almost all amendments, Article 9.2 requires the "written approval or affirmative vote" of 67% of "each class of membership" of The Shores. *See* The Shores' Declaration, Article 9.1. The Shores has had two classes of membership, one of which has 164 total votes (single-family detached residences) and the other of which has 24 total votes (single-family cluster housing residences). *See* The Shores' Declaration, Articles 4.6, 9.1. Amendments to the Declaration require the

approval or affirmative vote of 110 Class B votes and 17 Class A votes. All it takes is a small minority of 8 owners of cluster homes to veto any amendment. Compare this elaborate voting-rights regime with published Arizona cases involving the amendment of CC&Rs.³

Kalway holds "a general-amendment-power provision may be used to amend only those restrictions for which the HOA's original declaration has provided sufficient notice." Kalway, 252 Ariz. 532, 536. The Kalway Court must have meant that "general-amendment-power" provisions were inoperable on topics outside the scope of the declarations that contained them (Kalway, 252 Ariz. at 536):

"[The Declaration] must give notice that a restrictive or affirmative covenant exists and that the covenant can be amended to refine it, correct an error, fill in a gap, or change it in a particular way."

By its terms, the amendment provision at issue does indeed apply "generally" to all matters within its scope. The provision itself defines its scope:

³ See Duffy v. Sunburst Farms East Mut. Water & Agr. Co., Inc., 124 Ariz. 413, 415 (1979) (CC&Rs could be "amended or revoked by vote of a majority of the then owners"; amendment by owners held valid and enforceable over association's objection); Shamrock v. Wagon Wheel Park Homeowners Ass'n, 206 Ariz. 42, 46 (Ariz. App. 2003) (majority of owners required, amendment held invalid because it violated the state's nonprofit-corporation statute); Vales v. Kings Hill Condominium Ass'n, 211 Ariz. 561, 568 (Ariz. App. 2005) (majority of owners required, amendment was valid, but recorded amendment invalidated because it was different from amendment as approved by owners); Dreamland Villa Community Club, Inc. v. Raimey, 224 Ariz. 42, 226 P.3d 411, 413 (Ariz. App. 2010) (majority of owners required, amendment held invalid because its subject matter lay outside the scope of the relevant declarations); Kalway v. Calabria Ranch HOA, LLC, 252 Ariz. 532, 539 (2022) (majority of owners required, amendment held partially valid, partially invalid for various reasons).

"[T]he Declaration . . . may only be amended by the written approval or the affirmative vote, or any combination thereof, of Owners. . . ." The Shores 2001 Declaration, Article 9.2(A). That scope certainly includes the leasing provisions of The Shores 2001 Covenants. The Shores 2021 Amendment to those leasing provisions of the 2001 -- including a minimum term to qualify a lease for the Declaration's exemption of leasing from prohibited commercial activity -- surely qualifies as a "refine[ment]," as "fill[ing] in a gap," and also as a "change" within the meaning of the [Kalway](#) doctrine.

As previously discussed, the issue in [Las Sendas](#) was the same as in this case -- the enforceability of an amendment to a planned community's declaration to limit the minimum duration of residence-leasing to qualify for an exemption from a prohibition on commercial use. See [Preston v. Las Sendas Community Ass'n](#), 2023 WL 7139326, 2023 Ariz. App. Unpub. LEXIS 917 (October 31, 2023), ¶ 4 at page *1 and ¶ 9 at page *2. In [Las Sendas](#), the leasing provision, Article 3.2, is quoted and paraphrased in ¶ 14 at page *3. The "amendment power" in [Las Sendas](#) was no less "general" than the amendment provision in our case. Compare the [Las Sendas](#) declaration, Article 9.3.1 (quoted in [Las Sendas](#), ¶ 4) with The Shores 2001 Covenants, Article 9.2. The "leasing" exemptions from commercial-activity prohibition in the two pre-amendment declarations deserve comparison here:

The Shores 2.18: "All Lots and Parcels shall be used, improved, and devoted exclusively to Single Family residential use. . . ."

{

Las Sendas 3.12: "All Residential Units shall be used, improved and devoted exclusively to residential use by a Single Family."

The Shores 2.18: ". . . No gainful occupation, profession, trade, business, or

other nonresidential use shall be conducted on any Lot or Parcel or in or from any residence, except that an Owner or other resident or residence may conduct a business activity within a residence so long as: . . ."

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Las Sendas 3.12: . . . [The [*Las Sendas*](#) Court paraphrases what must be a very similar next sentence from this provision prohibiting "any 'business' or 'trade' within a residential unit unless . . ."]

The Shores 2.18: ". . . (i) the existence or operation of the business activity is not apparent or detectable by sight, sound or smell from outside the residence; . . ."

{

Las Sendas 3.12: ". . . (i) the existence or operation of the business activity is not apparent or detectable by sight, sound or smell from outside the Residential Unit; . . ."

The Shores 2.18: ". . . (ii) the business activity conforms to all applicable zoning ordinances or requirements for the property; . . ."

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Las Sendas 3.12: ". . . (ii) the business activity conforms to all applicable zoning ordinances or requirements[;] . . ."

The Shores 2.18: ". . . (iii) the business activity does not involve persons coming onto the lot or the door-to-door solicitation of owners or other residents in the property; and."

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Las Sendas 3.12: ". . . (iii) the business activity does not involve persons coming on to the [Residential] Lot or the door-to-door solicitation of Owners or other Residents[;] and . . ."

The Shores 2.18: ". (iv) the business activity is consistent with the residential character of the property and does not constitute nuisance or a hazard or offensive use or threaten security or safety of other residents in the property, as may be determined from time to time in the sole discretion of the Board."

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Las Sendas 3.12: ". . . (iv) the business activity is consistent with the residential character of the [community] and does not constitute a nuisance

or a hazardous or offensive use or threaten [the] security or safety of other Residents . . . as may be determined from time to time in the sole discretion of the Board."

*The Shores 2.18: ". . . The terms 'gainful occupation,' 'profession,' 'trade,' 'business,' and 'nonresidential use' . . . shall include . . . any occupation, work, or activity undertaken on an 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. . . ."

{

Las Sendas 3.12: ". . . [The terms 'business' or 'trade' include any] activity undertaken on an 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. . . ."

*Note that this sentence in Article 2.18 of The Shores' Declaration includes an introductory phrase that Article 3.12 of the Las Sendas Declaration may not include, i.e.,

"The terms 'gainful occupation,' 'profession,' 'trade,' 'business,' and 'nonresidential use' as used in this section shall be construed to have ordinary, generally accepted meanings. . . ."

The Shores 2.18: ". . . The leasing of a residence by the Owner thereof shall not be considered a trade or business within the meaning of this section."

{

Las Sendas 3.12: ". . . The leasing of a Residential Unit by the Owner thereof shall not be considered a trade or business."

Treatment of the declaration amendment by the [Las Sendas](#) Court amounts to a rigorous application of the [Kalway](#) tests. See [Las Sendas](#), ¶¶ 11-12. Regardless of the generality of the "general-amendment power" in the Las Sendas declaration,

the Court's analysis applies to, and validates, The Shores 2021 amendment in our case. See [Las Sendas](#), ¶ 17 at page 4 and ¶ 19 at page 5:

"¶ 17 . . . Although the original CC&Rs specifically exempt leases from the general category of business and trade, the breadth and scope of Section 3.12 reasonably places prospective purchasers on notice that their properties could be regulated by extensive use restrictions, including substantial limitations on commercial activity, subject to Board discretion and future amendment.

¶ 19 Viewed in their entirety, the original CC&Rs provided sufficient notice of the possibility of the short-term rental amendment. The existing use restrictions -- limiting residential units to single family, residential use -- are inconsistent with short-term rentals. And the existing limits on business and trade reasonably placed prospective purchasers on notice that any commercial activity would be extensively regulated and even curtailed in the Board's discretion In other words, prospective purchasers would have reasonably anticipated the possibility of further restrictions on leases as falling within the scope of the original CC&Rs' regulation. Therefore, because the short-term rental amendment is valid and enforceable, the superior court properly denied the Plaintiffs' requests for injunctive relief."

D. Neither the "intent of the declaration" nor the developer's intent or practices prevent amendment of the 2001 Declaration to limit lease terms.

Having invited the Court to ignore the Declaration's article on amendment as "generic" and "general," Plaintiffs devote a full section of their brief to the "intent of the declaration" on the topic of "leasing." See Answering Brief, section IV.C, at pages 13-15. They rest their argument on a passage from [Powell v. Washburn](#), 211 Ariz. at 556: "In Arizona, the traditional rule has been that when a restrictive covenant is unambiguous, it is enforced so as to give effect to the intent of the

parties (citations omitted)." *See* Answering Brief, ¶ 21.

Powell v. Washburn actually held (211 Ariz. at 554) that "restrictive covenants should be interpreted to give effect to the intention of the parties as determined from the language of the document in its entirety and the purpose for which the covenants were created." The "intent" of The Shores' Declaration surely must extend to its article on amendment as much as to its passages on leasing. The intent expressed in the Declaration seems clearly to be that if 67% of The Shores' owners disagree with the way a provision in their Declaration is being interpreted -- even by the long-since-departed original developer -- then they are invited to clarify or change that interpretation.

Plaintiffs may contend the Declaration's provision on amendment simply did not apply to the matter of leasing. But if the drafter of The Shores' Declaration intended that its amendment provisions were not to apply to lot leasing, it would have been an easy matter to make that intent explicit. For example, Article 9.2(A) of the Declaration could have included a sentence to the effect that "However, changes to this Declaration's provisions on the leasing of Lots are not subject to its amendment provisions"; or "However, changes to provisions on the leasing of Lots shall require the approval of 75% (or, instead, a simple majority) of Owners."

The entire community of The Shores -- not just its Association or the majority of its owners -- must take its Declaration as it is written. In the words of *Powell v. Washburn*, "intent" is to be "determined from the language of the [Declaration] in its entirety and the purpose for which the covenants were created." *Id.* at ¶ 1. The entirety of the language of the 2001 Covenants' amendment provision does not admit the exception for "leasing" that Appellees wish for it. And

the purpose of the amendment provision is equally clear: it applies to the entire universe within its limited scope -- a scope that includes the Declaration's provisions on leasing.

E. That reasonable minds can differ over the 2001 Declaration's terms serves to justify, rather than prevent, the amendment on lease duration.

Appellees emphasize their contentions about "drafter's intent" and "foreseeability" by pointing to [Horton v. Hartsock](#), 2009 WL 2244503. Instead of supporting Appellees, this unpublished Division 1 decision demonstrates the fallacy in their contentions.

Like [Powell v. Washburn](#), [Horton v. Hartsock](#) has to do with a planned community's declaration of restrictions. But neither of these cases have anything to do with a declaration's amendment provisions. As in [Powell v. Washburn](#), in [Horton v. Hartsock](#) these lawsuits were filed by one owner in the community against another owner over the proper interpretation of key terms in the community's declaration. In [Powell v. Washburn](#), summary judgment went plaintiffs' way on the interpretation issue, and the Arizona Supreme Court affirmed. In [Horton v. Hartsock](#), summary judgment on the interpretation issues went defendants' way; and this Court affirmed on some of those issues, but reversed on others.

Plaintiffs correctly state that [Horton v. Hartsock](#) involved terms in the declaration of Rainbow Cove at the Shores, a sub-community of the Appellant in this case; and that the "leasing" terms of the two declarations are similar to each other. See Appellees' Brief, footnote 2 at page 2. The Hortons claimed that three other Rainbow Cove owners were violating those terms by engaging in short-term

rentals of their units. Their argument was that, properly interpreted, the provisions on "leasing . . . single family residential use" in Rainbow Cove's declaration outright prohibited -- did not permit -- short-term rentals. In affirming and reversing a summary judgment for the defendants, this Court noted that the leasing provisions lacked a durational limitation and held (*id.* at, ¶ 13, and ¶16):

"¶ 13 . . . We hold the Declaration's language unambiguously permits the type of durational leasing engaged in by Appellees."

* * * * *

"¶ 16 Thus, by looking at the Declaration's language it is clear the Declaration permits leasing. By not including language restricting lease duration, we find the Declaration does not exclude short-term leases. . . ."

But Plaintiffs here need more than "the Declaration does not exclude short-term leases." They need "the Declaration prohibits 67% of The Shores owners, in each of its two classes of ownership, from amending it to exclude leases of less than 30 days." Neither [*Horton v. Hartsock*](#) nor [*Powell v. Washburn*](#) -- nor any other Arizona decision -- provides them with the answer they need.

Nor should this Court entertain Plaintiffs' desire to assuage their need. That is so because the dispute over the "leasing" terms in The Shores 2001 Covenants, unlike in [*Horton v. Hartsock*](#), is not the dispute this Court is being asked to resolve. Instead, the dispute before this Court is whether, when reasonable minds differ, their dispute may be resolved by a pre-established procedure in place when they became owners in The Shores' community; namely, the procedure for amendment in The Shores' Declaration. The Association believes that dispute must be resolved in favor of the procedure.

Because a sentence in The Shores 2001 Covenants prohibition on commercial activity does not include a durational restriction for a "lease" restriction, and because a lease can be of any duration, a reasonable mind could conclude, as did this Court in [Horton v. Hartsock](#), that "the Declaration does not exclude short-term leases." (at ¶ 16.) It does not begin to follow from this concession that The Shores' Declaration is precluded from amending its covenants to limit leasing to periods of no fewer than 30 days. That is so because reasonable minds could properly conclude, after reading the "leasing exception" in the Declaration, that "leasing of a residence" within the meaning of Article 2.18 means, or ought to mean, something a good deal longer than a weekend or week-long sojourn at hotel, motel, or bread-and-breakfast.

As reasonable minds differ on the range of meanings for "lease" and "single family residential use," Appellant, The Shores in this case, is joined by Arizona's Legislature, by courts, and by the authors of dictionaries. This Court in [Horton v. Hartsock](#) demonstrated as much across several paragraphs in its opinion. See, e.g., ¶¶ 19-25. Appellant's opening brief devotes several pages to demonstrating as much. See Opening Brief, at pages 19-29.

When it comes to the interpretation of the amendment provisions in The Shores 2001 Covenants, however, reasonable minds will not differ. These provisions, and in particular Article 9.2(A), mean exactly what they say:

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

F. "Foreseeability," no matter how many times uttered, does not resolve the issue in this case.

A mantra of "[un]foreseeability" pervades Appellees' Brief. The Answering Brief includes twenty uses of derivations of the verb "to foresee" there, after subtracting a twice-repeated argument heading and a thrice-repeated quote from the [Kalway](#) opinion that "substantial, unforeseen, and unlimited amendments" to CC&Rs are unenforceable.

The amendment at issue did not seek to convert The Shores, a statute-authorized planned community, into a municipality or turn the common area of The Shores into a public water feature or golf course. The amendment did not seek to make a voluntary, non-dues paying association into a mandatory dues-paying organization. If it had, then arguments over "foreseeability" would be meaningful.

Instead, the amendment at issue sought to modify the existing provisions and restrictions on leasing in The Shores 2001 Covenants, which exists only as an exception to the business use prohibition. Neither the court below nor Plaintiffs suggest the terms of the amendment are inherently unreasonable. In fact, lease duration restrictions are allowed as a matter of law. [A.R.S. § 33-1806.01\(A\)](#). Neither have reasonably suggested the amendment violates the Planned Communities Act or public policy. Instead, Appellants and the court below assert that one of the amendment's provisions -- the minimum durational requirement for leases -- was "unforeseeable."

Despite repeated references to leasing of lots for residential use in The Shores' Declaration, Plaintiffs assert [Answering Brief at ¶ 20]:

To the extent the Amendment contains a temporal restriction upon leasing, such is clearly invalid under [Kalway](#) as it creates a restriction that is entirely new and different in character to anything in the prior Declaration. . . . The Amendment goes beyond the scope of what is allowable under Arizona law as it imposes entirely new covenants which were unforeseeable and not contemplated under the original Declaration language.

Saying so -- even twenty times -- does not make it so. The Association submits that this leap over the chasm between doctrine and fact is similar to that of the Superior Court in this case, in stating [Ruling on Motion and Cross Motion for Summary Judgment, RA 32, at pages 11 and 13]:

"The Arizona Supreme Court in [Kalway](#) stated at paragraph 17 that 'the restriction itself does not have to necessarily give notice of the particular details of a future amendment; that would rarely happen. Instead, it must give notice that a restrictive or affirmative covenant exists and that the covenant can be amended to refine it, correct an error, fill in a gap, or change it in a particular way'.

** * * *

"3) The 2021 amended declaration states '(A) after December 31, 2021, no Lot may be leased for a time less than 30 days.' Clearly the 2001 declaration addressed the issue of leasing and placed some restrictions on the manner and requirements for leasing. The original declaration did not address any time restriction on leasing. At the time the properties were purchased, the 2001 Amended Declaration allowed all Owners to lease the property for any duration they deemed appropriate. The Court finds that placing term restrictions on leasing under these circumstances does create an entirely new and different restriction on the Owners' use of their property in a manner that was unforeseeable at the time the original and 2001 declarations were made." [Emphasis added.]

The trial court's "new and different . . . unforeseeable" ruling of the court below is itself different from the Kalway test that applies; namely, that the amendment "must give notice that a restrictive or affirmative covenant exists and that the covenant can be amended to refine it, correct an error, fill in a gap, or change it in a particular way." Kalway, 252 Ariz. at 539 (quoted in Ruling at page 11).

The problem with the conclusory assertion of "unforeseeable" by the court below and Plaintiffs here is that it is vacuous, completely lacking in analysis. No finding of fact -- only the utterance "unforeseeable" -- support the assertion. The court below recognized that the Declaration "[c]learly . . . addressed the issue of leasing and placed some restrictions on the manner and requirements for leasing." Having made that all important decision, what prevents the covenant being amended to refine, correct an error, fill in a gap or change it in a particular way? Can Kalway be read to allow the community to do away ("change it in a particular way") with the leasing exception completely, but disallow the community from eliminating only the motel-type transient rentals that have created a nuisance to members of the community? Is there a doubt that, once the Declaration announced restrictions and exceptions in their 2001 Covenants on various types of commercial uses, that they could amend those restrictions and exceptions?

That the 2001 Covenants "did not address any time restriction on leasing" means it was foreseeable that once 67% of The Shores' owners got sufficiently fed up or otherwise concerned about their neighbors' vacation-rental business, they would amend their Declaration to restrict the minimum duration of leases. That the 2001 Covenants "allowed all Owners to lease the property for any duration they

deemed appropriate" means it was foreseeable that a durational limitation on leasing would be fair game for amendment by at least 67% of The Shores ownership in pursuance of that Declaration's unambiguous, clearly applicable amendment provisions.

If *Horton v. Hartsock* stands for anything, it is that The Cove's CC&R's (similar The Shores Declaration) contained restrictions on leasing. *Horton* does not claim that the CC&Rs cannot be amended to contain a specific durational element to a form of property use that is definitionally durational. The *Horton* court remanded the case to determine if any of the leases violated the single-family residential restriction. *Id.* at ¶¶ 38 and 44.

In the passage quoted above, the trial court below found "placing term restrictions on leasing under these circumstances does create an entirely new and different restriction on the Owners' use of their property." No explanation is provided. In the absence of explanation, the 2021 Amendment's durational restriction is no "newer" than the amendment's restriction of "Single Family" from ". . . group of persons not all so related . . ." and to "[not] more than four (4) persons who are unrelated. . . ." Nor is the amendment's durational restriction on "lease" anymore "different" from that amendment's addition of "the address and telephonic number at which the Owner (or Owner's agent) can be contacted by the Association during the lease term" to the old notice provisions in 2001 Declaration Article 2.30.

Plaintiffs endeavor to explain the leap from "foreseeable amendment" to "unforeseeable lease-duration restriction" by disclosing that some owners in The Shores were engaging in the short-term rental business with their units before and at the time the amendment was offered and adopted. Appellees' Brief, ¶ 2. No

evidence, admissible or otherwise, of this claim is found in Plaintiffs' Statement of Facts. RA 17.

Continuing this theme, Plaintiffs disclose without evidentiary support that "vacationers and other short-term renters have been a mainstay of The Shores . . ." and argue that "Common sense suggests that the amendment was far from foreseeable." Appellees' Brief, ¶ 22. This experience with short-term renters, if true, explains, in part, why the amendment was offered and adopted; it does not begin to explain how the amendment was unforeseeable to anyone, including to Plaintiffs. (Such an amendment would have been considerably less commonsensical -- and unforeseeable -- if it had been offered and adopted in the absence of any prior community experience with short-term renting.)

Plaintiffs' only other explanation for the leap to "unforeseeable" is their claim, again unsupported by evidence, that the original developers offered short-term renting of their units while they were still in control of the development. Appellees' Brief, ¶¶ 2, 22, 23. In their endeavor to support the notion that the supposed practices of the developer somehow embed implied restrictions in the provisions for amendment of a planned community's declaration, Plaintiffs postulate [Appellees' Brief ¶ 20]: "Ultimately, deed restrictions are contracts that should be construed to give effect to the intent of the parties. [*Powell v. Washburn*](#) . . ." and then conclude [id., ¶ 23]:

"Because the deed restrictions must be construed in a way that comports with the original intent of the drafter (*i.e.*, the developer) . . . it makes sense why the Declaration did not prohibit short-term rentals as it would have been contrary to the business of the developer. Against this backdrop, it would not be foreseeable for the general-amendment-power provision of the Declaration to be used to impose a

short-term rental restriction where no temporal restriction ever existed, particularly in a development where the developer was engaged in short-term rentals for decades. To construe the Declaration otherwise, given the developer's historical short-term rentals, would result in an absurdity that this Court must avoid.

How ironic. In *Powell v. Washburn*, the plaintiffs prevailed in establishing that their planned community's declaration could not be interpreted to permit little recreational vehicles to substitute for capacious manufactured homes (e.g., double-wide "mobile" homes) on slabs.⁴ The defendant in that case, Thomas Washburn, was the developer who created the planned community and its declaration and who claimed recreational vehicles were allowed under his declarations. See *Powell v. Washburn*, 211 Ariz. at 554, ¶ 2. Cf. Joan M. Travis, Indian Hills Development Company; Salome has success in family company -- expansion going forward, Parker Pioneer, Nov 14, 2014:

www.parkerpioneer.net/news/article_ac7b4e40-6c1f-11e4-8e53-034a48349088.html (last visited November 6, 2023).

To the Arizona Supreme Court in *Powell v. Washburn*, neither the developer's intent nor the developer's practices superseded the terms of the planned community's declarations. Plaintiffs' attempts to bootstrap speculative and assertions unsupported by evidence about the The Shores' developer's intent and

⁴ In *Powell v. Washburn*, the planned community's declaration incorporated a La Paz County ordinance as its definition of "manufactured home subdivision." At the time the declaration was filed, the ordinance did not include recreational vehicles as manufactured homes. When the ordinance was changed to include RVs, Mr. Washburn posited that the community's lot owners were entitled to substitute RVs for the more permanent homes the prior ordinance contemplated. See *Powell v. Washburn*, 211 Ariz. at 554-55, ¶¶ 2-4. (The similes between "manufactured home . . . RV" and "single family residence . . . vacation rental" are difficult to ignore.)

practices into the rubric of "[un]foreseeability" should not enter this Court's consideration here.

What is important is the 2001 Covenants contained restrictions on leasing and restrictions on use of common areas. Because restrictions exist, under the "reasonable expectations" standard, the original CC&Rs "need not provide notice of the precise details of the [short-term rental] amendment, but they must make clear that a restriction exists and that it could 'be amended to refine it, correct an error, fill in a gap, or change it in a particular way.'" [*Cao v. PFP Dorsey Invs., LLC*](#), 253 Ariz. 552, 556 (App. 2022) (quoting *Kalway*).

III. CONCLUSION

Plaintiffs fail to discuss relevant Arizona decisions that void an effort to amend a comprehensive Declaration with existing restrictions on commercial use, use of common areas and leasing of lots and residential units. They speculate this Court's decision in [*Horton v. Hartsock*](#), that did not involve the Declaration's amendment provision, somehow provides an insight to the Developer's intent with respect to short term rentals that cannot be developed from an objective reading of the Declaration. They suggest that no matter how many restrictions on commercial use and leasing are set forth in a Declaration, it is unforeseeable that a reasonable modification to the Declaration, even though tethered to several existing restrictions, could be made.

Appellees choose not to read any context into the way Section 2.30 of the Shores' Declaration was modified that may not meet their crabbed view of the *Kalway* decision, but assuredly meets this Court's analysis of [*Kalway*](#) in [*Desert Mountain*](#) and [*Las Sendas*](#). They intentionally ignore the Planned Communities Act

and the numerous authorities supporting Appellant's Opening Brief.

The Association asks this Court to reverse the trial court's decision invalidating Section 2.30 (A) and remand to direct Judgment in favor of Appellant, allowing enforcement of a properly passed Amendment requiring any lot or residential lease or rental to have a minimum of thirty days duration, remand for a re-determination of attorney fees at the trial court level, and award attorney fees on appeal.

ANSWERING BRIEF

I. INTRODUCTION.

In their Opening Brief on Cross-Appeal, Plaintiffs raise two issues. The first is that Section 2.30(B) of the 2021 Amendment redefining Single Family is invalid. The second issue is that the trial court committed reversible error when stating "In the exercise of the Court's discretion, the Court denies all parties' requests for attorney fees." RA 71.

In their Answering Brief, Plaintiffs argued the preexisting restrictions applicable to leasing and use of common areas could not be amended because they did not already include a durational restriction. In their Opening Brief, Plaintiffs agree the 2001 Covenants included a definition of Single Family but argue that definition cannot be amended because there is already a definition in the 2001 Covenants. The arguments raised in Plaintiffs' Answering Brief and Opening Brief are notably contradictory.

Regarding Plaintiffs' claim that the trial court committed error by not awarding attorney fees to either party, Plaintiffs assert they won the only important

issue of the several issues they argued and therefore, they must be the successful party. Yet, Plaintiffs believe it is important for them to appeal from the trial court's conclusion that Section 2.30(B) of the 2021 Amendment is valid. Plaintiffs also requested in their Answering Brief (at footnotes 7 and 8), that this Court reverse the trial court's dismissal of all of Plaintiffs' other claims. Plaintiffs would not be seeking this relief on appeal if they already prevailed on all their important issues. Plaintiffs are again taking contradictory positions.

The Shores' position on the issues raised in the cross-appeal is consistent. Because the 2001 Covenants contain a definition restricting the meaning of Single Family to a prescribed meaning, which makes "clear that a restriction exists" and that it could "be amended to refine it, correct an error, fill in a gap, or change it in a particular way." *Cao v. PFP Dorsey Invs., LLC*, 253 Ariz. 552, 556, 516 P.3d 1, ¶ 20 (App. 2022) (quoting *Kalway*, 252 Ariz. at 539, ¶ 17). Because the trial court found Section 2.30(A) of the 2021 Amendment to be unenforceable but found sections (B), (C) and (D) valid and enforceable, Plaintiff was only partially successful, especially compared to Plaintiffs' request that The Shores sign a Quitclaim Deed stating the entire 2021 Amendment "is invalid and unenforceable as a matter of law." RA 33, Exhibit A. Because Plaintiffs do not appeal from the trial court's order finding sections (C) and (D) valid and enforceable, even if Plaintiffs succeed in this cross-appeal, the entire 2021 Amendment will never be found "invalid and unenforceable as a matter of law."

The trial court has two layers of discretion regarding the parties' requests for attorney fees. The first layer is determining who is the successful party in a case

where each party was successful with certain issues. The second layer of discretion is if to award fees to the party determined to be successful. Plaintiffs' Opening Brief on Cross-Appeal mentions the first layer, but does not mention the second layer of discretion, and therefor describes no error. As to the first layer of discretion, Plaintiffs do not present a valid argument that the trial court committed reversible error regarding the level of Plaintiffs' success or lack thereof.

For these reasons and those stated below, The Shores request the Court deny Plaintiffs any relief requested in their Opening Brief.

II. STATEMENT OF FACTS

Plaintiffs offered no statement of facts with this Opening Brief. The Association incorporates herein its Statement of Fact and Statement of the Case set forth in its Opening Brief.

III. LEGAL ANALYSIS

A. Issues Abandoned or Dismissed by Plaintiff

In their Opening Brief on Cross-Appeal, Plaintiffs make no mention of the trial court's determination that sections (C) and (D) of the 2021 Amendment are valid and enforceable. Accordingly, Plaintiff abandoned these issues. *DeElena v. Southern Pac. Co.*, 121 Ariz. 563, 572 (1979).

Although not raised in the Opening Brief on Cross-Appeal section of their combined brief, at footnotes 7 and 8 of their Answering Brief, Plaintiffs' request the Court reverse the trial court's order dismissing all other claims with prejudice. Plaintiffs claim if the primary appeal is resolved in favor of the Association, then the Court should also grant Plaintiffs relief from the trial court's dismissal of all

their remaining claims. Plaintiffs offer no citations to authority that would allow the Court to grant an appellee affirmative relief on appeal.

Plaintiffs do not argue the trial court committed error regarding the dismissal of all of Plaintiffs' other claims, including those based on allegations of campaign or voting irregularities. These other claims were dismissed with prejudice. RA 71. The dismissal with prejudice came because of Plaintiffs' unilateral decision to dismiss all further claims so it could move quickly from the trial court's order on the motions for partial summary judgment directly to a final judgment. *See generally* RA 37 (October 24, 2022 Objection to Form of Judgment).

Plaintiffs' rush to obtain a judgment resulted in this Court of Appeals dismissing the first appeal as premature. *See* April 5, 2023 Order of Dismissal entered in No. 1 CA-CV 23-0053 ("Although Homeowners indicated an intent to abandon and voluntarily dismiss the claims not raised in the summary judgment motions, those claims remain pending as there is no ruling on them.") After the dismissal of the first appeal, the trial court ruled on Plaintiffs' voluntary request to dismiss with prejudice all remaining claims and then entered an Amended Judgment to that effect. RA 71. The Amended Final Judgment states at paragraph 5, "In accordance with Plaintiffs' request to dismiss all remaining claims, the Court concludes all other claims Plaintiffs alleged in this litigation are dismissed with prejudice."

Plaintiffs are not entitled to enlarge their rights or lessen the Association's rights because (1) the trial court was not presented with the issue, and (2) the issue was not raised in the cross-appeal. *Davis v. Cessna Aircraft Corp.*, 182 Ariz. 26, 37 (App. 1994). Moreover, the issues raised in footnotes 7 and 8 of Plaintiffs'

Answering Brief were not (1) raised before the trial court, or (2) included in their Opening Brief on Cross-Appeal, and are therefore waived. [*BMO Harris Bank N.A. v. Espiau*](#), 251 Ariz. 588, 593-94, ¶ 25 (App. 2021) (arguments and legal theories not raised in Superior Court are waived on appeal); [*DeElena v. Southern Pac. Co.*](#), 121 Ariz. 563, 572 (1979).

B. Section 2.30(b) of the 2021 Amendment is Valid and Enforceable.

In the 2001 Covenants, the term “Single Family” was defined:

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.

In the 2021 Amendment, the term “Single Family” was redefined for purposes of Section 2.30, titled “Leasing of Lots” as “Single Family may not consist of more than four (4) individuals who are unrelated by blood, marriage or legal adoption.”

The trial court found Section 2.30(b) of the 2021 Amendment to be valid and enforceable by stating:

The 2021 amended section 2.30 (B) requires that a Lot may be leased to a single family and defines single family. The 2021 amendment states that "a single family may not consist of more than four (4) individuals who are unrelated by blood, marriage or legal adoption." The 2001 Amended and Restated Declarations section 2.18 states that "all Lots and Parcels shall be used, improved and devoted exclusively to single family residential use." (emphasis added). Section 1.47 of the 2001 Declaration states "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. This Court finds that the language in the 2001 Declaration is sufficient to put future owners on notice that

the term may be defined or amended in the future. This Court finds that placing the definition in Section 2.30 and applying the term to leases is still sufficient notice to future owners' that the Association intends to be able to define the term in the future.

See trial court's Order dated September 14, 2022, RA 32, at page 11/13. In its order, the trial court carefully explained the connection or "tether" between the 2001 Covenants and the 2021 Amendment regarding the definition of Single Family. Plaintiffs' Answering Brief does not explain where the trial court committed error in reaching the above conclusion.

1. Occupancy vs. Use Restrictions = No Difference.

Plaintiffs' principal argument is entitled "The Declaration did not contain an occupancy restriction." Opening Brief on Cross-Appeal, ¶ 37. Plaintiffs claim the definition at Section 1.47 of the 2001 Covenants is a "use restriction," while the definition found at Section 2.30(B) of the 2021 Amendment is an occupancy restriction. Plaintiffs argue "the occupancy restriction was entirely new and untethered to any prior restriction." Opening Brief on Cross-Appeal, ¶ 30. Plaintiffs repeat that the 2021 Amendment created "an occupancy restriction where there was previously only a use restriction" and "an occupancy restriction is *not* the same as a use restriction" at ¶ 39 of the Opening Brief. But that is not the case.

Whether a Single Family is using the property or occupying the residence on the property is a distinction without a difference under the 2001 Covenants, and not just because they are the same. This is because the 2001 Covenants use both terms.

Section 1.13 of the 2001 Covenants speak of a “Cluster Residential Unit” as being one intended “for use *and occupancy* as a residence by a Single Family.” Likewise, Section 1.19 of the 2001 Covenants describes a “Detached Residential Unit” as one intended for “use *and occupancy* as a residence by a Single Family.”

Because the 2001 Covenants expressly provide the residential units within the community be both used *and occupied* by a Single Family, Plaintiffs’ theory that the 2001 Covenants never address occupancy is built upon a faulty foundation. “Viewed in their entirety” ([Las Sendas](#) at ¶ 19), as the 2001 Covenants must be, the Court will conclude there is nothing “entirely new” about the requirement that only a Single Family use *and occupy* the residential units. Also, Plaintiffs do not explain how a Single Family is expected to use a cluster residential unit or detached residential unit unless by occupancy. At the very least, the trial court did not error in concluding the 2021 Amendment is sufficiently tethered to the 2001 Covenants and the occupancy restrictions found therein.

Plaintiffs also claimed the trial court failed to “appreciate the distinction between ‘use’ and ‘occupancy’ restrictions.” Opening Brief on Cross-Appeal, ¶ 43. If that is the case, it is because Plaintiffs’ Motion for Partial Summary Judgment did not make a distinction between “use” or “occupancy.” See RA 15, 24. The trial court cannot commit error by not considering a distinction Plaintiffs did not assert in their motion or reply. See [BMO Harris Bank N.A. v. Espiau](#), 251 Ariz. 588, 593-94, ¶ 25 (App. 2021) (noting that arguments and legal theories not raised in superior court are waived on appeal).

Finally, Plaintiffs cite [Tarr v. Timberwood Park Owners Ass’n](#), 556 S.W.3d 274 (Tex. 2018) as supporting Plaintiffs’ argument that there is a difference

between a use and occupancy restriction. However, the [Tarr](#) decision involved the distinction of if “single family” was describing the type of structure rather than the type of use or occupancy. [Id.](#) at p. 287.

In [Tarr](#), the only reference to single family in the restrictions provided in part as follows:

No building, other than a single family residence containing not less than 1,750 square feet, exclusive of open porches, breezeways, carports and garages, and having not less than 75% of its exterior ground floor walls constructed of masonry, i.e., brick, rock, concrete, or concrete products shall be erected or constructed on any residential tract in Timberwood Park Unit III[.]

The Court considered “whether the covenant’s restrictions apply to *the use* of the building or to *the nature* of the physical structure.” [emphasis supplied] [Id.](#) at p. 286. The Court concluded the restriction “describes structural or architectural limitations by specifying that the building ‘erected or constructed’ upon a track must be a ‘single family residence.’” [Id.](#) at p. 287. This is similar to how the Court in [Magnus Ld Macleod v. Mogollon Airpark, Inc.](#), 2023 WL 2582622 (App. March 21, 2023) held the term “guest house” described the type of structure and not the type of use.

Here, Plaintiffs do not claim the requirements that each lot be “devoted exclusively to Single Family residential use” is describing the type of structure. Even if Plaintiffs raised the distinction between use and occupancy in their Motion for Partial Summary Judgment or Reply, and even if there was an actual distinction between how a Single Family uses or occupies residential property, no one claims

that anyone other than a “Single Family” may use *or* occupy the residential units at The Shores.

As described above, the 2001 Covenants limited both use and occupancy to Single Families. Because the 2001 Covenants used both use and occupancy by Single Families when defining the residential units, Plaintiffs’ argument about use or occupancy is without merit. Moreover, this argument must be rejected because Plaintiffs waived the argument by not asserting this argument in their Motion for Partial Summary Judgment, *See* RA 15, 24.

2. Narrow Amendment to “Single Family” Definition Allowed.

Under the 2001 Covenants, whether the property owner or a tenant was using or occupying the unit, they must be a “Single Family” as that term is defined. In the [*Horton v. Hartsook*](#) decision Plaintiffs rely on, the litigation was remanded to allow the trial court to determine if the defendants were leasing exclusively to a Single Family as required by the Cove’s restrictions. Because the Single-Family use and occupancy restriction existed in the 2001 Covenants, the 2021 Amendment is sufficiently tethered to the 2001 Covenants.

Plaintiffs’ fallback position is their claim that the existing requirement under the 2001 Covenants that properties be occupied by Single Families do not allow for a narrow change of the definition. Plaintiffs claim there cannot be “two different meanings for ‘Single Family’ within the same document.” *See* Defendants’ Opening Brief at p. 24, ¶30. Plaintiffs conclude a narrowly defined definition that does not apply to every possible condition, yet still applies to all lots equally, “would unreasonably alter the nature of the original declaration.” *Id.* at ¶46.

In their Reply supporting their Motion for Summary Judgment (RA 24), Plaintiffs conceded “it might be reasonably foreseeable that an undefined, referenced term would later be defined for purposes of the entire declaration[.]” Indeed, [Kalway](#) expressly allows terms in existing covenants to be refined or changed in a particular way. [Kalway v. Calabria Ranch HOA, LLC](#), 252 Ariz. 532, 539-40 (2022) (“Thus, a later amendment defining the term was reasonably foreseeable.”) Although broad definitional changes are allowed as Plaintiffs concede, [Kalway](#) also expressly allows amendments that “refine” or remove unwanted meanings or undesired impact of any language. In the 2021 Amendment, The Shores’ owners did so by passing an amendment that had narrow application while still applying uniformly to all lots.

The [Las Sendas](#) Court, applying the rule stated in [Powel v. Washburn](#), utilized the following reasonable expectation standard:

Under this reasonable-expectations standard, the original CC&Rs "need not provide notice of the precise details of the [short-term rental] amendment," but they must make clear that a restriction exists and that it could "be amended to refine it, correct an error, fill in a gap, or change it in a particular way." [Cao v. PFP Dorsey Invs., LLC](#), 253 Ariz. 552, 556, 516 P.3d 1, ¶ 20 (App. 2022) (quoting [Kalway](#), 252 Ariz. at 539, ¶ 17). In other words, to be valid and enforceable, the short-term rental amendment "cannot be entirely new and different in character, untethered" to existing restrictions but must be a foreseeable modification or extension of the restrictions enumerated in the original CC&Rs.

Under the 2001 Covenants, the phrase “devoted exclusively to Single Family Use” applied to leasing. *See, e.g., Horton v. Hartsook*, 2009 WL 2244503,

2009 Ariz. App. Unpub. LEXIS 974 (2009). Thus, restrictions exist. This of course made it foreseeable that the term “Single Family” as applied to leasing or otherwise could be changed by amendment. *Kalway*, 252 Ariz. at 540.

The 2021 Amendment applies to all 188 Lots uniformly. The Amendment does not, as Plaintiffs claim, “unreasonably alters the nature of the original declaration.” See *Nicdon v. Desert Mountain Master Association*, 2021 WL 1691532, 2021 Ariz.App. Unpubl LEXIS 489 (April 29, 2021), at ¶29 (finding “the Amendment applies uniformly” and concluding “the rental restriction is neither arbitrary nor unreasonable”).

Plaintiffs claim the 2001 Covenants did not contain an express limit on the number of people unrelated by blood, adoption or marriage could be part of a “common household in a Residential Unit.” This is the same as the claim that the pre-existing covenants did not contain an express number of days a lease must be as made in *Las Sendas*, at ¶ 15. The *Las Sendas* court concluded even without an express duration restriction, the original restrictions “reasonably places prospective purchasers on notice that their properties could be regulated by extensive use restrictions[.]” Likewise, even if the 2001 Covenants did not express the number of unrelated people who could be considered a common household, the 2001 Covenants “reasonably places prospective purchasers on notice that their properties could be regulated by extensive use restrictions,” and the 2021 Amendment was sufficiently tethered to the 2001 Covenants to be valid and enforceable as the trial court determined.

In their Answering Brief, Plaintiffs want to compare some of the amendments the *Kalway* Court found invalid to a re-defining of Single Family. But

Kalway was applying the rule that “any doubts are resolved against the validity of a restriction.” The “any doubts resolved against the validity of a restriction” is the same rule the Court of Appeals applied in Powell v. Washburn, which the Arizona Supreme Court later vacated and reversed. Powell v. Washburn, at ¶ 17 (describing the Court of Appeals stating if there was “any wiggle room” the outcome would be to not enforce the restriction).

There is no presumption Section 2.30(B) of the 2021 Amendment is invalid. Powell v. Washburn, 211 Ariz. 553 (2006). Plaintiffs offer no compelling reason for why this Court must determine that Section 2.30(B) of the 2021 Amendment is “entirely new and different in character, untethered to the original covenants” when the original covenants contained a definition of Single Family, which applied to the leasing of any lot for any duration – and still does under the 2021 Amendment. The Court should agree with the trial court that Section 2.30(B) of the 2021 Amendment is not entirely new; it is not different in character; it is tightly tethered to the 2001 Covenants and therefore enforceable.

C. The Trial Court did not cause Reversible Error in Denying Attorney Fees.

Paragraph 48 in the Opening Brief is titled, “the trial court should have awarded attorneys’ fees to the Homeowners.” The Shores believes this is a Freudian slip, otherwise to obtain relief on appeal, the title would have been “the trial court must have awarded attorney fees.”

The trial court was not required to award attorney fees to either party. There are two layers of discretion to examine. In a case of mixed results, the first layer is

determining which party is successful. The second layer is then determining if the successful party should recover any attorney fees at all. Plaintiffs never discuss the second layer and therefore can never prevail.

Whether a party is successful for purposes of discretionary award of attorney fees, such as under [A.R.S. § 12-341.01\(A\)](#) or [A.R.S. § 12-1103](#), is within the trial court's sole discretion. [Berry v. 352 E. Virginia, L.L.C.](#), 228 Ariz. 9, 13, ¶ 21 (App. 2011). As this case involved multiple issues and varied success, the trial court could apply either a “percentage of success” test or a “totality of the litigation” test. [Id.](#) at 13–14, ¶ 22. This Court will affirm the trial court's prevailing party determination if it has any reasonable basis. [Lee v. ING Inv. Mgmt., LLC](#), 240 Ariz. 158, 161, ¶ 8 (App. 2016). The Court must do so because the trial court “is better able to evaluate the parties' positions during the litigation and to determine which has prevailed.” [Berry](#), 228 Ariz. at 13, ¶ 22. But even after determining the successful party, the trial court was not required to award attorney fees.

What the trial court could have or should have awarded to the party it thought was more successful than the other is also subject to discretion, and different results can be reached without constituting reversible error. [State v. Chapple](#), 135 Ariz. 281, 297 n.18 (1983) (citation omitted). The [State v. Chappel](#) Court explained “discretion” as follows:

Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not

substitute our judgment for that of the trial judge; we will not second-guess.

In this case, the trial court's decision whether to award attorney fees was "truly discretionary." Selecting a successful party in a case of mixed results involved "an assessment of conflicting . . . factual or equitable considerations . . . better determined or resolved by the trial judge." In this matter, Plaintiffs were successful before the trial court on one issue, unsuccessful as to three other issues (RA 32), and then dismissed all other claims, including their claim for breach of contract and other compensatory, incidental and consequential damages (with post-judgment interest) sought by their Complaint. RA 1 and 27.

Plaintiffs do not dispute the existence of factual or equitable considerations, they just say the trial court *should* have found them to be successful. Plaintiffs, therefore, do not show an abuse of discretion.

In the Amended Judgment, the trial court stated, "In the exercise of the Court's discretion, the Court denies all parties' requests for attorney fees." Plaintiffs must establish the trial court abused its discretion. "An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." [*Torres v. N. Am. Van Lines*](#), 135 Ariz. 35, 40 (App. 1982). Plaintiffs' Opening Brief on Cross-Appeal fails to establish the trial court acted manifestly unreasonable or acted on untenable grounds. Plaintiffs' challenge to the denial of attorney fees must therefore be denied and the trial court's decision on attorney fees affirmed.

1. Fees Under A.R.S. § 12-1103 Were Properly Denied.

The applicable language of [A.R.S. § 12-1103](#) is not provided in Plaintiffs' brief. Because a claim for attorney fees is governed by the terms of the statute, it helps to know what the statute states. [A.R.S. § 12-1103\(B\)](#) provides:

A. If a party, twenty days prior to bringing the action to quiet title to real property, requests the person, other than the state, holding an apparent adverse interest or right therein to execute a quit claim deed thereto, and also tenders to him five dollars for execution and delivery of the deed, and if such person refuses or neglects to comply, the filing of a disclaimer of interest or right shall not avoid the costs and the court may allow plaintiff, in addition to the ordinary costs, an attorney's fee to be fixed by the court.

To recover attorney fees under this statute, a party must be successful. But even a successful party is not entitled to recover attorney fees because the statute states "the court *may* allow" attorney fees.

In this action, the quitclaim deed Plaintiffs asked The Shores to execute would have resulted in the elimination of the entire 2021 Amendment, and not just 18 words of the 2021 Amendment. The issue of "success" under [A.R.S. § 12-1103](#) "turns on whether a party successfully quieted title." [Cook v. Grebe](#), 245 Ariz. 367, 369. ¶ 8 (App. 2018). Plaintiffs failed to achieve their desired result, which was the total elimination of the entire 2021 Amendment. RA 33, Ex. A. The trial court would not abuse its discretion if it found Plaintiffs' quiet title action was not successful enough to justify a discretionary award of attorney fees.

And even if the trial court could have found Plaintiffs were successful, the trial court retained discretion on if attorney fees would be awarded. This Court

must uphold the trial court's exercise of its discretion if the record contains a reasonable basis for the court's denial of fees. [*Pettay v. Ins. Mktg. Services, Inc.*](#) (*West*), 156 Ariz. 365, 368 (App.1987). In this action, the record contains a reasonable basis. RA 37, 39, 71.

2. Fees Under A.R.S. § 12-341.01 Were Properly Denied.

Plaintiffs also claim the trial court could have granted their fee request under the authority of [A.R.S. § 12-341.01](#). This is another statute where the trial court has discretion determining the successful party in a case with mixed results and, once the successful party is determined, the trial court had discretion on if to award attorney fees. This was explained as follows:

We may uphold a decision on attorney fees under § 12–341.01 if it has any reasonable basis, even if the trial court gave no reasons for denying the request for fees. *Uyleman v. D.S. Rentco*, 194 Ariz. 300, ¶ 27, 981 P.2d 1081, 1086 (App.1999). The question on appeal “is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason. We cannot substitute our discretion for that of the trial judge.” *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985), quoting *Davis v. Davis*, 78 Ariz. 174, 179, 277 P.2d 261, 265 (1954) (Windes, J., specially concurring).

[*Tucson Estates Prop. Owners Ass'n, Inc. v. McGovern*](#), 239 Ariz. 52, 56, ¶ 12 (App. 2016).

There is nothing in the Opening Brief describing why the trial court exceeded the “bounds of reason” when denying Plaintiffs’ application for attorney fees. In [*Tucson Estates*](#), the Court found even though certain “factors may weigh in

favor of Appellants, . . . because a reasonable basis supports the ruling, we do not substitute our discretion for that of the trial court.” Likewise, even if Plaintiffs claim (as they do) that the trial court “should have awarded” attorney fees, that does not require the finding the trial court must have awarded attorney fees. The trial court did not commit reversible error when it exercised its discretion to deny attorney fees to all parties.

IV. ATTORNEY FEES

The Association seeks to recover its costs and attorney fees pursuant to the terms of the 2001 Covenants as amended by the 2021 Amendment as well as under [A.R.S. 12-341.01](#).

V. CONCLUSION

Regarding the relief sought by Plaintiffs as a result of their Cross-Appeal, Defendant The Shores at Rainbow Lake Association respectfully requests the Court deny Plaintiffs any relief. The trial court did not commit legal error in determining the definition of Single Family found in the 2021 Amendments was sufficiently tethered to the 2001 Covenants. The trial court committed no error when exercising its discretion to deny Plaintiffs’ request for attorney fees. This Court must affirm the trial court’s decision enforcing Section 2.30(B) of the 2021 Amendment and affirm the trial court’s denial of Plaintiffs’ request for attorney fees. This Court is respectfully requested to grant the Association’s costs and attorney fees incurred in responding to the issues raised by the Cross-Appeal.

Dated this 6th day of December, 2023.

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