

**ARIZONA COURT OF APPEALS**

**DIVISION ONE**

JIE CAO, et al.,

Plaintiffs/ Appellants,

v.

PFP DORSEY INVESTMENTS, LLC, et al.,

Defendants/ Appellees.

Court of Appeals  
Division One  
No. 1 CA-CV 21-0275

Maricopa County  
Superior Court  
No. CV2019-055353

**RESPONSE OF PLAINTIFFS/APPELLANTS  
JIE CAO AND HAINING "FRAZER" XIA  
TO ADDITIONAL BRIEFING**

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**I. Every applicable principle of law and canon of construction points against finding the Xias consented to a forced sale.**

The defendants' supplemental brief contends that the Xias consented to follow the forced-sale provisions of A.R.S. § 33-1228, even if that statute is unconstitutional. (E.g., Add.Br. 3 ("putting Owners on *actual* notice that they agree to be bound by the Act".)) But every applicable principle of law and every applicable canon of construction cautions strongly against finding consent under these circumstances.

In the constitutional context, courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *State v. Rickman*, 148 Ariz. 499, 503 (1986). This applies with even greater force in the takings context. A waiver of the Takings Clause "must contain clear, unambiguous, unmistakable, and conspicuous language." *Missouri v. Muslet*, 213 S.W.3d 96, 99 (Mo. Ct. App. 2006).

The only asserted form of consent is via a supposed incorporation by reference. (E.g., Add.Br. 7 ("the 2018 version of the Statute is incorporated into the Declaration".)) But a document is not incorporated unless it is "clearly and unambiguously incorporated by reference." *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 268 (App. 1983) (emphasis in

original). “[T]he reference must be *clear and unequivocal* and must be called to the attention of the other party, [and] he must consent thereto . . . .” *Id.* (emphasis in original) (citation omitted).

That high standard is merely the general rule for incorporation by reference in ordinary contracts. When it comes to CC&Rs like the Declaration, the showing must be even greater still. For CC&Rs, courts “do not enforce unknown terms which are beyond the range of reasonable expectation.” *Kalway v. Calabria Ranch HOA, LLC*, \_\_ Ariz. \_\_, ¶ 14, [No. CV-20-0152-PR](#) (Ariz. Mar. 22, 2022) (quotation marks and citations omitted).

And when it comes to interfering with fundamental property rights (as this case unquestionably involves), the restriction “must be set forth in the Declaration with sufficient specificity that purchasers are on notice” of that restriction. *Wilson v. Playa de Serrano*, [211 Ariz. 511, 515](#), ¶ 16 (App. 2005). The restriction must be “clear and unambiguous.” *Id.* at 514, ¶ 10. Accordingly, “when there is any ambiguity” as to the restriction, courts “will construe the Declaration against the restriction and in favor of the free use and enjoyment of the property.” *Id.* at 515, ¶ 16 (internal quotation marks omitted; emphasis added).

These varied standards come from far-reaching aspects of Arizona law: constitutional rights, contract law, and property law. Yet they all point in the same direction: against finding consent to an otherwise-unconstitutional taking. They use every conceivable articulation to make the point as strongly as possible:

- “indulge every reasonable presumption”
- “clear, unambiguous, unmistakable, and conspicuous language”
- “clearly and unambiguously”
- “clear and unequivocal”
- “called to the attention of the other party”
- “beyond the range of reasonable expectation”
- “sufficient specificity”
- “construe the Declaration against the restriction”
- “in favor of the free use and enjoyment of the property”

These cases impose heightened standards on the defendants. If there is any ambiguity about whether a provision constitutes consent, these doctrines place a heavy thumb on the scale against finding such consent.

Here, holding that the simple statement, “[t]he Association shall have such rights, powers and duties as are prescribed by the Condominium Act

[and] other applicable laws and regulations” constitutes consent to an unconstitutional taking would violate every one of those standards.

**II. The defendants’ answers to the Court’s specific questions are wrong or incomplete.**

**A. The owners did not agree to be bound by the Act.**

The defendants incorrectly claim that “throughout the Association’s Declaration there are explicit references to the Condominium Act, putting Owners on *actual* notice that they agree to be bound by the Act, as it may be amended from time to time.” (Add.Br. 3; *accord* Add.Br. 5 (“actual notice that they agree to be bound by the same”).) To the contrary, however, the Declaration reflects no agreement “to be bound by the Act.”

The defendants cite three Declaration sections referencing the Act. None of them incorporates the Act by reference. “[A] mere reference to another document is not sufficient to incorporate that other document into a contract.” [17A C.J.S. Contracts § 419](#).

Declaration § 1.1 adopts the Act’s definitions for capitalized terms, which is not relevant here.

Declaration § 1.2.15 defines the Condominium Act but does not incorporate it.

Declaration § 6.1 merely gives the Association the powers given to *all* condominium associations under the Act. This narrow reference to the Condominium Act does not incorporate the Act. Most relevantly, it does not give the *unit owners* any power to authorize the sale of someone else's property. It does not give the Association the power to effectuate an unauthorized sale. On this point, the defendants acknowledge that "Decisions such as terminations and sale are left to the Owners," and that the Association "effectuate[s] the process that has been approved by the Membership." (Add.Br. 8.) But because Declaration § 6.1 does not authorize the *owners* to do anything vis-à-vis the Act, then § 6.1 cannot constitute the required consent.

And even if Declaration § 6.1 could be read to incorporate the Act, or give unit owners and the Association those powers, the Court may not enforce the provision in that manner for several reasons. The Act is not "*clearly and unambiguously* incorporated by reference." *United Cal. Bank*, [140 Ariz. at 268](#). The Declaration's supposed alteration of the Xias' property rights likewise is not "clear and unambiguous." *Wilson*, [211 Ariz. at 514](#), ¶ 10.

Declaration § 6.1 does not reflect consent to *unconstitutional* applications of the Act. And even if it did, the consent is not “clear, unambiguous, unmistakable, and conspicuous,” as required to consent to a taking. *Muslet*, 213 S.W.3d at 99. Particularly when “every reasonable presumption” is applied against that interpretation. *Rickman*, 148 Ariz. at 503.

To top it all off, the idea that a developer can sell the Xias’ privately owned, fully-paid home, when they have done nothing wrong, missed no payments, and violated no condominium rules, falls well “beyond the range of reasonable expectation.” *Kalway*, ¶ 14.

**B. The owners did not consent to change the type of transaction authorized by the Act.**

As the defendants point out (Add.Br. 3), Declaration § 1.2.15 includes the phrase “as amended from time to time” when defining “Condominium Act.” [IR-51, Ex. 1 at 2 (APP099).] In light of this, the Xias no longer dispute that this statement satisfies the requirements of 17 C.J.S. *Contracts* § 40, and withdraw the contrary statement on page 15 of their supplemental brief.

This does not end the inquiry, however. *Kalway* addressed CC&Rs that expressly provided for amending the CC&Rs. *Kalway*, ¶ 3. The Supreme

Court nevertheless ruled several amendments invalid for falling outside “the range of reasonable expectation.” *Kalway*, ¶ 14. Subsequent amendments are by definition unknown terms, and *Kalway* imposes a heightened standard for finding consent to such unknown terms.

Here, the Xias do not believe that either the 1986 or 2018 versions of § 33-1228(G)(1) authorize a forced sale at a fixed price. If the Court believes that the transaction would be authorized under the 2018 version but not the 1986 version, however, it should rule that the 1986 version applies. The 1986 version plainly does not permit a forced sale at a fixed price. If the 2018 amendments changed that, then the amendments fall outside the range of reasonable expectations and are unenforceable under *Kalway*. Reasonable owners would not anticipate that a forced-sale system that aligns incentives by distributing proceeds strictly proportionally would be changed to allow a fixed-price sale, which would benefit the supermajority owner at the expense of the minority owners.

The defendants argue that subsection (K) of the 2018 version essentially requires condominium associations to follow the 2018 amendments. But consider what the amendments mean. As the Xias explained (Supp.Br. 25-27), in 2018 the legislature sought to *add* protections

for minority owners, not remove them. Subsection (K) effectively requires condominium associations to follow the additional appeal process and moving expenses added in 2018. But even if the Court interprets the 2018 amendments to authorize a fixed-price sale that was unauthorized under the 1986 version, it is extremely unlikely that the legislature also intended to *impose that* on all pre-2018 condominium declarations. This is particularly true when subsection (D) still requires condominium associations to distribute the proceeds *proportionally*.

The defendants argue that if the Association had applied the 1986 version, it would have violated Arizona law. (Add.Br. at 6-7.) This assertion rests on a faulty assumption. If the legislature had the power to authorize forced sales, then the defendants would be correct and the Association would have to apply the 2018 version. The legislature need not act within the *Kalway* standards of reasonable expectations when it enacts *valid* legislation because with valid legislation the source of power is the legislative power, not contractual consent.

But the legislature must act within the bounds of the Arizona Constitution, and it does not have the power to authorize forced sales. Consequently, this transaction could not have been conducted under the

statute alone. Instead, the defendants must find contractual consent to the forced sale. That contractual consent, when based on a subsequent amendment, must fall within “the range of reasonable expectation” to be enforceable. *Kalway*, ¶ 14.

Consider a more extreme example. If the legislature had amended § 33-1228 to allow any unit to be sold for \$1, that would unquestionably fall outside the owners’ reasonable expectations “based on the declaration in effect at the time of purchase.” *Kalway*, ¶ 15. The Court could not enforce the statute, and could not enforce a provision in the Declaration that incorporated the statute, even if the Declaration said, “as amended from time to time.”

In sum, when the Court examines whether parties consented via contract to an unconstitutional statute, the *Kalway* standard applies (even though *Kalway* would not apply to a constitutional statute). Here, the 2018 amendments fail the *Kalway* test.

**C. The Association must follow its obligations as trustee.**

The defendants claim that condominium associations “are held to a standard of reasonableness,” and do not owe a fiduciary duty to the owners. (Add.Br. 8-9.) The Association might not owe fiduciary duties in some

circumstances, such as when deciding whether to approve an owner's request to install a satellite dish.

Here, however, the statute expressly imposes a trustee role on the Association. When the owners vote to terminate and sell, "title to that real estate on termination vests in the association *as trustee* for the holders of all interest in the units," and the association "has all powers necessary and appropriate to effectuate the sale." A.R.S. § 33-1228(D) (emphasis added). As a trustee, the association "owes a fiduciary duty to a trust's beneficiaries" (here, the unit owners), and must "act with the highest degrees of fidelity and utmost good faith." [76 Am. Jur. 2d Trusts § 334](#).

Once the owners vote to terminate and sell, therefore, the Association must conduct the sale with all of the obligations of a trustee—including doing its "best to secure competitive bidding and to surround the sale with such other factors as will tend to cause the property to sell to the greatest advantage." [Bogert's Law of Trusts and Trustees § 745](#).

The legislature's decision to impose trustee obligations makes perfect sense. If the legislature is going to authorize forced sales of someone's property, of course it will impose this kind of trustee obligation. The trustee obligation provides the guardrails that should protect against self-dealing.

The trustee obligation is what should protect the minority owners from the supermajority. Although the legislature did not choose to impose that obligation when approving satellite dishes or paint colors, it expressly chose to impose the obligation when the stakes were high, such as when people could have their homes sold out from under them. “[O]ne of the basic responsibilities of government is to protect private property interests.” *Bailey v. Myers*, 206 Ariz. 224, 227, ¶ 11 (App. 2003). Imposing the statutory trustee obligation provides an important safeguard that was completely trampled in this case.

**D. Contrary to the defendants’ assertion, *Kalway* applies to this case.**

The defendants argue that *Kalway* “has no bearing on this matter.” (Add.Br. 12.) To the contrary, *Kalway* stands for an important principle.

Most contracts are interpreted by their plain text. *Kalway*, however, confirms that there are some “special types of contracts” where some express terms will not be enforced. *Kalway*, ¶ 15. “CC&Rs are such contracts.” *Id.*

For this reason, the defendants’ very first assertion, that “Condominium declarations are contractual documents just like any others”

(Add.Br. 1), is simply wrong. Condominium declarations are *special* types of contracts with *special* types of rules.

*Kalway* involved amending the CC&Rs themselves, which is not at issue here. But the core holding applies to this case. As *Kalway* explained, “Under general contract law principles, a majority could impose any new restrictions on the minority because the original declaration provided for amendments by majority vote.” *Kalway*, ¶ 15. In other words, under the plain text of the CC&Rs at issue there, the amendments at issue were perfectly valid, and the ordinary contract analysis would stop there.

But *Kalway* protects the minority owners. “[T]he law will not subject a *minority* of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a *majority* to make changes to existing covenants.” *Id.* (quotation marks and citation omitted; emphases added). Despite the plain text of the contract allowing for amendment by majority vote, the Supreme Court refused to enforce that provision so broadly. It invalidated several amendments that were otherwise validly adopted by the majority as authorized by the contractual text.

The analysis for CC&Rs simply does not stop at the plain text. Instead, *Kalway* holds that a court must consider “a homeowner’s reasonable expectations.” *Kalway*, ¶ 15. This principle is closely related to *Wilson*’s holding, which also guarded against interpreting CC&Rs to alter fundamental private property rights. *Wilson*, 211 Ariz. at 514-15, ¶¶ 10-16. Like *Kalway*, *Wilson* also recognized that Arizona favors “the free use and enjoyment of [] property.” *Id.* at 515, ¶ 16 (citation omitted).

Here, the rights at stake are the highest possible property rights. The Xias, who violated no condominium rule, missed no condominium payment, and owned Unit 106 free and clear, were kicked out of their home. Instead of being sold to the highest bidder, the Association set aside its fiduciary obligations, assumed that the supermajority owner was the only possible buyer, and handed over title to the Xias’ unit. The Xias lost *all* of their rights to Unit 106. The legislature had no power to authorize this transaction and the Xias did not consent to it in the Declaration.

The Court should reverse.

RESPECTFULLY SUBMITTED this 2nd day of May, 2022.

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