**IN THE COURT OF APPEALS**

**STATE OF ARIZONA**

**DIVISION TWO**

| | |
|---|---|
| MAARTEN KALWAY,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>CALABRIA RANCH HOA, LLC, *et al.*,<br><br>Defendants-Appellees. | No.: 2 CA-CV 2019-0106<br><br>Pima County Superior Court<br>No.: C20181284 |

# APPELLANT'S OPENING BRIEF

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## INTRODUCTION

This is a declaratory judgment action regarding the validity of an Amended Declaration of Covenants, Conditions, Restrictions and Easements governing the subdivision in which the individual parties own Lots. Appellant Kalway owns one of the five lots. Without notice to Kalway, or a meeting of the Lot Owners, or any opportunity for input or to vote, the Owners of the other four lots amended the original Declaration to add new definitions, restrictions, and enforcement authority. Because the amendments unreasonably alter the nature of the original Declaration, were not foreseeable, do not apply uniformly to all of the lots, and were not adopted unanimously, Kalway brought this action to invalidate the Amended Declaration. On cross-motions for summary judgment, the trial court declared that some amendments are invalid but others are not. (ROA 46.) The trial court also ruled that the invalid amendments are severable, and therefore the other amendments survive. (*Id.*)

## STATEMENT OF THE CASE

This declaratory judgment action was decided on cross-motions for summary judgment. (ROA 17, 20.) The Hon. Janet C. Bostwick of the Pima County Superior Court partially granted and denied each motion by a signed ruling with Rule 54(c) language entered on April 12, 2019. (ROA 46.) Plaintiff Kalway filed a timely notice of appeal on May 7, 2019. (ROA 48.) Defendants filed a timely notice of cross-appeal on May 13, 2019. (ROA 53.)

This Court has jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101(A)(1).

## STATEMENT OF FACTS

The material facts are undisputed, as the parties agreed and the trial court found. (RT 12/17/18 ep 4, 18; ROA 46 ep 1.) The facts were summarized by the trial court as follows:

> The Plaintiff, Maarten Kalway, owns real property in a subdivision of Pima County known as Calabria Ranch Estates ("Calabria"). Since the subdivision's inception in 2015, the parcels of property within its boundaries have been subject to covenants, conditions, and restrictions ("CC&Rs") enumerated in a recorded declaration. The declaration provides that the CC&Rs may be amended by majority vote of Calabria's property owners and defines "majority vote" as four votes out of a possible six total votes. Each of the subdivision's five lots is allocated one vote, with the exception of Mr. Kalway's larger lot, which is granted two votes.
>
> On or before January 2, 2018, a majority of property owners in the subdivision voted to enact sweeping changes to the declaration. This vote was taken without holding a meeting or notifying Mr. Kalway, who attests that he was unaware of the proposed changes and, having no notice or opportunity to do so, did not vote. Among other changes, the CC&R amendments limit the size of dwelling and non-dwelling structures, prohibit subdividing and conveying any portion of a lot without a majority vote, empower Calabria's manager to levy a "special assessment" on owners by majority vote, permit individual assessments to be levied against any owner "in the sole discretion" of Calabria's manager, allow the manager to enter any parcel of property to "remove or de-construct" improvements made in violation of the declaration at the owner's expense, and otherwise vest Calabria, through its manager, with broad enforcement powers not granted under the original declaration.

(ROA 46 ep 1-2.)

The material facts are detailed in the parties' statements of fact. (ROA 18, 21 and 24.) Calabria Ranch Estates is a "Suburban Ranch" subdivision consisting

of approximately 44.55 acres east of Tucson near the Rincon Mountains. (ROA 18 ep 2, ¶ 3; ROA 25 ep 4.) A Declaration of Covenants, Conditions, Restrictions and Easements was recorded in 2015 by the then owner and developer of the property. (ROA 16; ROA 18 ep 3, ¶ 13.) The stated intent of the Declaration was "to establish a general plan for the improvement, development, use and enjoyment of the Property … for the purpose of protecting the value, desirability, attractiveness and natural character of the Property.…" (ROA 16 ep 2.)

The Declaration contemplated an "association" (ROA 16 ep 6, Art. 6) but did not create one. (*See* ROA 16; ROA 21 ep 8, ¶ 56.) Defendant Calabria Ranch HOA, LLC was formed in 2016 to hold assessment funds. (ROA 18 ep 2, ¶ 5; ROA 21 ep 8, ¶ 58.)

The Property was subdivided into five lots depicted as parcels 1-5 on the survey attached to the Declaration. (ROA 16 ep 10; ROA 18 ep 2, ¶ 4.)

Purchasers took title to their respective lots subject to the Declaration. (ROA 18 ep 2.) Plaintiff Maarten Kalway is the Owner of Lot 2, which contains almost 23 acres, over one-half of the entire subdivision area. (ROA 18 ep 2, ¶ 6.) The individual defendants own Lots 1, 3, 4 and 5. (ROA 18 ep 2-3, ¶¶ 9, 11-12.) Those Lots range in size from 3.3 to 6.6 acres. (ROA 18 ep 2-3, ¶¶ 10-12.)

The original Declaration included certain defined terms and imposed restrictions on the number of livestock, boarding of animals, vehicle repair and

storage, use of easements, residential purposes, home businesses, and setback of structures from property lines. (ROA 16 ep 2-3.) A Manager to be elected at a meeting of the Owners was to oversee maintenance of improvements and could enforce the Declaration as provided by law. (ROA 16 ep 3, 4-5.) In matters of governance, each Lot was entitled to one vote, except Lot 2, which had two votes. (ROA 16 ep 3.) A majority was defined as four of the six possible votes. (*Id*.) The Declaration could be amended "by an instrument executed and acknowledged by the Majority Vote of the Owners." (ROA 16 ep 7.)

Without a meeting of the Owners, any notice to Kalway, or informing him of proposed amendments and providing an opportunity to comment, the defendant Owners executed the First Amended and Restated Declaration of Covenants, Conditions, Restrictions and Easements for Calabria Ranch Estates. (ROA 18 ep 5-6, ¶¶ 20-24; ROA 21 ep 3, ¶ 19.) The Amended Declaration was then recorded and became effective in 2018. (ROA 15; ROA 18 ep 5, ¶ 18.)

The Amended Declaration added new definitions and restrictions and gave the Manager much increased enforcement authority. (*See* ROA 15.) The specific amendments are set forth in the arguments below.

A "red-lined" comparison of the original Declaration and the Amended Declaration is attached hereto for the Court's convenience.

## STATEMENT OF THE ISSUES

1. Whether the terms of the Amended Declaration, made without the consent of all of the Owners, unreasonably altered the nature of the terms of the original Declaration or were unforeseeable to a purchaser, and therefore are invalid.

2. Whether the amended livestock restriction, made without Kalway's consent, applies only to Kalway's Lot and is therefore invalid.

## ARGUMENT

### The Standards of Review

The propriety of summary judgment is reviewed de novo. *Wilson v. Playa de Serrano*, 211 Ariz. 511, 513, ¶ 6 (App. 2005). Whether the trial court properly applied the law is reviewed de novo. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4 (App. 2000). The facts and any inferences drawn from them are viewed in the light most favorable to the party against whom judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45 (App. 1996).

The interpretation of restrictive covenants is a question of law reviewed de novo. *Wilson v. Playa de Serrano*, 211 Ariz. at 513, ¶ 6. Statutory interpretation is also a question of law reviewed de novo. *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, 46, ¶ 17 (App. 2010).

## I. The Amended Declaration made without Kalway's consent is void.

### A. Deed restrictions may not be amended without unanimous consent in a manner that unreasonably alters their nature or if the amendments are not foreseeable to a purchaser.

Although the original 2015 Declaration provided that it "may be amended … by the Majority Vote of the Owners," and A.R.S. § 33-1817(A) (2016) recognizes that the Owners may amend the Declaration, the power to amend is not unlimited. Several limiting principles are worthy of note.

"If the recorded declaration does not contain or at least provide for later adoption of a particular restriction or requirement, that restriction or requirement is invalid." *Wilson v. Playa de Serrano*, 211 Ariz. at 513, ¶ 7. "We agree with the Restatement [§ 6.7(3)] that … a fundamental restriction of the individual owners' expected property rights must be set forth in the Declaration with sufficient specificity that purchasers are on notice that the occupancy of their property could be severely restricted." *Id*. at 515, ¶ 16.

The Declaration may not be amended "in a manner that would unreasonably alter the nature of the covenants." *Nickerson v. Green Valley Recreation, Inc*., 228 Ariz. 309, 320, ¶ 28 (App. 2011), citing *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. at 51, ¶ 38. Likewise, new burdens cannot be imposed where there was "a lack of proper notice that such servitudes could be imposed non-

consensually under the generic amendment power." *Dreamland*, 224 Ariz. at 51, ¶ 38.

Importantly, *Dreamland* illustrates that new restrictions that either unreasonably alter the nature of the covenants or lacked proper notice of their possible imposition are not valid even if a majority of owners vote in favor of the amendment.

**B. The Amended Declaration unreasonably altered the nature of the original Declaration and notice of the possibility of such amendments is not found in the original Declaration.**

The Amended Declaration herein includes multiple new provisions that either unreasonably alter the nature of the covenants in the original Declaration or were not contemplated by the original Declaration.

**The Definitions:**

**Dwelling.** The definition of "Dwelling" in the Amended Declaration is entirely new:

> 1.3 "Dwelling" shall mean a single family dwelling that is a permanent structure affixed to a Lot and used for residential purposes by a single family. Moreover, a dwelling must have at least 60% living space and at most 40% Garage, as defined below.

(ROA 15 ep 2.) Although the original Declaration provided that "all residences constructed on Lots will be Single Family Dwellings" (ROA 16 ep 3), it did not specify any percentages for living space or Garages. Indeed, the only mention of a

garage was in Section 3.3 stating that vehicle repair "may be performed in a garage or in the back yard areas only.…" (ROA 16 ep 3.) Thus, under the original Declaration an Owner could construct a residence with any mix of living and Garage space. But as in *Multari v. Gress*, the Amended Declaration "[took] away that unfettered right." 214 Ariz. 557, 559, ¶ 12 (2007) (new restriction invalidly limited size and dimension of building).

**Garage.** The definition of "Garage" is also new to the Amended Declaration:

> 1.5 "Garage" shall mean that part of the Dwelling that is used or intended to be used for storage, parking of motor vehicles, housing of livestock and/or any area that is used for any other non-living purpose.

(ROA 15 ep 2.) By that definition, a "Garage" is a storage room, a typical garage for vehicles, a barn, a workshop, or any other "area" used other than for living space. Furthermore, the definition contemplates that any Garage will be part of the Dwelling. Consequently, a detached Garage, storage building, or barn is now subject to other new restrictions on "Non-Dwelling Structures," *infra*.

**Improvement.** An "Improvement" is also newly defined in the Amended Declaration:

> 1.6 "Improvement" shall mean any changes, alternations or additions to a Lot, including any Dwelling, and including but not limited to buildings, outbuildings, patios, swimming pools, driveways, grading, excavation, landscaping, and any structure or other improvement of any kind.

(ROA 15 ep 2.) The broad scope of this definition becomes significant when the defined term is used in the context of other new restrictions.

**Votes.** The definition of "Votes" in the original Declaration, which only allocated the number of votes per Lot, is expanded in the Amended Declaration to provide that "[i]n the event of any potential future subdivision of the Lots, the allocation of Votes shall remain the same with any additional lots or parcels having no Vote under this Declaration. (ROA 15 ep 3.) Thus, although Kalway's Lot is large and has two votes, if it is subdivided the Owner of the newly formed Lot is unable to vote on subdivision matters. Although subdividing is not prohibited by the original Declaration and is permitted by law if the split lots are at least 3.3 acres each,[1] the Amended Declaration would disenfranchise the buyers of lots split from Lots 1, 2, 4, 5 and 6. Instead of dividing the established votes upon subdivision, the Amended Declaration prohibits fractional votes. Doing so unreasonably alters the nature of the original voting provision and was not indicated by the original Declaration. Indeed, the amendment is contrary to the implicit right under the original Declaration to subdivide Lots as allowed by law, the express covenant of good faith in Section 8.7, and the duty to treat Owners fairly. *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 201, ¶ 25 (App. 2007) (adopting RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.13.

[1] Pima County Zoning Code § 18.17.040. *See also* ROA 25 ep 4.

Furthermore, "unanimous approval is required … to change the basis for allocating voting rights … among community members." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.10(3). Here, the Amended Declaration effects a change from at least one vote per lot to no vote for any new lots. Because Kalway did not agree, the amendment is invalid.

**The Restrictions:**

**Livestock.** The types of permissible livestock and their maximum number are changed. The livestock restriction in the original Declaration mentioned "horses/cattle" as examples of livestock and was expressly "not limited to" horses and cattle:

> 3.1 Livestock. No Owner or Occupant shall keep more than six (6) livestock on the Property including, but not limited to, horses/cattle per 3.3 acres.

(ROA 16 ep 3.)

But the Amended Declaration limits livestock to specifically "chickens, horses, and cattle only":

> 3.1 Livestock. No Owner or Occupant shall keep more than six (6) livestock animal units per 3.3 acres on their Lot and livestock shall be limited to chickens, horses, and cattle only. In no event shall any Lot contain more than fifteen (15) livestock units.

(ROA 15 ep 3.)

The words in a restrictive covenant are given their ordinary meaning. *E.g.*, *Wilson v. Playa de Serrano*, 211 Ariz. at 514, ¶ 10. The ordinary meaning of

"livestock" is "animals of any kind kept or raised for use or pleasure." WEBSTER'S THIRD NEW INT'L DICTIONARY 2002.

Under the Amended Declaration, Owners may not have any livestock other than chickens, horses and cattle. Thus, other livestock, such as goats, sheep, ducks, geese, etc., are prohibited by the amendment. That change unreasonably alters the nature of the original restriction and was not portended by the original Declaration.

**Setbacks.** The restriction on "Setbacks" was changed from applying only to "structures" to apply to all "Improvements" as newly defined:

> 3.7 Setbacks. No Owner or Occupant shall construct any Improvements of any kind, including but not limited to corrals (temporary or otherwise), within fifty (50) feet of the property lines, as set forth in the attached Survey.

(ROA 15 ep 4.) In other words, no Improvements of any kind can exist within 50 feet of the boundaries of any Lot. As Improvements are defined, they include "driveways" and "landscaping." Consequently, an Owner cannot construct a driveway to enter and exit a Lot because it would violate the Setback restriction. Neither could an Owner construct any sort of decorative entrance feature (*e.g.*, lampposts) or a gate. And an Owner could not landscape a Lot to within 50 feet of a property line. Therefore, the new restriction unreasonably alters the original restriction that applied only to the setback of structures, and its future adoption was not suggested by any language in the original Declaration.

**Non-Dwelling Structures.** The Amended Declaration conceived the term "Non-Dwelling Structures" and imposed the following restrictions regarding their size, dimension, and placement:

> 3.8 Non-Dwelling Structures. The following additional restrictions shall apply to any Non-Dwelling Structure on a Lot:
>
> (a) Shall not exceed twenty-five hundred (2500) square feet in total area;
>
> (b) Shall be no more than eighteen (18) feet in height; and
>
> (c) Shall not obstruct the views of any neighboring Lots within Calabria Ranch Estates, with such views including the Catalina Mountains and the Rincon Mountains.

(ROA 15 ep 4.) There are no such restrictions in the original Declaration. Under the original Declaration an Owner could construct structures of any size and dimension, and without regard to any obstruction of views. (*See* ROA 16.) The Amended Declaration "[took] away that unfettered right." *Multari v. Gress*, 214 Ariz. at 559, ¶ 12 (new restriction limiting size and dimension of building invalid). Therefore, the Amended Declaration's new restriction unreasonably altered the original Declaration and was not foreshadowed by the original Declaration.

**Improvement Plans.** In addition to defining Improvements, the Amended Declaration now requires that "Improvement Plans" be submitted to and approved by the Owners before the Improvements are made:

> 3.9 Improvement Plans. Prior to making any Improvements to any Lot, the Owner must first submit the construction plans to the Owners and Manager. Construction plans must be approved by

> Majority Vote of the Owners, in writing, subject to the restrictions as set forth below in Section 3.10. If no approval or denial is provided within sixty (60) days of submittal of the construction plans to the Owners and Manager, the construction plans shall be deemed approved.

(ROA 15 ep 4-5.) No requirement for such a submission and approval can be found in the original Declaration, and nothing in the original Declaration indicates that such a requirement might be added in the future.

**Subdivision and Improvements.** The Amended Declaration also imposed new restrictions on "Subdivision and Improvements":

> 3.10 Subdivision and Improvements. No Lot shall be subdivided or separated into smaller lots by any Owner, and no portion of any Lot shall be transferred or conveyed by any Owner, without a Majority Vote of the Owners. Subdivision and Improvements shall be subject to the following restrictions:
>
> (a) Any subdivision and/or Improvements must comply with all City, State, and local governmental rules and regulations, including, but not limited to, any zoning and permitting laws ("Government Approvals"),
>
> (b) Thirty (30) days prior to submitting for Government Approvals, or, if no Government Approvals are required, thirty (30) days prior to making Improvements, the plans for subdivision or Improvements must be submitted to the Owners and Manager, in writing;
>
> (c) A Lot shall consist of no less than 3.3 acres;
>
> (d) A Lot must contain a Dwelling before a Garage or Non-Dwelling Structure can be erected or built, provided however, that a Garage can be built concurrently with the Dwelling;

(e) Each 3.3. acres, or multiple thereof, shall not contain more than one (1) Dwelling, one {1) guest house, and one (1) Non-Dwelling structure compliant with Section 3.8;

(f) A Dwelling shall not be less than two thousand (2,000) square feet;

(g) All Improvements shall be made to reduce the impact on the riparian areas described in the zoning laws in effect as of the recording of this Declaration; and

(h) No Improvement shall obstruct the views of any neighboring Lots within Calabria Ranch Estates, with such views including the Catalina Mountains, and the Rincon Mountains.

(ROA 15 ep 5.) The trial court struck the restrictions on subdividing and transfer in the first sentence of Section 3.10, minimum Lot size in subsection (c), number of Dwellings in subsection (e), and minimum Dwelling size in subsection (f). (ROA 46 ep 4-5.) The reasons stated by the trial court were that "no restraints on subdivision or restrictions on the size of lots or number structures can be found in the original declaration, nor does the original declaration contain any language that indicates such amendments might be considered in the future." (ROA 46 ep 4.)

Although the same could be said of the other new restrictions, except 3.10(a),[2] the trial court did not invalidate them. Again, no requirement as in 3.10(b) for submission of construction plans can be found in the original Declaration. Likewise, the original Declaration does not restrict the sequence of

[2] Section 3.10(a) requires that any subdivision and all Improvements comply with applicable law, a restriction that goes without saying. Deed restrictions are a form of contract, and every contract incorporates applicable law. *E.g.*, *American Power Products v. CSK Auto, Inc.*, 242 Ariz. 364, 368, ¶ 15 (2017).

the construction of a Dwelling, Garage, and Non-Dwelling Structure as in 3.10(d). No restraints on the number of Non-Dwelling Structures can be found in the original Declaration. But as amended in 3.10(e), an Owner cannot have more than one; in other words, there cannot be a detached garage and a barn. And no restrictions on environmental impact in riparian areas as in 3.10(g) or the obstruction of views as in 3.10(h) can be found in the original Declaration. Moreover, the original Declaration does not contain any language indicating that such amendments might be adopted in the future.

**Special Assessments.** In addition to Annual Assessments, the Amended Declaration created a new category of "Special Assessments" of two types. The first is apparently against all Owners for capital improvements in the Easement Areas. The second is against individual Lots "as determined in the sole discretion of the Manager."

> 4.2 Special Assessments. In addition to the Annual Assessments authorized above, the Manager may levy and collect, in any assessment year, a Special Assessment applicable to that year only for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of any capital improvement of the Easement Areas, including fixtures and personal property related thereto, provided that any such assessment shall have the assent of the Majority Vote of Owners.
>
> The Manager may also levy and collect from each Owner individual assessments against specific Lots, and shall have a lien thereon should the special circumstances of any Lot require special maintenance, expense or cost to be incurred for the protection of any of the Lots, Easement Areas, and Property or should the Manager be

> required to perform maintenance or repair upon the Lot or take enforcement action hereunder. Such individual assessments may be levied by the Manager, as determined in the sole discretion of the Manager.

(ROA 15 ep 6.) The trial court deemed the second paragraph invalid and void as a matter of law, reasoning as follows:

> The original declaration makes no provision for assessments to be levied by Calabria's manager against specific lots, nor does it permit assessments to be levied to recover the cost of enforcement action. As the Court has indicated, this quasi-punitive assessment could not have been anticipated under the original declaration.

(ROA 46 ep 5.) The same is true of the first paragraph of Section 4.2. There simply is no provision for special assessments for *any* reason in the original Declaration and nothing to indicate that such a provision would or could be added by amendment.

**Enforcement.** The Amended Declaration significantly expanded the enforcement powers of the subdivision's Manager. The trial court characterized those amendments as "intrusive and sweeping changes," observed that "[t]he original declaration does not authorize Calabria's manager to do any part of what amended § 5.2 permits," and "[t]he broad enforcement powers granted to the manager in § 5.2 are completely new and fundamentally alter the nature of the CC&Rs." (ROA 46 ep 6.) Accordingly, the trial court found that "Section 5.2 is void as a matter of law in its entirety." (ROA 46 ep 6.) Section 5.3 would permit the Manager to impose a Special Assessment against an individual Owner for

enforcement costs. The trial court struck that provision for same reason it struck the individual Special Assessment amendment in Section 4.2. (ROA 46 ep 6.)

**Maintenance.** Finally, the Amended Declaration includes a new section requiring Owners to maintain dried vegetation and "Fallen Deadwood" within specified measurements:

> 7.2 Fallen Deadwood. Dried Undergrowth and Other Fire Hazards. The Owners shall maintain their Lot in a manner such that the dried undergrowth shall be maintained/cut to less than one (1) foot in height. Additionally, all fallen deadwood longer than three (3) feet in length shall be removed or sized/chipped to less than six (6) inches such that dried undergrowth and fallen deadwood do not create a fire hazard on the Lot, and to the Property, as determined in the sole discretion of the Manager.

(ROA 15 ep 7.) However, the original Declaration did not impose any Lot maintenance requirements on Owners. Neither is there any language giving any notice that any such requirement might be imposed in the future.

## II. The amended livestock restriction applies only to Kalway's Lot and was made without his consent; it is therefore invalid.

Any amendment that applies to fewer than all of the Lots must be approved by both the required number of owners and the owners of the Lots to which the amendment applies:

> 2. *An amendment to a declaration may apply to fewer than all of the lots* or less than all of the property that is bound by the declaration and an amendment is deemed to conform to the general design and plan of the community, *if both of the following apply*:

> (a) *The amendment receives the affirmative vote or written consent of the number of owners or eligible voters specified in the declaration,* including the assent of any individuals or entities that are specified in the declaration.
>
> (b) *The amendment receives the affirmative vote or written consent of all of the owners of the lots or property to which the amendment applies.*

A.R.S. § 33-1817(A)(2) (emphasis added).

At least one of the amended restrictions in the Amended Declaration was of the nature that required Kalway's consent. The livestock restriction in the original Declaration limited livestock to 6 animals per 3.3 acres:

> 3.1 Livestock. No Owner or Occupant shall keep more than six (6) livestock on the Property including, but not limited to, horses/cattle per 3.3 acres.

(ROA 16 ep 3.) Under that restriction, Kalway's Lot 2 containing 22.94 acres could accommodate at least 36 and as many as 41 animals.[3]

But the Amended Declaration is more restrictive. It imposes a new limit of 15 animals per Lot:

> 3.1 Livestock. No Owner or Occupant shall keep more than six (6) livestock animal units per 3.3 acres on their Lot and livestock shall be limited to chickens, horses, and cattle only. In no event shall any Lot contain more than fifteen (15) livestock units.

(ROA 15 ep 3.)

[3] 22.94 acres ÷ 3.3 acres = 6.95 Lots of 3.3 acres; 6 Lots x 6 animals = 36 animals; 6.95 Lots x 6 animals = 41 animals.

The amended livestock restriction does not apply to the other Lots. Under either the original or Amended Declaration, each Lot can have 6 animals per 3.3 acres without exceeding the new limit of 15 total animals. Lot 1 of 6.63 acres can have 12 animals; Lot 3 of 3.31 acres can have 6 animals; Lot 4 of 5.01 acres can have 6 to 9 animals;[4] and Lot 5 of 6.64 acres can have 12 animals.

Therefore, the amended restriction applies to fewer than all of the Lots. In fact, it only applies to Kalway's Lot. Consequently, Kalway's affirmative vote in favor of or written consent to the Amended Declaration was required. A.R.S. § 33-1817(A)(2); *accord* RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.10(3), *infra*.

The trial court's literal interpretation of § 33-1817 to conclude that the Amended Declaration applies equally to every Lot is erroneous. Here is the trial court's analysis:

> Mr. Kalway argues that the amendments do not "apply" equally to his property because the new restrictions disproportionately impact his larger lot. The Court reads the statute literally and gives it its plain meaning. *Hughes v. Jorgenson*, 203 Ariz. 71, 73 (2002) (if statute is clear, court must simply apply it). The amendments make no distinction between different lots. As written, the amendments "apply" equally; every amendment applies to every Calabria lot across the board. The legislature could have enacted exceptions for amendments that disproportionally "impact" or "affect" some lots more than others, but that is not the statutory language. Again, the Court is bound by the statute's plain meaning, and does not find it

[4] 5.01 acres ÷ 3.3 acres = 1.5 Lots of 3.3 acres; 1 Lot x 6 animals = 6 animals; 1.5 Lots x 6 animals = 9 animals.

> ambiguous. Thus, the statute permits the Calabria declaration to be amended by the number of eligible voters specified in the declaration.

(ROA 46 ep 3.)

Although an amendment could identify specific Lots fewer than all of the Lots, the amendment need not do so in order to "apply to fewer than all of the lots." Indeed, the trial court's interpretation of "apply" is illogical and emasculates the statute. By the trial court's reasoning, an amendment that facially applies to all of the Lots by virtue of a mere statement that it does would avoid any need for the vote or consent of the affected Lot owners without examining whether the effect of the amendment is uniform.

Arizona law not only requires that "any amendment to restrictive covenants must apply to every lot," *Camelback Del Este Homeowners Ass'n v. Warner*, 156 Ariz. 21, 27 (App. 1987), an amendment must also have "uniform effect" unless all of the landowners join in the amendment. *La Esperanza Townhome Ass'n, Inc. v. Title Sec. Agency of Arizona*, 142 Ariz. 235, 239 (App. 1984). Otherwise stated, "any amendment to a set of restrictive covenants must have uniform application to all of the lots in the subdivision.…" *La Esperanza*, 142 Ariz. at 238 (restating holding of *Riley v. Boyle*, 6 Ariz. App. 523 (1967). *Accord Shamrock v. Wagon Wheel Park Homeowners Ass'n*, 206 Ariz. 42, 46 (App. 2003) ("restrictions and conditions in declaration can only be changed uniformly," citing *La Esperanza*).

The requirement of uniform application is further supported by the Restatement. Arizona law regarding common-interest communities and restrictive covenants has repeatedly been guided by the Restatement.[5] "When the law is not settled on a particular subject, we look to the Restatement with favor." *Burns v. Davis*, 196 Ariz. 155, 161–62, ¶ 18 (App. 1999). "It is well established that we will follow the Restatement in the absence of Arizona law to the contrary." *Koepke v. Carter Hawley Hale Stores, Inc.*, 140 Ariz. 420, 423 (App. 1984)

In this instance, RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.10 is instructive. It prescribes the power to amend a declaration, and subsection (2) parallels § 33-1817(A) and Arizona case law:

> (2) Amendments that do not apply uniformly to similar lots or units and amendments that would otherwise violate the community's duties to its members under § 6.13 are not effective without the approval of members whose interests would be adversely affected unless the declaration fairly apprises purchasers that such amendments may be made. * * *
>
> (3) Except as otherwise expressly authorized by the declaration, and except as provided in (1), unanimous approval is required
>
> (a) to prohibit or materially restrict the use or occupancy of, or behavior within, individually owned lots or units,
>
> * * * *

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[5] *E.g.*, *Powell v. Washburn*, 211 Ariz. 553 (2006) (RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.1(1)); *College Book Ctrs, Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533 (App. 2010) (same); *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195 (App. 2007) (RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.13; *Wilson v. Playa de Serrano*, 211 Ariz. 511 (App. 2005) (RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.7(3)).

Our statutory language – "apply to fewer than all of the lots" – and the Restatement language – "apply uniformly" – are synonymous. Each contemplates the effect of the amendment on an individual Lot in comparison to the effect on other Lots.

These principles are consistent with the duty of common-interest communities "to treat members fairly," as stated in RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.13 and adopted in Arizona. *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 201, 25 (App. 2007). It would be unfair to impose a restriction that literally applies to all lots, but does not uniformly affect all lots, without the consent of the affected lot owners.

The "Severability" provision does not avoid the resulting invalidity. The original Declaration provides:

> 8.1 Severability. Any determination by any court of competent jurisdiction that any provision of this Declaration is invalid or unenforceable shall not affect the validity or enforceability of any other provision hereof.

(ROA 16 ep 5.) That provision only applies to the provisions in "this Declaration," meaning the original Declaration. It does not apply so as to allow that Declaration to be amended in a manner inconsistent with the Declaration and the law. In other words, despite the severability provision, any amendments must still be adopted in the manner prescribed by law.

## NOTICE OF CLAIM FOR ATTORNEYS' FEES

Appellant hereby gives notice that he seeks attorneys' fees on appeal pursuant to A.R.S. § 12-341.01 in this case arising out of an express contract, the Declaration of Covenants, Conditions, Restrictions and Easements.

## CONCLUSION

The judgment should be reversed to the extent it denied Appellant's motion for summary judgment and granted Appellees' motion for summary judgment, and Appellant should be awarded his attorneys' fees and costs.

Respectfully submitted on August 29, 2019.

GUST ROSENFELD P.L.C.

By */s/ Charles W. Wirken* – 004276
Charles W. Wirken
Attorneys for Appellant

## CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that this brief uses proportionally spaced type of 14 points, is double-spaced using a Times New Roman font, and contains 5,730words. The word count was determined by the word processing system used to prepare this brief.

Dated: August 29, 2019.

GUST ROSENFELD P.L.C.

By */s/ Charles W. Wirken* – 004276
Charles W. Wirken
Attorneys for Appellant

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that Appellant's Opening Brief was served by regular mail and email on August 29, 2019, to the following:

Craig L. Cline
Cline Law Firm PLLC
4801 E. Broadway Suite 400
Tucson, AZ 85711
craig@clineLawAZ.com
Attorneys for Appellees

Dated: August 29, 2019.

By */s/ Adriana Taylor*

# ATTACHMENT

"Red-lined" comparison of original Declaration and Amended Declaration

Cline Law Finn, PLLC
4801 E. Broadway Blvd., Suite 400
Tucson, AZ 85711

# FIRST AMENDED AND RESTATED DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS FOR CALABRIA RANCH ESTATES

This First Amended and Restated Declaration of Covenants, Conditions, Restrictions and Easements for the Calabria Ranch Estates (the "Declaration") is executed to be effective as of the ~~February day of 21st, 2015 by the REGINA REVOCABLE LIVING TRUST, dated August 16, 2002, Thomas L. and Teresa A. Regina, Trustees (the "Declarant"), as fee title holder of the Property as defined and set forth below.~~ 2nd day of January, 2018.

## RECITALS

A. ~~Declarant is the beneficial owner and developer of~~By that certain Declaration of Covenants, Conditions, Restrictions and Easements for the Calabria Ranch Estates effective February 21, 2015; and recorded in the Office of the Recorder, Pima County, Arizona, at Sequence No. 20150750089 (the "Original Declaration"), the Declarant established a general plan for the improvement, development, use and enjoyment of ~~that~~ certain real property in Tucson, Pima County, Arizona, comprising forty four (44) acres, more particularly described in the legal description~~, and Survey~~ attached hereto as Exhibit A (the "Property"), to be known by and under the name "Calabria Ranch Estates."

B. By the Original Declaration, the Declarant ~~desires and intends to establish a general plan for the improvement, development, use and enjoyment of the Property, and declares that the Property (currently scheduled to be sold February 24, 2015) shall be held, sold and conveyed subject to the easements, restrictions, covenants and conditions provided for in this Declaration, which: (i) are for the purpose of protecting the value, desirability, attractiveness and natural character of the Property; (ii) shall run with all the real property comprising the Property; (iii) shall be binding on all parties having any right, title or interest in the Property, or any part thereof; and (iv) shall inure to the benefit of each Owner thereof and any successors and assigns.~~ imposed certain conditions, covenants, and restrictions burdening and benefiting the Property.

C. Pursuant to Section 8.5 of the Original Declaration, the Original Declaration may be amended, at any time, by Majority Vote of the Owners.

D. By not less than a Majority Vote, and as evidenced by execution of this Declaration, the Owners of the Lots 1, 3, 4 and 5 have approved this Declaration.

E. The Owners, by execution of this First Amended and Restated Declaration of Covenants, Conditions. Restrictions and Easements for the Calabria Ranch Estates, do

hereby amend, restate and supersede in its entirety the aforementioned Original Declaration.

F. By this Declaration, as the same may be amended from time to time, the Property shall be subject to this Declaration and shall be held, conveyed, hypothecated, encumbered, leased, occupied, built and otherwise used, improved, or transferred, in whole or in part, subject to shall run with the land of all of the Property . This Declaration shall be binding on all parties having a right, title or interest in the Property, or any part thereof~~;~~ , and shall inure to the benefit of and be binding upon all heirs, successors and assigns of the aforementioned parties and their heirs, successors and assigns.

NOW, THEREFORE, ~~Declarant hereby declares, covenants~~in accordance with the Original Declaration, by the Majority Vote of the Owners, the Owners hereby declare, covenant and ~~agrees~~agree as follows:

## ARTICLE 1
## DEFINITIONS

As used in this Declaration, the following terms shall have the following meanings:

1.1 "Annual Assessments" shall mean the ~~Assessment~~Assessments established by the Manager~~, or the appointed management company agreed upon by Majority Vote,~~ for the maintenance, repair and/or replacement of the current chip seal multi-use streets, street lights, gates and related improvements in the Easement Areas as depicted in the Survey, attached hereto as Exhibit B ("Survey"). The ~~i~~Initial Annual Assessment shall be Two Hundred and Fifty ($250.00) per Vote per Lot, and be paid to the Manager~~, or the appointed management company agreed upon by Majority Vote, within thirty (30) days of the First Meeting~~.

1.2 "Declarant" shall mean REGINA REVOCABLE LIVING TRUST, dated August 16, 2002, Thomas L. and Teresa A. Regina, Trustees, together with its respective successors or assigns.

1.3 "Dwelling" shall mean a single family dwelling that is a permanent structure affixed to a Lot and used for residential purposes by a single family. Moreover, a dwelling must have at least 60% living space and at most 40% Garage, as defined below.

~~1.3~~1.4 "Easement Areas" shall mean ~~(a)~~ all easements and licenses and all personal property, improvements and facilities thereon, as depicted in the attached Survey, used for pedestrian, equestrian, utilities and vehicular ingress and egress, as applicable and depicted therein.

~~1.4 "First Meeting" shall be held with the Declarant and Owners within thirty (30) days of the recordation of the deeds conveyed from the Declarant to the Owners.~~

1.5 "Garage" shall mean that part of the Dwelling that is used or intended to be used for storage, parking of motor vehicles, housing of livestock and/or any area that is used for any other non-living space purpose.

1.6 "Improvement" shall mean any changes, alterations or additions to a Lot, including any Dwelling, and including but not limited to buildings, outbuildings, patios, swimming pools, driveways, grading, excavation, landscaping, and any structure or other improvement of any kind.

~~1.5~~1.7 "Lot" shall mean the Lots as depicted and identified in the attached Survey.

~~1.6 "Manager" shall initially be elected by Majority Vote at the First Meeting who~~1.8 "Manager" is currently Stuart Scibetta, owner of Lots 4 and 5. The Manager may be removed and a new manager, including a management company, may be appointed by Majority Vote. The Manager shall be tasked with management and oversight of the maintenance, repair and/or replacement of the current chip seal streets and associated street lights, Speedway and Tanque Verde wash gates and related improvements in the Easement Areas as shown on the Survey~~.~~ , including any additional responsibilities, set forth herein.

~~1.7~~1.9 "Majority Vote" shall mean at least four (4) of the six (6) possible Votes for the Property.

~~1.8~~1.10 "Occupant" shall mean any Person, other than an Owner, occupying a Lot, or any portion thereof or building or structure thereon, as a ~~Resident, Tenant~~resident, tenant, licensee, or otherwise, other than on a merely transient basis.

~~1.9~~1.11 "Owner" shall mean the record holder of legal title to the fee simple interest in any Lot or, in the case of a recorded "contract" (as that term is defined in A.R.S. § 33- 741(2)), the holder, of record, of the purchaser's or vendee's interest under said contract, but excluding others who hold such title merely as security. If fee simple title to a Lot or Parcel is vested of Record in a trustee pursuant to A.R.S. § 33-801 *et seq.*, for purposes of this Declaration legal title shall be deemed to be held by the trustor (or the trustor's successor of Record), and not by the trustee. An Owner shall include any Person who holds Record title to a Lot in joint ownership or as an undivided fee interest.

~~1.10~~1.12 "Survey" shall mean the survey dated February 12, 2015, as prepared by Putt Land Surveying, Inc., and attached hereto as Exhibit B.

~~1.11~~1.13 "Votes" shall be allocated as follows: one (1) Vote per Lot~~,~~ as identified in the attached Survey, with the exception of Lot 2 , which shall have two (2) Votes. In the event of any potential future subdivision of the Lots, the allocation of Votes shall remain the same with any additional lots or parcels having no Vote under this Declaration.

## ARTICLE 2
## EASEMENTS AND RIGHTS OF ENJOYMENT IN THE EASEMENT AREAS

2.1 Easements and Rights of Enjoyment. Each Owner shall have a nonexclusive easement for use and enjoyment in and to the Easement Areas, as specifically depicted therein, which nonexclusive easement shall be appurtenant to and shall pass with the title to each Owner's Lot. All Occupants shall have a nonexclusive, nontransferable temporary license to use and enjoy the Easement Areas so long as they remain Occupants.

2.2 Delegation of Use. Any Owner or Occupant, in accordance with this Declaration, may delegate his or her rights of use and enjoyment in the Easement Areas to the members of his or her family or his or her Occupants or guests subject to the limitations set forth herein.

## ARTICLE 3
## RESTRICTIONS AND CONTROL

3.1 Livestock. No Owner or Occupant shall keep more than six (6) livestock ~~on the Property including, but not~~animal units per 3.3 acres on their Lot and livestock shall be limited to chickens, horses~~/cattle per 3.3 acres~~, and cattle only. In no event shall any Lot contain more than fifteen (15) livestock units.

3.2 Boarding. No Owner or Occupant shall board or kennel animals of any kind on the Property.

3.3 Vehicles. Vehicle repair on only one vehicle (and not on a regular and recurring basis for commercial purposes) may be performed in a ~~garage~~Garage or in the back yard areas only and vehicle repair and/or disassembly of any kind for a period of more than one day must be done in such a manner so as not to be visible from neighboring Lots. Inoperable and unregistered vehicles may not be stored on any Lot at any time, unless stored in a Garage or similar structure, and not visible.

3.4 Easement Areas. The specific use and purpose of the Easement Areas are identified in the Survey. No Owner or Occupant shall use the Easement Areas for any purpose other than specifically identified in the Survey.

3.5 Residential Purposes. Except as provided for elsewhere in this Declaration, all ~~residences~~Dwellings constructed on Lots will be ~~Single Family Dwellings~~single family dwellings. An Owner or Occupant residing in a ~~Single Family Dwellings~~single family dwelling may operate a home business as long as it complies with the following:

(a) The existence or operation of the business activity is not apparent by sound, sight or smell from outside of the Lot, as identified in the attached Survey;

(b) The business activity conforms to all zoning requirements for the Property;

(c) The business activity does not involve frequent or annoying traffic by persons coming on the Property who do not reside therein or door-to-door solicitation of ~~residents~~Owners/Occupant in the Property;

(d) The business activity is consistent ~~-~~with the residential character of the Property and does not constitute a nuisance or hazard, nor threaten the security, safety or well-being of other Owners or Occupants of the Property; and

(e) No business may involve equipment or machinery, manufacturing, or drilling activities.

3.6 Access Gate Control. Upon acquisition of a Lot, the Owner thereof shall receive from ~~Declarant, or~~ the Manager~~, as applicable,~~ two (2) controllers necessary to operate the Speedway access gate.

3.7 Setbacks. No Owner or Occupant shall construct any ~~structures~~Improvements of any kind, including but not limited to corrals (temporary or otherwise), within fifty (50) feet of the property lines, as set forth in the attached Survey.

3.8 Non-Dwelling Structures. The following additional restrictions shall apply to any Non-Dwelling Structure on a Lot:

(a) Shall not exceed twenty-five hundred (2500) square feet in total area;

(b) Shall be no more than eighteen (18) feet in height; and

(c) Shall not obstruct the views of any neighboring Lots within Calabria Ranch Estates, with such views including the Catalina Mountains and the Rincon Mountains.

3.9 Improvement Plans. Prior to making any Improvements to any Lot, the Owner must first submit the construction plans to the Owners and Manager. Construction plans must be approved by Majority Vote of the Owners, in writing, subject to the restrictions as set forth below in Section 3.10. If no approval or denial is provided within sixty (60) days of submittal of the construction plans to the Owners and Manager, the construction plans shall be deemed approved.

3.10 Subdivision and Improvements. No Lot shall be subdivided or separated into smaller lots by any Owner, and no portion of any Lot shall be transferred or conveyed by any Owner, without a Majority Vote of the Owners. Subdivision and Improvements shall be subject to the following restrictions:

(a) Any subdivision and/or Improvements must comply with all City, State, and local governmental rules and regulations, including, but not limited to, any zoning and permitting laws ("Government Approvals"),

(b) Thirty (30) days prior to submitting for Government Approvals, or, if no Government Approvals are required, thirty (30) days prior to making Improvements, the plans for subdivision or Improvements must be submitted to the Owners and Manager, in writing;

(c) A Lot shall Consist of no less than 3.3 acres;

(d) A Lot must contain a Dwelling before a Garage or Non-Dwelling Structure can be erected or built, provided however, that a Garage can be built concurrently with the Dwelling;

(e) Each 3.3. acres, or multiple thereof, shall not contain more than one (1) Dwelling, one {1) guest house, and one (1) Non-Dwelling structure compliant with Section 3.8;

(f) A Dwelling shall not be less than two thousand (2,000) square feet;

(g) All Improvements shall be made to reduce the impact on the riparian areas described in the zoning laws in effect as of the recording of this Declaration; and

(h) No Improvement shall obstruct the views of any neighboring Lots within Calabria Ranch Estates, with such views including the Catalina Mountains, and the Rincon Mountains.

## ARTICLE 4
## ASSESSMENTS AND CREATION OF LIEN

4.1 Annual Assessments. The Manager~~, or the appointed management company agreed upon by~~ shall determine, subject to Majority Vote, ~~shall determine~~ and levy the Annual Assessments for the purposes set forth ~~hereinbelow~~below. The Annual Assessments levied shall be used to promote the recreation, health, safety and welfare of the Owners and Occupants, to enhance the quality of life within the Property, to preserve and enhance the value of the Property, to pay ~~the costs and the maintenance of the Easement Areas~~operating expenses, including but not limited to, fees and costs of professionals, to establish reasonable reserves, and to otherwise further the interests of the Owners as the Manager~~, or the appointed management company agreed upon by Majority Vote,~~ deems appropriate and necessary. Subject to the provisions of this Declaration, the Manager~~, or the appointed management company agreed upon by Majority Vote~~ may, during an assessment period, revise the amount of the Annual Assessments, in order to meet expenses which exceed the amounts previously budgeted by the Manager, ~~or the appointed management company agreed upon by Majority Vote,~~ and collect such increased Annual Assessment in accordance with ~~Section 1.22 below~~this Declaration.

4.2 Special Assessments. In addition to the Annual Assessments authorized above, the Manager may levy and collect, in any assessment year, a Special Assessment applicable to that year only for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of any capital improvement of the Easement Areas, including fixtures and personal property related thereto, provided that any such assessment shall have the assent of the Majority Vote of Owners.

The Manager may also levy and collect from each Owner individual assessments against specific Lots, and shall have a lien thereon should the special circumstances of any Lot require special maintenance, expense or cost to be incurred for the protection of any of the Lots, Easement Areas, and Property or should the Manager be required to perform maintenance or repair upon the Lot or take enforcement action hereunder. Such individual assessments may be levied by the Manager, as determined in the sole discretion of the Manager.

4.3 Billing and Collection Procedures. The Manager~~, or the appointed management company agreed upon by Majority Vote,~~ shall have the right to adopt procedures for the purpose of making, billing and collecting the Annual and Special Assessments.

## ARTICLE 5
## ENFORCEMENT

5.1 The Manager~~, or the appointed management company agreed upon by Majority Vote,~~ and/or Owner shall have the right to enforce ~~the~~this Declaration in any manner provided for by law or equity. The failure of the Manager~~, or the management company agreed upon by Majority Vote,~~ and/or any Owner to take enforcement action shall not constitute a waiver of the right to enforce ~~the~~this Declaration in the future.

5.2 Compliance and Enforcement. Every Owner and Occupant shall comply with this Declaration. The Manager shall impose sanctions on any Owner for violation of this Declaration. Such sanctions include, but are not limited to:

(a) Imposing reasonable monetary fines which shall constitute a lien upon the violator's Lot, in accordance with Arizona law;

(b) Suspending the violating Owner's right to Vote;

(c) Exercising self-help or taking corrective action to abate any violation of this Declaration, including, without limitation, the right to enter violating Owner's Lot, as deemed necessary by the Manager, and at Owner's expense. This right also includes the right to remove or de-construct any Improvement made in violation of this Declaration and restoring the Lot to substantially the same condition as previously existed, at the Owner's expense. The entering of the Lot under this Section shall not constitute a trespass;

(d) Requiring the Owner, at the Owner's expense, to remove or otherwise de-construct, any Improvements made in violation of this Declaration;

(e) Prohibiting any contractor, subcontractor, agent, employee, or other invitee of the violating Owner from entering the Property or continuing to conduct activities within the Property; and

(f) Levying Special Assessments to cover the costs incurred by the Manager or Owners to bring a Lot/Owner in compliance with this Declaration.

5.3 In addition to any other enforcement rights, if an Owner fails to comply with this Declaration in its entirety, the Manager or, by a Majority Vote of the Owners, the Owners, may Record a Notice of Violation and/or bring the Lot/Owner into compliance and assess all costs resulting from the non-compliance against the Lot and the Owner as a Special Assessment ("Special Assessment"). Except in an emergency situation, the violating Owner shall receive reasonable notice of and an opportunity to cure the violation

prior to taking such enforcement action. Reasonable notice shall be no more than thirty (30) days. All remedies set forth in the Declaration shall be cumulative of any remedies available at law or in equity. In any action, at law or equity, to enforce this Declaration, the prevailing party shall be entitled to recover all costs, including, without limitation, attorney fees and court costs, reasonably incurred in such action, as well as costs to enforce any judgment or lien obtained as a result of such action.

## ARTICLE 6
## USE OF ASSOCIATION FUNDS

6.1 Use of Funds From Year to Year. The Manager~~, or the appointed management company agreed upon by Majority Vote,~~ shall not be obligated to spend in any year all funds received by it in such year, and the Manager~~, or the appointed management company agreed upon by Majority Vote,~~ may carry forward as surplus any balances remaining. The Manager~~, or the appointed management company agreed upon by Majority Vote,~~ shall not be obligated to reduce the amount of the Annual Assessment in the succeeding year if a surplus exists from a prior year(s). Moreover, the Manager may not use any Association funds to pay or contract with third-party contractors, professionals, consultants, etc. without Majority Vote.

## ARTICLE 7
## MAINTENANCE

7.1 Scope of Maintenance. The Manager~~, or the appointed management company agreed upon by Majority Vote,~~ shall be responsible for the management and oversight of the maintenance of the chip seal streets and associated street lights, Speedway and Tanque Verde wash gates and related improvements in the Easement Areas, as depicted on the attached Survey.

7.2 Fallen Deadwood. Dried Undergrowth and Other Fire Hazards. The Owners shall maintain their Lot in a manner such that the dried undergrowth shall be maintained/cut to less than one (1) foot in height. Additionally, all fallen deadwood longer than three (3) feet in length shall be removed or sized/chipped to less than six (6) inches such that dried undergrowth and fallen deadwood do not create a fire hazard on the Lot, and to the Property, as determined in the sole discretion of the Manager.

## ARTICLE 8
## MISCELLANEOUS

8.1 Severability. Any determination by any court of competent jurisdiction that any provision of this Declaration is invalid or unenforceable shall not affect the validity or enforceability of any of the other provisions hereof.

8.2 Rules Against Perpetuities. If any of the interests, privileges, covenants, or rights created by this Declaration shall be unlawful, void, or voidable for violation of the Rule against Perpetuities or any related rule, then such provision shall continue until twenty-one (21) years after the death of the survivor of the now living descendants of the President of the United States living on the date this Declaration is Recorded.

8.3 Gender and Number. Wherever the context of neuter genders~~;~~ , words used in the neuter gender shall include the masculine and feminine genders. Words in the singular shall include the plural; and words in the plural shall include the singular.

8.4 Captions. All captions, titles or headings of the Articles and Sections in this Declaration are for the purpose of reference and convenience only and are not to be deemed to limit, modify, or otherwise affect any of the provisions hereof or to be used in determining the intent or context thereof.

8.5 Amendments. This Declaration may be amended at any time by an instrument executed and acknowledged by the Majority Vote of the Owners ~~which shall not be effective until the recording of such instrument~~.

8.6 Term. The covenants, conditions, and restrictions of this Declaration, as the same may hereinafter be amended in accordance with the terms hereof, shall remain in full force and effect for a term of twenty (20) years from and after the date of recording of this Declaration, as set forth above, except as amended above, from which time they shall be automatically renewed and extended for a successive period for ten (10) years each, unless terminated as of the end of such initial twenty (20) years or any successive 10-year period, within the 6-month period immediately preceding the expiration of such initial period, or any renewal period, by an instrument of termination executed and acknowledged by the Majority Vote of the Owners and recorded in the office of the Pima County Recorder, State of Arizona.

8.7 Future Cooperation. The Owners agree to use good faith and to reasonably cooperate to carry out the intent of this Declaration. Moreover, the Owners specifically agree to execute any and all other documents, reasonably necessary to carry out the intent of this Declaration.

8.8 State Law. This Declaration shall be construed and interpreted in accordance with the laws of the State of Arizona.

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[Signature pages to follow~~.~~]