IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

MAARTEN KALWAY, Plaintiff/Appellant, v. CALABRIA RANCH HOA, LLC, an Arizona limited liability company; MICHAEL A. REID and FLORENCE J. CLARK, husband and wife; EDWARD A. PHLAUM and DIANE LYN PHLAUM, husband and wife, and as Co-Trustees of the EDWARD A. AND DIANE LYN PHLAUM REVOCABLE TRUST, dated April 10, 2017; and STUART J. SCIBETTA, an unmarried man; and as Trustee of the STUART J. SCIBETTA LIVING TRUST dated April 1, 2015, Defendants/Appellees.	No.: 2 CA-CV 2019-0106 Pima County Superior Court Case No. C20181284

APPELLEES' ANSWERING BRIEF

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INTRODUCTION

The Trial Court did its job correctly in this case—resulting in winners and losers on both sides.[1] As such, the Court of Appeals should not reverse the judgment just because Appellant Kalway is not happy with the Trial Court's decision.

Calabria Ranch Estates is a subdivision in Pima County bound by the Declaration of Covenants, Conditions, Restrictions and Easements for Calabria Ranch Estates (the "Declaration" or "Original Declaration"). The Declaration was subsequently amended by a Majority Vote (as that capitalized term is defined in the Declaration) of the Owners (as that capitalized term is defined in the Declaration) within the subdivision and recorded as the First Amended and Restated Declaration of Covenants, Conditions, Restrictions and Easements for Calabria Ranch Estates (the "Amended Declaration"). Appellant Kalway brought this action in which he argues the Amended Declaration is invalid.

Below, through cross motions for summary judgment, the Trial Court determined that there were no factual disputes between the parties. The parties agreed. In applying the law, the Trial Court determined that while A.R.S. §33-1817 permitted the Original Declaration to be amended by a

[1] As such, Appellees have opted to waive their Appeal and simply focus on and file their Answering Brief.

Majority Vote, the statute was not wholly dispositive. The Trial Court went on to determine that some of the amendments violated Arizona common law established by *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42 (App. 2010). As such, using its severance authority, as provided under the Declaration and Amended Declaration, the Trial Court severed the amendments that it deemed unlawful and validated the remaining provisions of the Amended Declaration. By this appeal, Appellant Kalway is asking the Court of Appeals to reverse the Trial Court's determination as to the specific amendments the Trial Court declared valid.

This Answering Brief will show that the Trial Court's determinations on summary judgment were exactly what Arizona law contemplates and intends whereby the trier of fact determines the facts, applies the law, and then, if permitted and applicable, severs those provisions of a contract that are deemed unlawful. And while this process may result in winners and losers on both sides, it simply does not warrant or support continued litigation and/or this appeal. As such, the judgment of the Trial Court should be upheld.

STATEMENT OF FACTS

Appellees do not dispute the Statement of Facts submitted by Appellant in his Opening Brief, with some minor clarifications and additions as stated below.

The Declaration was created by the Regina Revocable Living Trust dated August 16, 2002, as Declarant and as the common owner of Lots (as that capitalized term is defined in the Declaration) 1 through 5 of the subdivision. (ROA 21 ep 6, ¶43.) When established, the Property (as that capitalized term is defined in the Declaration) was accurately depicted and identified by the Survey dated February 12, 2015 and attached to the Declaration as Exhibit A and the Amended Declaration as Exhibit B (the "Survey"). (ROA 18 ep 3, at ¶13; ROA 21 ep 6, at ¶36.) Moreover, there are no amendment notice requirements set forth under the Declaration related to the amendment process. (ROA 21 ep 8, at ¶55.) As such, the proposed Amended Declaration received a Majority Vote and was recorded with the Pima County Recorder's Office as of January 2, 2018 at Sequence No. 20180020522.

Thereafter, on January 3, 2019 a Notice of Special Meeting was sent to Appellant and his legal counsel setting a meeting on Monday January 14, 2019 at 10:00 AM at the office of Cline Law Firm, 4801 East Broadway Blvd., Suite

400, Tucson, AZ 85711. (ROA 36 ep 6-10.) The purpose of the special meeting was to discuss, evaluate, and/or vote on the specific amendments and/or the entirety of the Amended Declaration. *Id*. The agenda of the Special Meeting was stated in the notice. *Id*. The Special Meeting was held at the date and location stated in the notice.[2] *Id*.

Moreover, all of the real property within the Calabria Ranch Estates is zoned SR Suburban Ranch Zone as defined and regulated by the Pima County Code §18.17.010, *et seq*.

[2] It is undisputed that neither Plaintiff nor his counsel appeared at the January 14, 2019 Special Meeting and that Defendants ratified the Amended Declaration and adjourned the Special Meeting with no further action.

STATEMENT OF THE ISSUES

1. Whether the terms of the Amended Declaration unreasonably alter or are not consistent with the underlying Declaration.
2. Whether the Trial Court properly determined that it is the *application* and not the *impact* of an amendment that triggers the obligation under A.R.S. §33-1817(A)(2) for all lot owners to authorize an amendment.

ARGUMENT

I. Standard of Review on Summary Judgment.

When a party appeals the trial court's entry of summary judgment, the Court of Appeals will review de novo whether the entry of judgment was proper. *Wilson v. Playa de Serrano*, 211 Ariz. 511, 513 (App. 2005). The interpretation of a restrictive covenant is reviewed de novo. *Id*. The interpretation of a statute is also reviewed de novo. *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, 46 (App. 2010).

In reviewing a summary judgment ruling, where material facts are undisputed, the appellate court should determine whether the trial court "correctly applied the substantive law to the undisputed facts." *Carden v. Golden Eagle Ins. Co.*, 190 Ariz. 295, 296, 947 P.2d 869, 870 (App.1997). Moreover, there is a presumption that the trial court's ruling is correct. *Dreamland*, 224 Ariz. at 46 (Ct. App. 2010)("We will affirm a grant of summary judgment if the trial court was correct for any reason."); *City of Tempe v. Outdoor Sys., Inc.*, 201 Ariz. 106, HN 14, 32 P.3d 31 (Ct. App. 2001)(The appellate court may affirm a summary judgment even if the trial court reached the right result for the wrong reason); *see also*, *Mozes v. Daru*, 4 Ariz. App. 385, 390, 420 P.2d 957, 962 (1966). In order to reverse the judgment, the Appellant has the burden to show that "there is material in the

record which, under pertinent legal authorities, renders the summary judgment improper." *Id*.

II. The Trial Court Correctly Applied the Law to the Facts of the Case.

A. The issue of whether or not Appellant had notice of the proposed amendments is not dispositive to whether or not the amendments are enforceable.

The issue of Appellant being notified of the proposed amendments before a vote was taken is not dispositive in this instance. If we assume for a moment that Appellant was notified of the proposed amendments, the date/time of the vote and he had voted "no," the proposed amendments, pursuant to Majority Vote, would have still passed. Moreover, in fact, Appellees had a second meeting to discuss the proposed amendments to conduct another vote and Appellant did not appear at that second meeting. Therefore, the larger issue here is whether the amendments, as adopted, violate the law. It is not whether Appellant had notice of the proposed amendments before they were adopted.

B. The Amended Declaration does not unreasonably alter and is consistent with the underlying Declaration.

Appellees believe that the Amended Declaration, in its totality, does not unreasonably alter and is generally consistent with the underlying Declaration. Appellees appreciate that the Trial Court decided that some of the provisions in the Amended Declaration were unlawful, and while

Appellees respectfully disagree with that decision, as a matter of practicalities and economic prudence, Appellees will address only those provisions that were deemed lawful by the Trial Court and disputed by Appellant in his appeal.

In Arizona, restrictive covenants may be amended "by an affirmative vote or written consent of the number of owners or eligible voters specified in the declaration…" [*See* A.R.S. §33-1817(A)(1).] It is undisputed here that the Declaration could be amended by a Majority Vote (as that capitalized term is defined in the Declaration) and that the Amended Declaration was in fact ratified by a Majority Vote of the Owners (as that capitalized term is defined in the Declaration). (ROA 46 ep 2). Thus, Appellant's sole argument as to why the Amended Declaration is unlawful is that it violates Arizona's common law.

Notably, after extensive and detailed analysis, including listening to oral arguments and reviewing briefings (including supplemental briefings), the Trial Court made its determination as to which amendments complied with Arizona's common law. (ROA 46 ep 3-4). While Appellee does not necessarily agree with the totality of the Trial Court's decision related to the provisions it struck from the Amended Declaration, such is not the subject of this Answering Brief.

Under Arizona common law, amendments to a declaration may not unreasonably alter the underlying covenants. *Nickerson v. Green Valley Recreation, Inc.*, 228 Ariz. 309, 320 (Appr. 2001), *citing*, *Dreamland*, 224 Ariz. at 42, ¶ 38 (Ct. App. 2010). Amendments must "generally" appear in the recorded declaration, giving owners notice of the proposed amendment. *Wilson v. Playa de Serrano*, 211 Ariz. 511, 513, 123 P.3d 1148, 1150 (Ct. App. 2005). Arizona courts have rejected amendments that (i) make membership into an association mandatory where such membership was not previously required, (ii) create mandatory membership to and assessments for non-common area facilities (such as a recreational club), and (iii) create age-restrictions into a subdivision where the declaration historically only governed the common areas. *Shamrock v. Wagon Wheel Park Homeowners Ass'n*, 206 Ariz. 42 (App.2003); *Dreamland*, 224 Ariz. 42 (Ct. App. 2010); *Wilson*, 211 Ariz. 511 (App. 2005).

Importantly, it should also be noted that all of these decisions came down ***before*** A.R.S. §33-1817 was amended to add section "(A)". That is not to say that common law principals do not still apply, but it is important to take notice that none of the cases cited by Appellant in support of his position that

the Amended Declaration violates Arizona common law considered A.R.S. §33-1817(A) in rendering its rulings.

In this case, the amendments were all contemplated by and derived from the Declaration (except as found by the Trial Court). The amendments dealt with the "*purpose of protecting the value, desirability, attractiveness and natural character of the Property*," which is the stated general plan for the development, use and enjoyment of the Property (as that capitalized term is defined in the Declaration) as embodied and regulated in the Declaration. (ROA 16 ep 2, at Recitals B.) The amendments are uniformly applied to all five Lots (as that capitalized term is defined in the Declaration) within the subdivision and are, in their entirety, focused on the maintenance, development, cleanliness, and attractiveness of the subdivision.

Furthermore, the Amended Declaration (even those that were struck by the Trial Court) comply or are consistent with the zoning ordinances imposed by the Pima County Code. Moreover, it is undisputed the Calabria Ranch Estates is zoned SR Suburban Ranch, which Pima County defines as:

> Suburban Ranch is intended as a low density zone principally for single-family residences and associated conditional uses on large lots. A wide range of agricultural and ranch uses are permitted. The large minimum lot size requirement of this zone insures a considerable reservation of open space.
>
> [*See* Pima County Code §18.17.010(A)].

Despite the permitted uses under Pima County Code §18.17.020, the Declaration specifically provides that the Lots are to be used for residential purposes only. (ROA 16 ep 4, at Section 3.5.) Further, and as will be argued in greater detail below, the Amended Declaration compliments, reinforces and complies with the development standards set by Pima County regarding lot size, setbacks, accessory building usage, minimum yard and height requirements. [*See* Pima County Code §§18.17.040 & .050.]

The Definitions:

Most of Appellant's grievances as to the changes to the definitions in the Declaration can be addressed by looking at the deed restrictions expressly stated and contemplated under Article 3 of the Declaration. (ROA 16, ep 4 at Article 3.) That Article 3 provides notice under *Dreamland* of what Owners within the subdivision can expect regarding deed restrictions. Appellees submit that none of the changes to the definitions exceed or are otherwise not generally contemplated by Article 3 per the *Dreamland* standards.

Dwelling. Appellant wrongfully relies on *Multari v. Gress*, 214 Ariz. 557, 559-60 (2007) to argue that the new definition of "Dwelling" in the Amended Declaration violates the law. *Multari* invalidated the amendment as to the size of structures because the process for amending the underlying declaration was not followed. In *Multari*, the developer recorded deed

restrictions against a handful of individual lots within a subdivision that limited the rights previously granted to those lots in the underlying declaration. However, unlike in this case, the developer did not follow the procedure and process for amending the declaration. *Multari v. Gress*, 214 Ariz. 557, 559-60 (2007). The "unfettered right" that Appellant refers to may very well have been taken away had the developer in *Multari* simply followed the proper amendment process.

Here, it is true that "Dwelling" is a new definition, but it is certainly generally contemplated by the underlying Declaration and, unlike *Multari*, the amendment process was followed. (ROA 16 ep 7, at Section 8.5.) Article 3 of the Declaration restricted the repair of vehicles to only one at a time to be performed out of sight and not visible to neighboring Lots. (*Id* ep 4, at Section 3.3.) Article 3 also expressly limited the use of a Lot to "Single Family Dwelling." (*Id* ep 4, at Section 3.5.) Pima County Code of Ordinances defines a "Dwelling, one-family" as "A building containing only a single dwelling unit" with a "Dwelling unit" being "A room or suite of two or more rooms that is designed for, or is occupied by, one family doing its cooking within a room or suite of two or more rooms that is designed for, or is occupied by, one family doing its own cooking therein and having only one kitchen." *See* Pima County Code §§18.03.020(D)(4) & (6). Article 3 also stated clearly

that an Owner's use of a Lot cannot be obnoxious in "sound, sight or smell" and be consistent with "residential character" of the subdivision. (ROA 16 ep 4, at Section 3.5)

To define the amount of space a Dwelling unit can designate to a garage is consistent with the overall intention of the Declarant regarding the subdivision and is also consistent with the Pima County Code of Ordinances. Article 3 states that the subdivision was to be used for residential purposes only and expressly limited the type of garage use, livestock, and home businesses that could be operated on each Lot. (ROA 16 ep 4, at Section 3.5) Certainly, in this context, to restrict an attached garage to 40% of the overall square footage is certainly not an unreasonable restriction as the subdivision was expressly contemplated to be a residential neighborhood and a 3,000 square foot home could have a 1,200 square foot garage. And, per the Non-Dwelling provision in the Amended Declaration, an Owner could have another accessory building of 2,500 additional square feet. These changes are not unreasonable and arise from the Declaration and Pima County Code. The Trial Court was therefore correct in **not** striking this definition as violative of *Dreamland*.

Garage. Appellant is correct that Section 3.3 of Declaration contemplated garages being used within the subdivision and in fact intended

for work typically conducted in a garage area "to be done in such a manner so as not to be visible from neighboring Lots." (ROA 16 ep 4, at Section 3.3) Section 3.5 further contemplates each Lot being used as a single family residence and restricts Owners from doing mechanical garage-type work, from doing offensive activities to "sound, sight or smell," and requires the Lots to be used "consistent with the residential character of the property and does not constitute a nuisance or hazard…" (ROA 16 ep 4, at Section 3.5) Stated plainly, the Lots were not without restrictions. By offering a formal definition of Dwelling and Garage, the Amended Declaration simply promotes and clarifies the general restrictions in Section 3.3 and 3.5 of the Declaration, as amended.

Further, Pima County defines a "Garage, private" as, "An accessory building or portion of the main building, designed or used for the shelter or storage of self-propelled vehicles owned or operated by the occupants of the main building." *See* Pima County Code §18.03.020(G)(1).] Thus, the definition in the Amended Declaration also coincides and is harmonious with the definition offered by Pima County.

Improvement. It is not totally clear why Appellant takes issue with the definition of "Improvement" in the Amended Declaration. However, the matters identified in the definition of "Improvement" are contemplated and

considered in Article 3 of the Declaration and are in line with *Dreamland* standards. This definition also compliments the zoning ordinances governing the subdivision in that it provides a definition to the requirement in the Amended Declaration to Section 3.9 that Owners submit Improvement Plans to the Manager for vote and approval.

Votes. The definition of Votes was simply clarified to state that in the event of a future subdivision of a Lot, the allocation of Votes under the Original Declaration would not change. In other words, for example, if Lot 5 was subdivided in the future, the additionally created lot would have no additionally created Vote. This was specifically designed to prevent the dilution of the Votes among the Lots, as identified and depicted in the Survey, attached as Exhibit A to the Declaration.

The Restrictions:

Livestock. The Amended Declaration does not unreasonably restrict livestock allowed on the Lots. If anything, it expands the type of livestock allowed. The original Declaration provided for cattle and horses. (ROA 16 ep 4, at Section 3.1) The Amended Declaration states that livestock may include cattle, horses, and chickens. (ROA 16 ep 4, at Section 3.1) Certainly, it was foreseeable that the type of livestock permitted under the Declaration, per *Dreamland*, was cattle and horses. Thus, the amendment to add chickens

is authorized. Importantly, if Appellant would like to permit additional types of livestock beyond cattle, horses and chickens, he is well-within his right to request an amendment to Section 3.1 and the Owners can take a vote. But when a person purchases land subject to deed restrictions, he or she is bound thereby, and, thus, Appellant is bound by the provision authorizing an amendment by a Majority Vote. *Duffy v. Sunburst Farms E. Mutual Water & Agric. Co., Inc.*, 124 Ariz. 413, 416, 604 P.2d 1124, 1127 (1980)(By accepting a deed subject to deed restrictions, a grantee assents to such restrictions and is bound by them.).

Setbacks. As with the livestock provision, the amendments to Section 3.7 were contemplated by the underlying Declaration. The original restriction did not allow "structures of any kind" to be built within fifty feet of property lines. "Improvements" now include buildings, patios, pools, driveways, grading and landscaping. It is reasonable and contemplated from the Declaration that the Declarant wanted the subdivision to be used for residential purposes and to have open space fifty feet from each Lot line. Thus, the Amended Declaration is generally in harmony with that position. And again, if Appellant would like changes to the setback requirements, he is allowed to ask for a vote to amend this section.

Further, Pima County requires setbacks for accessory buildings and structures of up to 100 feet if being used for poultry or animals and up to fifty feet if not being used for poultry or animals. [*See*, Pima County Code §18.17.050(C).] Thus, the 50-foot requirement is in line with the existing laws on accessory buildings, structure and garages.

Non-Dwelling Structure. The definition of a "Non-Dwelling Structure" is also in line with the Pima County Code for zoning. An accessory building is defined as, "A subordinate building on the same lot or building site as a main building, the use of which is incidental to that of the main building and which is used exclusively by the occupants of the main buildings or their nonpaying guests or employees." [*See*, Pima County Code §18.03.020(A)(1).] An accessory structure is, "Any structure not defined as an "accessory building" on the same lot or site as a main building, the use of which is incidental and subordinate to that of the main building on the same lot or site." [*See*, Pima County Code §18.03.020(A)(2).]

The restrictions for an "Accessory Building" on real property zoned SR Suburban Ranch Zone in Pima County has a maximum square footage of 1,500 square feet or seventy percent of the largest main building on the lot, whichever is greater, and a maximum height of 24 feet. *See* Pima County Code §18.17.050. The Amended Declaration has a maximum square footage

of 2,500 and height of 18 feet. Thus, the restrictions stated in the Amended Declaration are entirely reasonable and are not unforeseeable from the Original Declaration and the existing zoning requirements in Pima County. Appellant may not like the amendments, but this does not make them violative of *Dreamland*.

Improvement Plans. The addition here complies with the Majority Vote requirements pursuant to the Original Declaration and ensures compliance with the changes made in the Amended Declaration. It is consistent with the requirement in Section 3.5 of the Declaration that the Lots be used for residential uses and to promote the protection of *"…the value, desirability, attractiveness and natural character of the Property*…" and to also promote compliance with the zoning code of Pima County. (ROA 16 ep 1, at Recital B.

Subdivision and Improvements. The amendments are wholly consistent with and supported by the recorded Survey of February 5, 2015 that was attached to and recorded with the Original Declaration. The Survey was made an integral part of the creation of the Calabria Estates. (ROA 16, ep 2 – 6, at Recitals (A), Section 1.1, 1.3, 1.5, 1.6, 1.10, 1.11, 3.4, 3.5(a), 3.7, & 7.1) The underlying Declaration defined a "Lot" as such "Lot" as depicted and identified in the Survey. Easement areas, voting rights and membership

rights were all based on references to the Survey and an "Owner" is only given rights within the subdivision by virtue of owning one of the five (5) Lots depicted and identified on the Survey.

Quite frankly, neither the Survey nor the underlying Declaration expressly contemplated the Lots to be subdivided. The Amended Declaration simply clarifies that position. That being said, the Trial Court determined that some of the provisions in Section 3.10 were unlawful. Importantly, for example, this Court will note that Section 3.10(c) of the Amended Declaration established a minimum Lot size to 3.3 acres and is ***entirely consistent with the applicable zoning code*** and should not have been rejected by the Trial Court. *See* Pima County Code §18.17.040(b)(minimum lot size with dwelling is one hundred forty thousand square feet). Section 3.10(e) also complies with Pima County Code §18.17.050(A), which does not permit an accessory building or structure on a lot that does not have a dwelling. *See* Pima County Code §18.17.050(A) (size of accessory building is tied to the size of the "main building on the site"). Thus, the Trial Court erred in striking that provision on the Amended Declaration as well. Although, realistically, any such improvements will need to be in compliance with and subject to Governmental Approvals, as set forth in §3.10(a) of the Amended Declaration.

Nonetheless, Appellant would like this Court to strike the remaining provisions of §3.10 arguing that these restrictions did not appear in the underlying Declaration. This is argument is a non-starter because the amendments are in line with the laws in Pima County regarding lot size and accessory buildings. *See* Pima County Code §18.17.040 and Pima County Code §18.17.050. Further, the Survey depicted the subdivision and did not envision any Lots being subdivided into smaller lots. (ROA 16 ep 10, Survey.) Finally, practically speaking, it is highly unlikely that Appellant would even be allowed to subdivide his Lot because, upon information and belief, the majority of his Lot is within a flood plain and he will be subject to the land use restrictions set forth by Pima County in that regard. (ROA 16 ep 10, Survey.)

The bottom line is that neither the zoning codes, the underlying Declaration, nor the Survey provides for subdivision of the Lots beyond what is stated in the Amended Declaration and any additional right to subdivide should not be read into the covenants. "When interpreting a declaration containing restrictive covenants, we give its words their ordinary meaning, the best evidence of which is the words themselves." *Wilson v. Playa de Serrano*, 211 Ariz. 511, 515, 123 P.3d 1148, 1151 (Ct. App. 2005).

Special Assessments. Article 4 of the Original Declaration provides for the creation of assessments to be levied against the Owners within the subdivision. (ROA 16 ep 5, at Section 4.1.) The Declaration further provides that the assessments are to be used "to preserve and enhance the value of property, to pay the costs and the maintenance of the Easement Areas, to establish reasonable reserves, and to otherwise further the interests of the Owners as the Manager, or the appointed management company agreed upon by the Majority Vote, deems appropriate" and can be revised "in order to meet expenses which exceed the amounts previously budgeted…" *Id.* Moreover, Article 5 of the Declaration provides for the enforcement of the covenants "in any manner provided for by law or equity." (ROA 16 ep 5, at Article 5)

Thus, it is foreseeable that assessments can be created, increased, changed and enforced in accordance with the law. Arizona common law will uphold changes in assessments due to an association so long as assessments were previously in place. *Shamrock v. Wagon Wheel Park Homeowners Ass'n*, 206 Ariz. 42 (App.2003)(mandatory membership into an association unlawful where such membership was not previously required); *see also*, *Dreamland*, 224 Ariz. 42 (Ct. App. 2010)(mandatory membership to and assessments for non-common area facilities invalid).

In this case, the Trial Court upheld a portion and invalidated a portion of Section 4.2 of the Amended Declaration. (ROA 46 ep 4-6.) The Trial Court struck the provisions purporting to create lien rights to be enforced by the Manager. (*Id.*) Appellant is asking this Court to also invalidate the creation of special assessments. However, the Original Declaration contemplates increases and changes to the assessment and the Special Assessments is simply in furtherance of those rights and, as the Trial Court correctly determined, was in line with the stated purpose of the assessments and applies uniformly to all Lots. (*Id.*) The amendment also allows the Owners to vote on the creation of any Special Assessments. (*Id.*) Thus, there is no lawful basis for striking this provision.

Fallen Deadwood. The Declaration was created 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, at Recitals B.) Article 7 of the Original Declaration allows for the "management and oversight of the maintenance of the…related improvements in the Easement Area." (*Id.*, ep 6, at Article 7.) Section 7.2 of the Amended Declaration relates to the maintenance of fallen deadwood, which has become a problem within the subdivision. The deadwood and undergrowth to the trees create a fire and safety hazard to the

Lots within the subdivision. It is also cosmetically unappealing. The Manager was permitted under the Declaration to enforce the maintenance of the subdivision in line with the Recitals and Article 7. Section 7.2 is an amendment to that authority and is very clear and specific as to the intent and regulation associated with the deadwood. Thus, this amendment is permitted under the law.

C. The Trial Court Correctly Determined that A.R.S. §33-1817(A)(2) Does Not Render the Livestock Amendment Unlawful.

A.R.S. §33-1817(A)(2) requires unanimous consent of all members to an association where an amendment is being applied "to fewer than all of the lots or less than all of the property that is bound by the declaration…" A.R.S. §33-1817(A)(2). Appellant argues that because the amendment to the livestock provision (Section 3.1) *impacts* his lot disproportionately, A.R.S. §33-1817(A)(2) is triggered and, thus, unanimous consent is required. This argument is flawed and the Trial Court correctly rejected it, stating:

> The Court reads the statute literally and gives it plain meaning. *Hughes v. Jorgenson*, 203 Ariz. 71, 73 (2002) (if statute is clear, court must 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 disproportionately "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 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.)

The Trial Court's interpretation and application of A.R.S. §33-1817(A)(2) is correct. Black's Law Dictionary defines the word "apply" to mean:

> 1. To make a formal request or motion <apply for a loan> <apply for injunctive relief>. 2. To employ for a limited purpose <apply payments to a reduction in interest>. 3. To put to use with a particular subject matter <apply the law to the facts> <apply the law only to transactions in interstate commerce>.
>
> *See*, APPLY, Black's Law Dictionary (11th ed. 2019).

Here, the amendments were put to use (or applied) against all Lots within the subdivision. Thus, A.R.S. §33-1817(A)(2) was **not** triggered and unanimous consent was **not** required.

Notably, if this Court accepts Appellant's argument – that even if an amendment is *applied* uniformly, A.R.S. §33-1817(A)(2) is nonetheless triggered if the *impact* of that amendment is not uniform – then A.R.S. §33-1817(A)(1) would be grossly undermined in its application. There could be countless scenarios whereby an association amends its declarations per the voting requirements in its governing documents to apply to all lots (i.e., comply with A.R.S. §33-1817(A)(1)) and the *impact* of that amendment

arguably affects only a handful of lot owners. For example, an association could amend its landscaping guidelines across the neighborhood to limit the height and canopy of trees. It is inevitable that only those homes with large trees exceeding the height and canopy restrictions (now or in the future) are going to be *impacted* by such amendment. Thus, practically speaking, as long as the original landscaping guidelines gave the association the right to control landscaping, such an amendment is authorized under A.R.S. §33-1817(A)(1), subject to the amendment process "specified in the declaration."

Appellant is essentially arguing here that since his Lot is the only one with large trees in excess of the new height and canopy restrictions (using the example above), the amendment must garner unanimous consent under A.R.S. §33-1817(A)(2). If this interpretation were adopted by this Court, this would create unimaginable consequences, including countless litigations, for planned communities across the state.

III. The Trial Court Correctly Severed those Portions of the Amended Declaration it Deemed Unlawful.

Section 8.1 of the Declaration allowed for invalid or unenforceable provisions to be severed from the Declaration. (ROA 16 ep 6, at Section 8.1.) The same severance clause appears in the Amended Declaration. (ROA 15 ep 8, at Section 8.1.) Thus, using this authority, the Trial Court severed those provisions from the Amended Declaration it deemed unlawful. This is also

known as the "Blue Pencil Rule" that allows courts to enforce lawful parts of a contract and ignore unlawful parts. *Olliver/Pilcher Ins., Inc. v. Daniels*, 148 Ariz. 530, 533, 715 P.2d 1218, 1221 (1986)("If it is clear from its terms that a contract was intended to be severable, the court can enforce the lawful part and ignore the unlawful part."); *see also*, *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 372, 982 P.2d 1277 (1999)("Arizona courts will 'blue pencil' restrictive covenants, eliminating grammatically severable, unreasonable provisions."); *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, 213 Ariz. 24, 32, 138 P.3d 723, 731 (2006).

Thus, here, the Trial Court determined that certain provisions in the Amended Declaration were not reasonably contemplated by the Declaration and "blue penciled" those provisions. As such, the entire Amended Declaration should not be invalidated.

IV. Attorney Fees.

Appellees have incurred attorney fees and taxable costs in defending this matter and this appeal. Since this matter arises out of a contract, (Declaration and Amended Declaration) Appellees seek an award of reasonable attorney fees and costs per A.R.S. §§12-341 and 12-341.01 and the law. *Pinetop Lakes Ass'n v. Hatch*, 135 Ariz. 196, 198, 659 P.2d 1341, 1343 (Ct. App. 1983)("An action to enforce restrictive covenants is, in

essence, an action to enforce the mutual contractual obligations assumed by the various grantees in the subdivision. We therefore hold that an action to enforce a restrictive covenant "arises out of contract" pursuant to A.R.S. § 12–341.01…").

CONCLUSION

Appellees appreciate that Appellant does not like the Amended Declaration revisions and amendments imposed by the Majority Vote of the Owners. This does not, however, render those amendments invalid or unenforceable. Appellant was aware of the recorded Declaration when he took title to Lot 2. This created a binding agreement between Appellant and the remaining Owners, including how, when, why, etc. the underlying Declaration could be modified (including that there is no meeting or notice requirements for same). Thus, since the Amended Declaration applied to all Lots within the subdivision, there is no requirement for unanimous consent.

Further, the amendments overwhelmingly address the maintenance and attractiveness of Calabria Estates. The amendments are also consistent with and support the Survey, which is attached and integrated into the Declaration. Finally, the remaining amendments are not punitive or arbitrary as to one Owner, apply uniformly, and are wholly contemplated under the Declaration.

. . . .
. . . .

Thus, the amendments complied with Arizona's statutory and common law, and the Trial Court's ruling should be upheld.

Respectfully submitted on November 8, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Civil Appellate Procedure (ARCAP) 14, I hereby certify that this brief uses proportionally spaced type of 14 points, is double-spaced using Times New Roman font, and contains 6287 words. The word count was determined by a word processing system.

Dated November 9, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that Appellees' Answering Brief was served by regular mail and email on November 9, 2019 to the following:

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