

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

MAARTEN KALWAY,

Plaintiff-Appellant,

v.

CALABRIA RANCH HOA, LLC, *et*
al.,

Defendants-Appellees.

No. 2 CA-CV 2019-0106

Pima County Superior Court
No. C20181284

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. The standard of review is purely de novo, without favoring Appellees.

Appellees make two incorrect statements that the Court has no doubt already observed upon reading the Answering Brief.

First, the trial court is not a “trier of fact” on a motion for summary judgment. (AB ep 6.) “The court does not try issues of fact but only whether the same are genuine and in good faith disputed.” *Kaufman v. City of Tucson*, 6 Ariz. App. 429, 433 (1967). In doing so, 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).

Second, there is no “presumption that the trial court’s ruling is correct.” (AB ep 10.) Appellees’ quotation from *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, 46 (App. 2010), is not supportive. That this Court will affirm a grant of summary judgment if the trial court was correct for any reason does not create a presumption that the trial court was correct. Such a presumption would be inconsistent with this Court’s obligation to review the summary judgment and underlying legal issues de novo.

II. The Declaration herein could not be amended in a manner that unreasonably alters its nature or was not foreseeable by a purchaser.

Appellees suggest, relying on [A.R.S. § 33-1817\(A\)\(1\)](#), that *any* amendment may be made to a declaration “by an affirmative vote or written consent of the number of owners or eligible voters specified in the declaration....” That would be unconstitutional in this instance.

When the subject Declaration was recorded in 2015 it became a contract running with the land. *E.g.*, [Arizona Biltmore Estates Ass’n v. Tezak](#), 177 Ariz. 447, 448 (1993). The language of [§ 33-1817\(A\)\(1\)](#) quoted by Appellees was not added to the statute until 2016. *See* Historical and Statutory Notes. Therefore, the added language cannot affect the common law rights of the lot owners. “No ... law impairing the obligation of a contract, shall ever be enacted.” [ARIZ. CONST. art. II, § 25](#). Consequently, the attempted amendments must be judged by their compliance with common law principles, not mere majority approval. Appellees do not dispute the common law principles, only their application to the individual amended or additional restrictions.

III. The Amended Declaration either unreasonably altered the nature of the original Declaration or notice of the possibility of the amendments is not found in the original Declaration.

The stated purpose of the original Declaration to “protect[] the value, desirability, attractiveness and natural character of the Property” (ROA 16 ep 2) does not give the ownership majority *carte blanche* to amend the Declaration. No amendment may be made that unreasonably alters the nature of the restrictions or imposes a restriction that was not foreshadowed by the original Declaration.

The Definitions:

The new or revised definitions are themselves restrictions. Contrary to Appellees’ assertion, Article 3 of the original Declaration does not give notice that such restrictive definitions could be adopted in the future.

Dwelling. Appellee asserts that this new definition was “generally contemplated by the underlying Declaration.” (AB ep 16). Not so. The new definition regulates the relative sizes of a dwelling’s living space and attached garage. Nothing in the original Declaration portended such a restriction. Indeed, the original Declaration did not specify any size percentages for living spaces or Garages. Under the original Declaration, an Owner could construct a residence with any mix of living and Garage space. The Amended Declaration “[took] away that unfettered right.” *Multari v. Gress*, 214 Ariz. 557, 559, ¶ 12 (2007).

Contrary to Appellees’ understanding of *Multari* (AB ep 15-16), the amended restrictions limiting the dimensions of structures were invalidated in that case because they impermissibly altered the original restrictions, not because the process for amending was disregarded. In any event, that Appellees herein followed the amendment process by obtaining majority approval cannot validate the new dwelling restriction that is invalid as a matter of law.

Appellees’ efforts to validate the new dwelling definition then wanders from mention of a restriction on vehicle repair that is irrelevant to living space or garage sizes (§ 3.3); to the Pima County Zoning Code definitions of “dwelling” that make no mention of living space or garage sizes ([§§ 18.03.020\(D\)\(4\) & \(6\)](#));¹ and then to the irrelevant restriction that “the existence or operation of [home] business activity ... not [be] apparent by sound, sight or smell from outside of the Lot.” (§ 3.5(a).) (AB ep 16-17.) None of that supports the contention that the Amended Declaration’s new and restrictive definition of a dwelling is “generally contemplated by the underlying Declaration.”

Appellees next contend that the restrictive dwelling definition is “consistent with the overall intention of the Declarant ... and also consistent with the Pima County Code.” The sole support offered is that “the subdivision was to be used for residential purposes only and limited the type of garage use...” (AB ep 17.) But

¹ All sections of the Pima County Zoning Code cited in the briefs are attached hereto. The Code is available at http://pimacounty-az.elaws.us/code/coor_title18.

the residential nature of the subdivision does not justify or predict a future restriction on living space and garage sizes. Moreover, there was no limit on the type of garage use in the original Declaration. The only mention of a garage is in the restriction limiting vehicle repair to “a garage or in the back yard.” (§ 3.3.)

Appellees next state, in conclusory fashion, that “to restrict an attached garage to 40% of the overall square footage is certainly not an unreasonable restriction....” (AB ep 17.) The offered rationale is that “a 3,000 square foot home could have a 1,200 square foot garage” and “an Owner could have another accessory building of 2,500 additional square feet.” (*Id.*) But the 40% restriction was not foreseeable to a purchaser. And the second restriction on the size of Non-Dwelling Structures” is irrelevant to the restriction on the percentage sizes of a living space and an attached garage. Furthermore, because there was no restriction on the size of Non-Dwelling Structures in the original Declaration, limiting a Non-Dwelling Structure to 2,500 square feet does not make the 40% restriction on attached garages reasonable. Appellees’ bootstrap logic is nonsensical.

Finally, Appellees contend that “[t]hese changes ... arise from the [original] Declaration and Pima County Code.” (AB ep 17.) That is an illusion. From where the changes arise in those sources is not identified. They cannot arise from the original Declaration because it did not address dwelling size at all, let alone the relative sizes of a living space and an attached garage. And they cannot arise from

the zoning code because its thirty percent limitation on “maximum lot coverage by structures” and limitation on accessory buildings and structures to either “fifteen hundred square feet, or seventy percent of the area of the largest main building on the site, whichever is greater,” does not govern the relative sizes of a living space and an attached garage. ([Pima County Zoning Code §§ 18.17.040\(E\), 18.17.050\(A\)](#)).

Garage. There was no definition of a garage in the original Declaration, and the only mention of a garage is in the restriction limiting vehicle repair to “a garage or in the back yard.” (§ 3.3.) Rather than relying on the common meaning of a garage² or the zoning code definition of a garage as a vehicle shelter,³ the Amended Declaration defines a garage more broadly than “parking for motor vehicles” to unexpectedly include other uses, such as “storage,” “housing for livestock,” and “any other non-living purpose.”

Appellees contend that the definition “simply promotes and clarifies the general restrictions” in other sections of the original Declaration. ([AB ep 18](#).) But the phrases that Appellees quote from other sections are taken out of context and irrelevant to the definition or use of a garage. Specifically, the phrase “be done in

² “[A] building or indoor area for parking or storing motor vehicles.” WEBSTER’S UNABRIDGED DICTIONARY (2d ed. 1998).

³ “Garage. 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.” [Pima County Zoning Code § 18.03.020\(G\)\(1\)](#).

such a manner so as not to be visible from neighboring Lots” refers to vehicle repair “in the back yard areas.” (§ 3.3.) And the phrases “sound, sight or smell” and “nuisance or hazard” are found in the restrictions on operating a home business. (§3.5(a) and (d).)

Instead of promoting and clarifying other restrictions, the “Garage” definition creates a consequence that no purchaser would expect. The Amended Declaration’s unique definition of a garage must be considered with the new definition of a Dwelling. As a consequence, no more than 40% of the Dwelling’s square footage can be “used for storage, ... housing of livestock and/or ... any other non-living purpose.” Thus, if an owner wanted to have a storage room or a workshop, or, as odd as it might be, keep livestock in the “Garage,” the area so used would decrease the square footage available for a traditional garage for the parking of motor vehicles.

Improvement. Appellees ignore the significance of the broad scope of the definition of “Improvement” when the term is used in the context of other new restrictions. Instead, Appellees assert without any explanation that “the matters identified in the definition ... are contemplated and considered in Article 3 of the [original] Declaration....” (AB ep 18-19.) However, a review of Article 3, “Restrictions and Controls,” does not support that assertion. The headings and text of Article 3 do not concern any of the things defined as an Improvement, except §

3.7 states that “structures” must be setback from property lines by fifty feet. However, “patios, ... driveways, grading, excavation [and] landscaping,” which are mentioned in the definition of “Improvement,” are not commonly thought of as structures. Even as Pima County defines a “structure” it does not include some of the things defined as an Improvement:

"structure" does not include:

- 1) Items constructed or placed roughly parallel to and at the same elevation as the ground surface such as roads, driveways, alleys, uncovered slabs, and recreational courts.
- 2) Mailboxes, hardscape features, fences, and other items traditionally associated with residential uses when such items are forty-eight inches or less in height.

[Pima County Zoning Code § 18.03.020\(S\)\(23\)\(b\)](#).

Next Appellees assert that the definition “compliments (sic) 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 ... for vote and approval. ([AB ep 19](#).) But no zoning ordinance is specified and no explanation is provided as how the definition complements the zoning ordinances. Thus, the assertion that providing a definition for use in the new and unforeseeable requirement to submit “Improvement Plans” (§ 3.9) is a bootstrap.

Votes. Appellees agree that the amended definition of “Votes” means what it says; if a Lot is subdivided the newly created Lot will have no voting rights, not even a fraction of the vote(s) of the original Lot:

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.

(ROA 15 ep 3, § 1.13.)

Appellees’ attempts to justify the amendment do not withstand scrutiny. First, the amended definition of “Votes” is not a simple clarification of the original Declaration. The original Declaration did not indicate such a consequence of subdividing a Lot. Second, the amendment does not “prevent the dilution of the Votes among the Lots.” The subdivision of a Lot and its vote(s) does not dilute the voting power of any other Lot.

The Restrictions:

Livestock. Appellees do not dispute the meaning of “livestock.” Instead, Appellees argue that the Amended Declaration expands the type of livestock allowed. That is plainly wrong. In fact, the Amended Declaration changes the original restriction from unspecified “livestock ... *including, but not limited to, horses/cattle,*” to “livestock ... *limited to chickens, horses, and cattle only.*” (Compare ROA 16 ep 3 with ROA 15 ep 3, emphasis added.)

Appellees' absurd argument that "if Appellant would like to permit additional types of livestock ... he [may] request an amendment to Section 3.1" avoids the issue of whether the amendment to limit permissible livestock unreasonably altered the original Declaration.

Setbacks. This is the first restriction that is affected by the previously discussed new definition of an "Improvement." The original Declaration only applied the setback restriction to "structures." The Amended Declaration substitutes "Improvements" for "structures" and thus extends the restriction to "Improvement[s]" as defined to also include "patios, swimming pools, driveways, grading, excavation, landscaping, and any ... improvement of any kind." No such expansion of the restriction was contemplated by the original Declaration. The intended residential nature of the subdivision does not support the prohibition of, as examples, driveways and landscaping within 50 feet of a property line.

Again, Kalway's right to seek the reversal of the amendment does not address the impropriety of the Amended Declaration.

Finally, Appellees' citation to the Pima County Zoning Code setback requirements for "accessory buildings" and "accessory structures" used for poultry or animals is immaterial to the propriety of a setback restriction on "improvement[s] of any kind."

Non-Dwelling Structures. Although a “Non-Dwelling Structure” is not defined in the Amended Declaration, Appellees equate such a structure to both an “accessory building” and an “accessory structure” as they are separately and each somewhat differently defined in the Pima County Zoning Code. (AB ep 21.) Even assuming that a Non-Dwelling Structure is synonymous with either an accessory building or an accessory structure, or both, the Amended Declaration is more restrictive than the Code.

The Code requires a minimum lot size of 144,000 square feet (3.3 acres). [Pima County Zoning Code § 18.17.040\(B\)](#). The maximum lot coverage by structures is 30%. *Id.*, [§ 18.17.040\(E\)](#). Thus, the total square footage of all structures could be 43,200 on a minimum size lot, and more than 43,200 on larger lots such as Lots 1, 2, 4 and 5.⁴ Of that square footage, the Code allows accessory buildings and structures to cover 1,500 square feet or 70% of the area of the largest main building. (“Main” building is not defined. *See Code § 18.03.020(M)*.) No minimum or maximum size of a single-family dwelling is prescribed by the Code or by either the original or Amended Declaration. Therefore, the Code permits Lot 3, the smallest of the Lots at 3.31 acres, to contain, for example, a 10,000 square foot home and a 7,000 square foot accessory structure. The total structure coverage of 17,000 square feet would be well within the 43,200 square foot

⁴ 144,000 x 30% = 43,200.

maximum. If the home were larger, the accessory structure could also be larger. The point being that the Amended Declaration's 2,500 square foot limit on Non-Dwelling Structures is not "in line" with the Code or foreseeable from it.

The same is true of the Amended Declaration's height restriction of 18 feet on Non-Dwelling Structures. The Code's limit is 24 feet. [§ 18.03.050\(B\)](#). The restriction to only 18 feet is not "in line" with the Code or foreseeable from the Code's pre-existing, more generous limit.

Finally, Appellees fail to defend the new view obstruction restriction on Non-Dwelling Structures. Indeed, they cannot. There is no nothing in the original Declaration to suggest that such a restriction might be adopted. Neither is there any provision in the Code to support it.

Improvement Plans. Appellees do not dispute that there is nothing in the original Declaration to indicate that the new restriction requiring majority approval of any Improvements might be added in the future. Instead, Appellees assert that the addition "ensures compliance with the changes made in the Amended Declaration." ([AB ep 22.](#)) That's a bootstrap. Other unforeseeable changes do not justify this unforeseeable change.

Appellees further assert that the creation of what amounts to a majority rule architectural committee is consistent with the residential nature of the subdivision and the original Declaration's purpose of "protecting the value, desirability,

attractiveness and natural character of the Property.” (AB ep 22.) But neither of those indicated to a purchaser that the ability to make any Improvements would depend on the subjective judgment of the neighbors.

Finally, Appellees assert that the new restriction “promote[s] compliance with the zoning code.” (AB ep 22.) But, again, nothing in the original Declaration indicated to a purchaser that the other Owners would become the arbiters of compliance with the Code and authorized to withhold approval of Improvement Plans thought by them to be noncompliant.

Subdivision and Improvements. For clarity and convenience in considering the arguments, the restriction reads as follows after the trial court’s decision:

~~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 46 ep 4-5.)

Appellees first argue to preserve the remaining portions of the restriction on the theory that they are “consistent with and supported by the recorded Survey ... attached to and recorded with the Original Declaration.” (AB ep 22.) That is nonsensical. The Survey has nothing to do with either the submission of construction plans, the sequence of construction of structures, the number of structures, impact on riparian areas, or the obstruction of views. A survey is merely “[t]he measuring of a tract of land and its boundaries and contents; a map indicating the results of such measurements.” BLACK'S LAW DICTIONARY (11th ed. 2019).

Appellees next argue that the Survey did not contemplate or envision the subdivision of any Lots. (AB ep 23, 24.) That argument is pointless because the trial court struck the restriction on subdividing and Appellees have abandoned their cross-appeal. Incidentally, future subdivision was not the function of the Survey. A survey is a depiction of land as it is situated at the time of the survey. It is not a comment on how the land might be situated in the future. And Appellees assertion “upon information and belief” that the majority of Kalway’s Lot is in a flood plain and therefore cannot be subdivided is not supported by the record.

Appellees further argue that “the amendments are in line with the laws of Pima County regarding lot size and accessory buildings.” (AB ep 24.) But the new restriction does not concern “lot size.” And the new restrictions regarding the submission of construction plans, the sequence of construction of structures, the number of structures, impact on riparian areas, and the obstruction of views do not correlate to any Code requirement regarding accessory buildings. See [Code § 18.17.050](#).

Special Assessments. The original Declaration only provides for “Annual Assessments” for the stated purposes. There is no provision for “Special Assessments” for other purposes. The provision for Annual Assessments does not make the imposition of Special Assessments foreseeable.

Contrary to Appellees' argument, the Special Assessment provision is not "simply in furtherance" of the Annual Assessment power. The Annual Assessment serves several purposes, including "to pay the costs and the maintenance of the Easement Areas." The Special Assessment provision is broader. Its purpose is to pay "the cost of any construction, reconstruction, repair or replacement of any capital improvement of the Easement Areas." In other words, the Annual Assessment is for maintenance, while the Special Assessment is for capital improvements. The Special Assessment provision should be stricken because the original Declaration did not forewarn that Owners could be assessed for capital improvements in the Easement Areas shown on the Survey.

Enforcement. Appellees' observation that the original Declaration may be enforced "in any manner provided for by law or equity" (AB ep 25) does not support the imposition of Special Assessments as a means of enforcement. Indeed, the trial court struck the new Enforcement provisions of the Amended Declaration, including the imposition of a Special Assessment for the costs of enforcement. (§§ 5.2, 5.3; ROA 46 ep 6.)

Maintenance (Fallen Deadwood). The original Declaration imposed maintenance requirements only on the Manager as to the streets, street lights, gates, and improvements in the Easement Areas. (ROA 16 ep 6, § 7.1) No maintenance requirements were imposed on Owners as to their individual Lots as new § 7.2 now

does. Therefore, contrary to Appellees' argument, the new restrictions on Owners in § 7.2 are not "an amendment to [the Manager's] authority...." (AB ep 27.) Accordingly, § 7.2 should also be stricken either as unreasonably altering the original Declaration or as unforeseeable to a purchaser.

Incidentally, there is no support in the record for Appellees' assertions that "fallen deadwood ... has become a problem within the subdivision," "create[s] a fire and safety hazard," and "is also cosmetically unappealing." (AB ep 26-27; see ROA 17.)

IV. A declaration amendment, like the livestock amendment, that on its face applies to all lots but actually affects only some lots is not valid without the consent of the affected lot owners.

Appellees misconstrue A.R.S. § 33-1817(A)(2) in two ways. First, the statute does not require "unanimous consent of all members of 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....'" (AB ep 27.) Instead of "unanimous consent, the statute requires the "consent of the number of owners ... specified in the declaration" and the "consent of all of the owners of the lots ... to which the amendment applies." A.R.S. § 33-1817(A)(2). The "number of owners ... specified in the declaration" could be a majority rather than all of the owners.

Secondly, and more importantly, the words “apply” and “applies” as used in the statute refer to the uniformity of the effect of an amendment on the lots, not the amendment’s mere statement that it “applies” to all of the lots. On this point, context is more determinative of meaning than any dictionary definition. The purpose of the statute is to prevent unfair amendments to declarations.

Arizona case law prior to the 2016 enactment of [A.R.S. § 33-1817\(A\)](#) invalidated amendments that did not have uniform application to and effect upon all of the lots in a subdivision. [Wilson v. Playa de Serrano](#), 211 Ariz. 511 (App. 2005); [Shamrock v. Wagon Wheel Park Homeowners Ass’n](#), 206 Ariz. 42, 46 (App. 2003); [Camelback Del Este Homeowners Ass’n v. Warner](#), 156 Ariz. 21, 27 (App. 1987); [La Esperanza Townhome Ass’n, Inc. v. Title Sec. Agency of Arizona](#), 142 Ariz. 235, 238-39 (App. 1984); [Riley v. Boyle](#), 6 Ariz. App. 523 (1967). The legislature recognized that body of law when enacting [A.R.S. § 33-1817\(A\)](#). As stated in the Fact Sheet for [H.B. 2382](#):

Purpose

Establishes a method to amend community declarations.

Background

Property owners may enter into a private covenant on real property that is valid and enforceable if all of the following apply: 1) it is not violating other existing private covenant, declaration or statute; 2) the owner or persons *affected* consent; and 3) any existing private covenant, declaration requirements have been met. * * *

* * * *

(Emphasis added.)

Consistent with the stated purpose and existing law, the legislature codified the procedure for amending declarations, including the requisites for an amendment that affected fewer than all of the lots. There is no indication that the legislature intended to change established law.

As noted in the opening brief, the Restatement view is consistent with Arizona law. (OB ep 26.) Indeed, the Reporter's Note to [RESTATEMENT \(THIRD\) OF PROPERTY \(SERVITUDES\) § 6.10 cmt. f](#) cites this court's *La Esperanza* opinion and summarizes it as follows:

(developer-instigated amendment to permit multifamily dwellings on south 223 feet of the property formerly restricted to townhomes was void because amendments must have *uniform* application to all lots in the subdivision; otherwise, patchwork restrictions will apply, upsetting the orderly plan of development).

(Emphasis added.)

The Restatement's Illustrations are also instructive:

7. The declaration for Green Acres provides for amendment of the declaration by the affirmative vote of owners of two-thirds of the lots. Lots in Green Acres are restricted to residential use, except for parcels owned by the association, which are restricted to recreational use. Three lots at the entrance to the subdivision fronting on State Route 5 are acquired by a grocery-store developer, which seeks and obtains the consent of the owners of two-thirds of the lots to an amendment that permits the three lots to be used for retail-commercial purposes. The owners of lots nearest the proposed development all oppose the amendment. The conclusion would be justified that the amendment is invalid without their consent.

9. Same facts as Illustration 7. The declaration provides that the board of directors may promulgate rules governing parking. It also provides

that the declaration may be amended by the affirmative vote of owners holding two-thirds of the voting power. An amendment is adopted allocating all available parking to a list of units that includes units that hold two-thirds of the voting power. The owners of units holding the remaining voting power opposed the amendment. The conclusion would be justified that the amendment is invalid.

In short, the majority cannot adopt an amendment that does not uniformly affect all lots without the consent of the affected lot owners.

Finally, Appellees' tree height restriction hypothetical reveals the fallacy of their argument. Assume that a declaration includes the landscaping requirement that each home must have two trees in the front yard. All of the lots in the subdivision, except one, have trees no more than 20 feet in height. The other lot has palm trees that exceed 60 feet in height. All of the owners, except the owner with palm trees, approve an amendment limiting tree height to 30 feet and stating that it "applies" to all of the lots. Although literally applicable to all of the lots, the amendment does not apply uniformly and actually affects only the non-consenting owner. Such an amendment is invalid. Appellees' cries of "countless scenarios," "unimaginable consequences," and "countless litigations" is pure hyperbole and no reason not to invalidate the nonuniform, nonconsensual livestock amendment.

V. The invalid livestock restriction can and must be severed.

Appellees misconstrue Kalway’s severability argument and the Blue Pencil Rule. Kalway argued in the context of the new livestock restriction that the “Severability” provision in the original Declaration does avoid the invalidity of that restriction. “[D]espite the severability provision, any amendments must still be adopted in the manner prescribed by law.” (OB ep 27.)

Whether the Blue Pencil Rule applies to the original Declaration is doubtful. The only court to discuss the rule in the context of real property restrictions rather than employment contracts was “not persuaded that the ‘blue pencil’ rule mentioned in *Valley Medical Specialists* [*v. Farber*, 194 Ariz. 363 (1999)] has any application to restrictive covenants in deeds.” *Burke v. Voicestream Wireless Corp.*, 207 Ariz. 393, 398, ¶ 24 (App. 2004).

In any event, neither the “Severability” provision nor the Blue Pencil Rule may be used to rewrite the livestock restriction to somehow make it valid.

Respectfully submitted on December 2, 2019.

GUST ROSENFELD P.L.C.

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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 4,820 words. The word count was determined by the word processing system used to prepare this brief.

Dated: December 2, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that Appellant's Reply Brief was served by regular mail and email on December 2, 2019, to the following:

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ATTACHMENT

Pima County Zoning Code Excerpts

PIMA COUNTY ZONING CODE EXCERPTS

§ 18.03.020. Definitions

A. Definitions "A."

1. Accessory building: 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.
2. Accessory structure: 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.

D. Definitions "D."

1. Discernibly turgid state: Means the state of being visibly swollen, bloated, inflated or distended.
2. Dwelling, duplex: A building containing only two dwelling units.
3. Dwelling, multiple: A building or portion thereof containing three or more dwelling units.
4. Dwelling, one-family: A building containing only a single dwelling unit.
5. Dwelling group: A group of two or more detached or semi-detached one-family, duplex or multiple dwellings occupying a parcel of land in one ownership and having any yard or court in common, including house court and apartment court, but not including motel.
6. Dwelling unit: A room or suite of two or more rooms that is designed for, or is occupied by, one family doing its own cooking with internal unimpeded access to all kitchens, and no more than two kitchens.

G. Definitions "G."

1. Garage, private: 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.

S. Definitions “S”

23. Structure:

- a. Anything constructed or erected, the use of which requires location on the ground or attachment to something having a location on the ground;
- b. For the purposes of this ordinance, "structure" does not include:
 - 1) Items constructed or placed roughly parallel to and at the same elevation as the ground surface such as roads, driveways, alleys, uncovered slabs, and recreational courts.
 - 2) Mailboxes, hardscape features, fences, and other items traditionally associated with residential uses when such items are forty-eight inches or less in height.
 - 3) Items placed underground with no surface expression such as utility, water, and sewer lines.
 - 4) Amateur radio towers one hundred or less in height.
 - 5) Underground cisterns.
 - 6) Clothes lines seventy-two inches or less in height.

§ 18.17.010. Purpose

A. 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.

§ 18.17.020. Permitted uses

A. Permitted Uses:

1. All uses as permitted in Section 18.09.020A (General Residential and Rural Zoning Provisions);
2. Temporary mobile home: * * *

3. Commercial agricultural uses such as field crops, truck gardening, berry or bush crops, tree crops, flower gardening, nurseries, orchards and aviaries; in accordance with Section 18.21.010A3a (CR-1 Single Residence Zone);
4. Farm products stand, provided:
5. The raising and marketing of poultry, rabbits and small animals, but no slaughtering of other than those raised on the premises: In accordance with Section 18.21.010(A)(3)(a) (CR-1 Single Residence Zone);
6. The grazing and raising of livestock, provided there is not more than one head of cattle, horse, sheep, goat or other similar animal more than six months of age per ten thousand square feet of lot area;
7. The raising of hogs, in accordance with Section 18.14.020(A)(8) (GR-1 Rural Residential);
8. Raising of ratites, subject to the following restrictions and requirements:

§ 18.17.040. Development standards—General

- A. Minimum site area: One hundred forty-four thousand square feet.
- B. Minimum lot area per dwelling unit: One hundred forty-four thousand square feet.
- C. Minimum setback requirements:
 1. Front: Fifty feet;
 2. Side: Ten feet each;
 3. Side, when adjacent to street: Twenty feet;
 4. Rear: Fifty feet.
- D. Maximum building height: Thirty-four feet.
- E. Maximum lot coverage by structures: Thirty percent.
- F. Minimum distance between main buildings: Twenty feet.

§ 18.17.050. Development standards—Accessory buildings and accessory structures

A. Permitted coverage: Fifteen hundred square feet, or seventy percent of the area of the largest main building on the site, whichever is greater.

B. Maximum height: Twenty-four feet.

C. Minimum distance standards:

1. To front lot line: One hundred feet;

2. To side and rear lot lines if building is not used for poultry or animals:

a. Not adjacent to street: Ten feet;

b. When adjacent to street: Fifty feet.

3. To side and rear lot lines if building is used for poultry or animals: One hundred feet.

a. All horses, cattle, sheep, goats, or other similar animals must be confined within a stock-tight fence (no material shall be permitted not ordinarily used for a stock-tight fence) in an area of no less than four hundred square feet per animal. Such fenced-in area shall be set back ten feet from the rear where it abuts an IR, RH, GR-1, SR, SR-2, SH, CR-1, CR-2, or MU zone and forty feet from the rear where it abuts a zone other than IR, RH, GR-1, SR, SR-2, SH, CR-1, CR-2, or MU, and forty feet from a side property line. A setback of ten feet shall be permitted on the side yard upon the submittal of a written recorded agreement to this effect with the adjacent property owner, but, in no event, shall a corral be closer than fifty feet to any residence or living quarters in an abutting property.