IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MAARTEN KALWAY, A MARRIED MAN
DEALING WITH HIS SOLE AND SEPARATE PROPERTY,
Plaintiff/Appellant,

v.

CALABRIA RANCH HOA, LLC, AN ARIZONA LIMITED LIABILITY COMPANY;
MARK 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
Filed March 13, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20181284
The Honorable Janet C. Bostwick, Judge

AFFIRMED

COUNSEL

Gust Rosenfeld P.L.C., Phoenix
By Gerard R. O'Meara and Charles W. Wirken
Counsel for Plaintiff/Appellant

Thompson Krone P.L.C., Tucson
By Craig L. Cline
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring concurred and Judge Brearcliffe concurred in part and dissented in part.

V Á S Q U E Z, Chief Judge:

¶1 In this declaratory-judgment action, homeowner Maarten Kalway appeals the trial court's ruling, denying in part his motion for summary judgment and determining Calabria Ranch Homeowners Association LLC's amendment of the Declaration of Covenants, Conditions, Restrictions and Easements (CC&Rs) was valid. He argues the amendments approved by the court are invalid because they altered the nature of the original declaration and were not otherwise foreseeable to purchasers. He also contends the amendment relating to livestock is invalid because it applies only to his property and was made without his consent. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 The relevant facts are undisputed. In 2015, Calabria Ranch Estates was formed and divided into five lots. Kalway owns lot two. The Edward A. and Diane Lyn Phlaum Revocable Trust, dated April 10, 2017, owns lot one; Michael Reid and Florence Clark own lot three; and the Stuart J. Scibetta Living Trust dated April 1, 2015, owns lots four and five (collectively, "the other property owners"). The owners took title to their respective properties subject to the CC&Rs.

¶3 In January 2018, the other property owners, without Kalway's knowledge, recorded an amended declaration by a majority vote. The amended declaration included new definitions for the terms "Dwelling," "Garage," and "Improvement." Additional changes were incorporated into the livestock, vehicles, and setbacks provisions, and new restrictions concerning "Non-Dwelling Structures," "Improvement Plans," and "Subdivision and Improvements" were also added. A "Special Assessments" provision was included in the annual assessment covenant,

and a "Compliance and Enforcement" provision, including a notice of violation procedure, was incorporated into the enforcement covenant. The amended declaration also included a new "Fallen Deadwood, Dried Undergrowth and Other Fire Hazards" provision within the maintenance covenant, and it eliminated language in the "Amendments" provision, which stated that amendments "shall not be effective until the recording of such [amendment]."

¶4 In March 2018, Kalway filed this action against Calabria and the other property owners, seeking a declaratory judgment that he "and all other owners of land within the Calabria Ranch Estates [were] not obligated to abide by the terms of the [amended declaration]." He alleged the amended declaration had not been "unanimously adopted" and, thus, was "not legal and not enforceable." Specifically, he asserted that the amendments "materially restrict[ed] the previously permitted uses of the property" and "eliminated voting rights for potential new owners of land within Calabria Ranch Estates." He further reasoned that the amendments "adversely and negatively affected the current value of privately owned Lots . . . from a development perspective." Calabria and the other property owners, in relevant part, denied Kalway's allegations.

¶5 Kalway filed a motion for summary judgment, claiming the amended declaration was void because "unanimous approval [was] required to implement the changes." Calabria and the other property owners filed a cross-motion for summary judgment, arguing the validity of the amended declaration. They reasoned, "There is no requirement in the Original Declaration that it may only be modified by unanimous consent nor are there any notice or meeting requirements." They further argued the amended declaration was valid because it "amended and restated the Original Declaration by a Majority Vote" and it had "uniform [e]ffect on all five . . . Lots."

¶6 After a hearing, the trial court issued its under-advisement ruling, granting in part and denying in part both Kalway's and Calabria's motions for summary judgment. The court determined that A.R.S. § 33-1817 allows the original declaration to be amended by a majority vote and does not require a unanimous vote as Kalway maintained. It further evaluated the amended declaration's "reasonableness and foreseeability" under the lens of Calabria's residential community purpose—"[to] protect[] the value, desirability, attractiveness and natural character of the Property"—and it concluded that portions of section 3.10, paragraph two of section 4.2, and sections 5.2 and 5.3 in their entirety, were invalid because they "unreasonably and unforeseeably alter the nature of Calabria's

covenants."[1] The court explained section 3.10(c) and (f), as well as the amendment restricting additional subdivision, were invalid because "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." The court also struck the second paragraph of section 4.2 because "[t]he 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" and further explained the "quasi-punitive assessment could not have been anticipated under the original declaration." The court also determined section 5.2 was invalid in its entirety because "[t]he original declaration d[id] not authorize Calabria's manager to . . . unilaterally impose sanctions, engage in 'self-help' and take 'corrective action to abate any violation' of the declaration," explaining that the "broad enforcement powers" granted to the manager in section 5.2 "are completely new and fundamentally alter the nature of the CC&Rs." And the court further determined that section 5.3 was invalid in its entirety because the special assessment provision in section 4.2 was void as a matter of law, and the enforcement authority associated with the special assessment in section 5.3 "must be deemed void as well."

¶7 The trial court nevertheless explained, "The amended declaration contains a severability clause, and in such a case, Arizona courts follow the 'Blue Pencil Rule,' allowing lawful parts of a contract to stand when other, grammatically-severable parts of the contract are unlawful."[2] The court thus reasoned, "[t]he invalid portions of the amendments are

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[1]The stricken amendments provided as follows: section 3.10 would have prohibited a property owner's ability to subdivide and make improvements upon their respective lots without a majority vote of owners; subsections (c) and (f) would have restricted lot and dwelling size. Section 4.2, paragraph two, would have authorized a special assessment to be levied against specific lots as determined in the sole discretion of the manager. And sections 5.2 and 5.3 would have established compliance and enforcement provisions, including authorizing sanctions and "self-help" measures by the manager. Calabria and the other lot owners do not challenge the trial court's ruling striking these provisions on appeal.

[2]Section 8.1 of the CC&Rs provides that if any court determines "that any provision of this Declaration is invalid or unenforceable" the validity or enforceability of "any of the other provisions" shall not be affected.

severable," and found "the remaining amendments are valid as a matter of law." The court determined that other pending motions were rendered moot by its summary judgment rulings and concluded it had resolved all pending claims pursuant to Rule 54(c), Ariz. R. Civ. P. Kalway appealed.[3] We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶8 Kalway argues the trial court erred in ruling on the summary judgment motions. He contends the amended declaration is void because unanimous consent is required when declaration amendments alter the nature of the original declaration or when the amendments are not foreseeable to individual lot owners at the time of purchase. He further contends the livestock amendment is void because it does not uniformly affect the other four lots and was made without his consent. We review the denial of a motion for summary judgment de novo. *Strojnik v. Gen. Ins. Co. of Am.*, 201 Ariz. 430, ¶ 11 (App. 2001); *see also Saban Rent-A-Car LLC v. Ariz. Dep't of Revenue*, 244 Ariz. 293, ¶ 8 (App. 2018) (motion for summary judgment denial typically not appealable unless based on point of law). "The interpretation of a restrictive covenant is generally a matter of law, which we review de novo." *Coll. Book Ctrs., Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, ¶ 11 (App. 2010).

Unanimous Consent

¶9 Section 33-1817(A)(1) states that CC&Rs may be amended "by an affirmative vote or written consent of the number of owners or eligible voters specified in the declaration." And in this case, the original CC&Rs provided, "This Declaration may be amended at any time . . . by the Majority Vote of the Owners . . . ." According to the original declaration, "'Majority Vote' shall mean at least four . . . of the six . . . possible Votes for [Calabria]." Thus, only a majority vote was required to amend the original declaration. *See* § 33-1817(A)(1). And "when a homeowner takes a deed containing [a] deed restriction that allows for amendment by the vote of a majority of homeowners, that homeowner implicitly consents to the subsequent majority vote." *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, ¶¶ 10, 18, 25 (App. 2010) (alteration in *Dreamland*) (quoting trial court); *see Johnson v. Pointe Cmty. Ass'n, Inc.*, 205 Ariz. 485, ¶¶ 23-24 (App. 2003) (lot owner must adhere to deed restrictions incorporated into his

[3]Although Calabria and the other property owners also filed a notice of appeal, they later "opted to waive their [a]ppeal."

deed); *Hueg v. Sunburst Farms (Glendale) Mut. Water & Agric. Co.*, 122 Ariz. 284, 288 (App. 1979) (lot owners may impose modification and extinguishment).[4]

¶10 Kalway cites no authority to support his argument that unanimous consent is required to amend the CC&Rs here, nor have we found any. A majority of the votes were cast in favor of the amended declaration; thus, the declaration was properly amended and Kalway "implicitly consent[ed] to the majority vote.[5] *See Dreamland*, 224 Ariz. 42, ¶¶ 10, 18, 25 (quoting trial court); *see Johnson*, 205 Ariz. 485, ¶¶ 23-24.

Amended Declaration

¶11 Nevertheless, a properly amended declaration may be invalid if the amendments "unreasonably alter the nature of the covenants," *Dreamland*, 224 Ariz. 42, ¶¶ 36, 38, or if the 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. 511, ¶ 7 (App. 2005); *see also Shamrock v. Wagon Wheel Park Homeowners Ass'n*, 206 Ariz. 42, ¶¶ 2-5, 14-16 (App. 2003) (amended declaration could not require mandatory membership in homeowners' association without notice as no such requirement existed in original recorded declaration, nor did original authorize such membership without majority vote). However, an amended declaration may be valid if the "grantee takes title with[] proper notice that a majority of the lot owners may impose a[] . . . [change] upon his property at some future time." *Dreamland*, 224 Ariz. 42, ¶ 35 (quoting *Lakeland Prop. Owners Ass'n v. Larson*, 459 N.E.2d 1164, 1170 (Ill. App. Ct. 1984)). Put another way, "a grantee can only be bound by what he had notice of." *Id.* (quoting *Lakeland Prop. Owners Ass'n*, 459 N.E.2d at 1170).

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[4]As he did below, Kalway relies on Restatement (Third) of Property (Servitudes) §§ 6.10, 6.13 (2000). However, the trial court determined statutory and common law precedent "should control its analysis" because both parties agreed the relevant case law, *Dreamland*, 224 Ariz. 42, and § 33-1817, "are consistent," and "there is no need to defer to the cited Restatement provision[s]." We agree and therefore do not apply Restatement §§ 6.10, 6.13. *See Scalia v. Green*, 229 Ariz. 100, n.1 (App. 2011) (we look to Restatement in absence of Arizona legal authority).

[5]At oral argument, Kalway's counsel confirmed Kalway had waived any notice deficiency arguments.

¶12 Like the trial court and parties, we find *Dreamland* instructive. Dreamland Villa was a residential community that consisted of eighteen sections, each governed by a separate "Declaration of Restrictions." *Id.* ¶¶ 2, 4. Those declarations were eventually amended to require, among other things, the homeowners to pay annual and special assessments to Dreamland Villa Community Club, Inc. (DVCC). *Id.* ¶¶ 3, 6. With the exception of one section, none of the original declarations required the payment of assessments or even mentioned DVCC. *Id.* ¶ 4. When several homeowners failed to pay their assessments, lawsuits were filed and consolidated, and the homeowners challenged the amended declarations, reasoning that they had not consented to the required membership in DVCC. *Id.* ¶¶ 7-9. The trial court granted summary judgment in favor of DVCC. *Id.* ¶ 10.

¶13 On appeal, this court determined that the amended declarations were invalid and unenforceable, reversing the trial court's grant of summary judgment. *Id.* ¶¶ 37, 40. We explained:

> For decades after the first development of Dreamland Villa, DVCC was a voluntary club with voluntary membership. Homeowners had no right appurtenant to their lot ownership to membership in the club and no such right in the recreational facilities. There were no common areas. There were no assessments paid to the club, only voluntary dues paid by those who chose to use the facilities. Many homeowners chose not to become members or to use the facilities. The authority to amend the original Declarations did not allow 51% of the lot owners to force the other 49% into club membership the latter had chosen against, nor to assess and lien the properties of such homeowners for an association they did not seek. It is not reasonable to use the amendment provision to direct that one group of lot owners may, in effect, take the property of another group in order to fund activities that do not universally benefit each homeowner's property or areas owned in common by all.

Id. ¶ 36. At bottom, we pointed out that there was "a lack of proper notice" to the homeowners that the amendments to the declarations "could be imposed non-consensually." *Id.* ¶ 38.

¶14 Here, Kalway argues that the definitions in the amended CC&Rs, including the amended restrictions, all "unreasonably alter the nature of the covenants in the original Declaration or were not contemplated." Yet, Kalway suggests incorrectly that any addition to the amended declaration not previously within the original declaration was not previously "contemplated" as to provide notice of a future change, *see Dreamland*, 224 Ariz. 42, ¶ 35, or "unreasonably alter[s] the nature of the covenants," *see id.* ¶ 38. Although the definitions and restrictions within the amended CC&Rs may be entirely new or include additional specificity, Kalway took title to his lot with notice, pursuant to section 8.5, that the original declaration could be amended by a majority vote of lot owners. This includes defining terms and specifying restrictions included or implied in the original declaration. *See id.* ¶¶ 35-36, 38. Thus, unlike in *Dreamland*, the remaining amendments were consistent, foreseeable, and an extension of the original declaration.

¶15 The definitions for "Dwelling," "Garage," and "Improvement" in the amended declaration add clarity to the provisions in the original, and they neither altered the nature of the covenant nor were unforeseen. For example, the original declaration specified in section 3.5, "all residences constructed on Lots will be Single Family Dwellings." The amended declaration clarifies at section 1.3 what qualifies as a dwelling: "a single family dwelling that is a permanent structure affixed to a Lot and used for residential purposes by a single family" with "at least 60% living space and at most 40% Garage." Because the original declaration expressly provided that "all residences constructed on Lots will be Single Family Dwellings," this amendment neither altered the nature of the CC&Rs nor was unforeseeable in light of the stated "Residential Purposes" of the community. We therefore also agree with the trial court's finding that "the § 3.8 amendment limiting size of non-dwelling structures and avoiding obstruction of mountain views is reasonable and consistent with protecting value, desirability, attractiveness and natural character of Calabria and does not unforeseeably alter the nature of the covenants as described in the original declaration."

¶16 Additionally, the original declaration specifically limited the type and amount of animals an owner may keep to six livestock per 3.3

acres [6] and imposed a fifty-foot setback limitation, as specified in sections 3.1 and 3.7. Thus, an owner reasonably could have anticipated that an amended declaration may further restrict or expand the livestock and setback covenants. Further, in the original CC&Rs, in section 3.7, the owners were permitted to "construct any structures of any kind, including but not limited to corrals," presumably encompassing non-dwelling structures, improvement plans, further subdivision, and improvements. The amended declaration both specifies and restricts the previously mentioned "structures of any kind" within sections 3.8, 3.9, and 3.10 to coincide with the purpose of the original declaration, "protecting the value, desirability, attractiveness and natural character of the Property." Thus, these additional restrictions were foreseeable and reinforce the nature of the covenant. Moreover, as the trial court determined, the first paragraph of section 4.2, authorizing special assessments, is proper because it applies to all lots and is an expansion of the annual assessment in that "the Manager may levy and collect" money to "construct[], reconstruct[], repair, or replace[]" easement areas, as the original declaration allowed. Finally, the enforcement and maintenance covenants—again, absent the portions stricken by the court as invalid—are essentially unchanged with the exception of the inclusion of section 7.2—requiring property owners to clear fallen deadwood, dried undergrowth, and other fire hazards.

¶17 Kalway nevertheless argues that the livestock restriction is invalid because it only applies to his lot. And relying on § 33-1817(A)(2), he asserts that because the restriction applies "to fewer than all of the lots," his consent was required. Although Kalway conceded at oral argument that the livestock restriction in the amended declaration applies to all lots, relying on *La Esperanza Townhome Ass'n, Inc. v. Title Security Agency of Arizona*, 142 Ariz. 235, 238 (App. 1984), he maintained the livestock provision's application created a "peculiar effect" on his lot instead of a uniform application.[7] His reliance, however, is misplaced.

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[6]"'Livestock' means cattle, equine, sheep, goats and swine, except feral pigs." A.R.S. § 3-1201(5).

[7]Although Kalway did not make the "uniform effect" argument below, we consider it preserved because the trial court appears to have addressed it in its under-advisement ruling, and review the matter as such. *See Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342 (App. 1984) ("We recognize that courts prefer to decide each case upon its merits rather than to dismiss summarily on procedural grounds.").

¶18 *La Esperanza* similarly involved a residential development and the effect of an amendment to the declaration of covenants, conditions, and restrictions. *Id*. at 236. But unlike the amendments in this case, the revision in *La Esperanza* eliminated seven lots and revised the boundaries of eight different lots, replacing them with nine lots. *Id*. at 237. This court reversed the trial court's judgment, which declared the amendment, approved by a majority of the lot owners, valid. *Id.* at 237, 240. We stated that "the case turn[ed] on the fact that the amendment purports to affect only part of the lots in the subdivision." *Id*. at 237. Although we used the term "uniform application," we did so in the context of describing our holding in another case that "an amendment which purported to modify the restrictions only as to one lot or a number of lots, but not all the lots, was null and void." *Id*. at 238 (referring to holding in *Riley v. Boyle*, 6 Ariz. App. 523 (1967)); *see also Villas at Hidden Lakes Condos. Ass'n v. Geupel Constr. Co., Inc.*, 174 Ariz. 72, 77 (App. 1992) ("the court [in *La Esperanza*] held the attempted amendments were invalid for failing to treat all units uniformly"); *Camelback Del Este Homeowners Ass'n v. Warner*, 156 Ariz. 21, 27 (App. 1987) ("[A]ny amendment to restrictive covenants must apply to every lot."); *Riley*, 6 Ariz. App. at 526 (amendment to set of restrictive covenants must have uniform application). In none of these cases did this court suggest "uniform application" meant "uniform effect."

¶19 In this case, the amended CC&Rs provision has uniform application, "No Owner or Occupant shall keep more than six . . . 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 . . . livestock units." Thus, we agree with the trial court's conclusion that the remaining portions of the amended declaration are valid. *See Saban Rent-A-Car LLC*, 244 Ariz. 293, ¶ 8; *Strojnik*, 201 Ariz. 430, ¶ 11.

Attorney Fees and Costs on Appeal

¶20 Calabria requests its attorney fees and costs on appeal pursuant to A.R.S. § 12-341.01 and the CC&Rs. The court may award a successful party on appeal their reasonable attorney fees for "any contested action arising out of a contract, express or implied." § 12-341.01(A). Because CC&Rs "constitute a contract between the subdivision's property owners as a whole and individual lot owners," *see Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, ¶ 5 (App. 2000), in our discretion, we grant Calabria's request for reasonable attorney fees and costs, upon compliance with Rule 21(b), Ariz. R. Civ. App. P.

Disposition

¶21 For the reasons stated above, we affirm.

B R E A R C L I F F E, Judge, concurring in part and dissenting in part:

¶22 The majority fails to fully apply the principles of *Dreamland Villa Community Club, Inc. v. Raimey*, 224 Ariz. 42 (App. 2010) to the First Amended and Restated Declaration of Covenants, Conditions, Restrictions and Easements for Calabria Ranch Estates ("amended CC&Rs") in this case. The original restrictive covenants to which Maarten Kalway bound his property in the 2015 Declaration of Covenants, Conditions, Restrictions and Easements ("original CC&Rs") did not provide sufficient notice that many of the new covenants imposed by the amended CC&Rs could be imposed. I therefore dissent as to the majority's treatment of those amended covenants as discussed below, and would reverse the trial court's ruling as to them. But as to the remaining covenants addressed on appeal, the majority reaches the proper result and I concur in the decision as to those covenants.

¶23 As an initial matter, in his opening brief, Kalway heavily relies on *Dreamland* and also asserts that the 2016 enactment of A.R.S. § 33-1817, which post-dated the adoption of the original CC&Rs, bars certain of the amendments.[8] But, in his reply brief, Kalway seems to claim

[8]A.R.S. § 33-1817, in pertinent part, states that:

> A. Except during the period of declarant control, or if during the period of declarant control with the written consent of the declarant in each instance, the following apply to an amendment to a declaration:
>
> 1. The declaration may be amended by the association, if any, or, if there is no association or board, the owners of the property that is subject to the declaration, by an 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.
>
> 2. An amendment to a declaration may apply to fewer than all of the lots or less than all of the

that § 33-1817 cannot be enforced to limit his pre-existing property rights at all. Appellees Calabria Ranch HOA LLC, et al. ("Calabria Ranch") argue that § 33-1817 governs the amended CC&Rs, but, in oral argument, conceded that *Dreamland* is "consistent" with the statute. Nonetheless, neither party argues that *Dreamland* was incorrectly decided or that we should depart from its reasoning, *see State v. Patterson*, 222 Ariz. 574, ¶ 19 (App. 2009), and, because I conclude that § 33-1817 is consistent with *Dreamland*, I apply *Dreamland* here.

¶24 In *Dreamland*, this court, under a different factual scenario, concluded that new burdens may not be imposed on a property owner under a general power to amend CC&Rs where the property owner lacked "proper notice" under the existing CC&Rs "that such servitudes could be imposed non-consensually." 224 Ariz. 42, ¶ 38. It cited favorably to the statement of this principle in an Illinois case, *Lakeland Property Owners Ass'n v. Larson*, 459 N.E.2d 1164, 1170 (Ill. App. 1984), that a court should "not enforce changes [of restrictions] where a grantee takes title without proper notice that a majority of the lot owners may impose an assessment upon his property at some future time. Such a grantee can only be bound by what he had notice of . . . ." 224 Ariz. 42, ¶ 35 (alteration in *Dreamland*) (quoting *Lakeland Prop. Owners Ass'n*, 459 N.E.2d at 1170). Consequently, notwithstanding the general power of the Calabria Ranch property owners to amend the original CC&Rs by majority vote alone, our task is to determine whether the provisions of the original CC&Rs gave sufficient notice to Kalway (that is, to a reasonable property owner) that the new restrictive covenants (or servitudes) challenged here could be imposed without his consent. As to almost all of the new restrictive covenants

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> 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.

Kalway complains of on appeal, the original CC&Rs did not provide the required notice, and the new covenants are consequently invalid.

Residences and Dwellings

¶25 The original CC&Rs at section 3.5 stated that "all residences constructed on Lots will be Single Family Dwellings," but gave no definition as to what constituted a "residence." Section 3.5 in the amended CC&Rs substitutes the term "dwelling" for "residence." The amended CC&Rs then adds a definition of "dwelling" at new section 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." "Garage" is then defined, for the first time, in new section 1.5 as "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."

¶26 Because the original CC&Rs did not define what an acceptable residence was—other than that it must be a single-family dwelling—it provided no limitations on the type of single-family dwelling that could be placed on a lot—affixed or not affixed—or on what the size of garage or living space must be. A mobile home or manufactured home was a perfectly acceptable residence under the original CC&Rs, but, because a mobile or manufactured home need not be affixed to the land, one left unaffixed would not be permitted on any lot under the amended CC&Rs. Similarly, a single-family residence, affixed to the lot, with a 2,000 square foot living space and a 2,000 square foot, seven car, two motor home attached garage, was perfectly acceptable under the original, limitless CC&Rs. But now, under the amended CC&Rs, such a dwelling and its garage—amounting to fifty percent of the structural space—is similarly no longer allowed.

¶27 Because neither "single-family" nor "residence" were defined as terms of art in the original CC&Rs, there is no reason for a reasonable property owner to look beyond the common definition of each. A "residence" is synonymous with "dwelling." *See Residence*, The American Heritage Dictionary 1493 (5th ed. 2011). Generally, a "single-family" residence or dwelling is contrasted with a multi-family housing or "multiple dwelling development"—such as an apartment building, condominium complex, or other structure with multiple residential units. *See generally* Pima County Code 18.27.010 (providing permitted zoning uses for mixed-dwellings). Had the amended CC&Rs merely clarified that no

existing single-family dwelling may be converted into duplex or multi-family housing, or that a similar new structure could not be built, such an amended provision would have been reasonably within the scope of the original covenant. Or had the original CC&Rs provided that "a single-family residence with attached, proportionately-sized garage," a subsequent amendment by majority vote limiting that proportionate garage size to forty percent of the entire structure, would have been permissible.

¶28 The majority seems to conclude that, because the original CC&Rs called for only single-family dwellings, and because this new provision merely defined single-family dwellings, then it was a permissible change. This begs the questions as to what an impermissible definition of single-family dwelling might be and why. If the definition of "dwelling" were changed to include, "A building or complex in which units of property, such as apartments, are owned by individuals and common parts of the property, such as the grounds and building structure, are owned jointly by the unit owners," *Condominium*, The American Heritage Dictionary 384 (5th ed. 2011), the majority does not give any reasoning that would prevent such a new definition and covenant. Or, if similarly, it defined a "dwelling" as "a structure of no fewer than three stories and four bedrooms," no reasoning in the decision would prevent such a new definition.

¶29 Nothing in the original CC&Rs restricting residences to single-family dwellings would put a reasonable property owner on notice that his neighbors could, by general amendment power by majority vote, now limit both the size and type of his residence. Because the amended section 3.5, and the amended definition of "dwelling" in section 1.3, were imposed on Kalway without notice as required by *Dreamland*, they are invalid without his consent.

Non-Dwelling Structures

¶30 Under the original CC&Rs, no limitation was placed on "non-dwelling structures" location, placement, or size (other than the limitation on any structures within setbacks, as discussed below). But in newly added section 3.8, Kalway's fellow homeowners limited non-dwelling structures to 2,500 total square feet in area, limited their height to eighteen feet, and barred them from obstructing any "views" of any neighboring lot,

including those of the Catalina and Rincon Mountains.[9] Nothing in the original CC&Rs put a reasonable homeowner on notice that his neighbors might impose such restrictions.

¶31 Neither did the original CC&Rs limit the number of non-residential structures on a lot or control the sequence of their construction. In the amended CC&Rs, however, in addition to the new "view" provision above, at new section 3.10(d), (e), Kalway's neighbors impose limits on both the number and type of structures on a lot ("one (1) Dwelling, one (1) guest house, and one (1) Non-Dwelling structure") and when those may be built on a given lot ("A Lot must contain a Dwelling before a Garage or Non-Dwelling Structure can be erected or built."). Nothing in the original CC&Rs touched on or hinted at such limitations or mandatory sequencing, and no reasonable property owner should have expected that any such future provisions would be imposed without his consent as required by *Dreamland*. Consequently, these new sections, 3.8, 3.10(d), (e), are invalid.

Setbacks and Improvements

¶32 Original section 3.7 entitled "Setbacks" provided that, "No Owner or Occupant shall construct any structures 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." "Structure" was not defined in the original CC&Rs as a term of art. "Structure" is commonly defined as "[s]omething constructed, such as a building." *Structure*, The American Heritage Dictionary 1731 (5th ed. 2011). In new section 3.7 as amended, "structure" is replaced with "Improvement," which is then defined in new section 1.6, as "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." Under the new setback provision, then, not only may a property owner not construct any structure within the setback area as before, neither may he "grade," "excavate" or "landscape" within fifty feet of any property line. The original limitation on structures in a setback did not put a reasonable property owner on notice, as required by *Dreamland*, that it could be amended in such a manner that he could not landscape—or even dig a

[9]Such "views" were not limited to the mountain ranges; given its vagueness a protected "view" could be of anything including of trees, other homes, the horizon, or of nearby billboards.

hole—within fifty feet of his property line. Consequently, the changes to section 3.7 and the addition of new section 1.6 are invalid without Kalway's consent.

Improvement Plans

¶33 In addition to defining "Improvement" as discussed above, the amended CC&Rs created a requirement for the submission to and approval by fellow property owners of "construction plans" for improvements on a lot. New section 3.9 states that,

> 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.

¶34 Given the new definition of "Improvement" in new section 1.6, the consequence of the provision above is that, whether it is a house, a patio, a driveway, a hole in the ground, or simple landscaping, a property owner must now submit construction plans—whether or not plans are even required by governmental regulation—to his neighbors for their approval by majority vote. Nowhere in the original CC&Rs was any approval process required for any undertaking by a property owner on his property. Nothing in the original CC&Rs put any reasonable property owner on notice that an otherwise permissible use of his property would be subject to a plans requirement or general approval by a vote of his neighbors. Because Kalway was not provided notice, and it was adopted without his consent, new section 3.9 is invalid under *Dreamland*.

Livestock

¶35 The original CC&Rs at section 3.1 states that, "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." Amended section 3.1 provides that, "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." While a reasonable property

owner might, contrary to Kalway's argument (and discussed below), anticipate that further and different numerical limitations could be placed on the permitted livestock—given that numerical limits are stated in the original CC&Rs—this provision does more than that; it changes the definition of "livestock."

¶36 The term "livestock" is not defined in the original CC&Rs. "Livestock" is commonly defined as, "Domestic animals, such as cattle or horses, raised for home use or for profit, especially on a farm." *See Livestock*, The American Heritage Dictionary 1027 (5th ed. 2011). Under Arizona law, livestock is defined as "cattle, equine [to include horses, mules, burros and asses], sheep, goats and swine, except feral pigs." A.R.S. § 3-1201(4), (5). And, under Arizona law, livestock does not include "poultry," such as chickens. § 3-1201(7).

¶37 Under the original CC&Rs, then, a reasonable property owner would understand that he could certainly have horses and cattle, but also might understand that he could also have pigs, sheep, and mules. He might also think he could have chickens, but, under Arizona law, technically, he might be wrong. Nonetheless, under the new CC&Rs, Kalway's neighbors now limit his livestock property to two kinds of livestock, where formerly all livestock were permitted. And, now, allows chickens, where formerly none were allowed. While a reasonable property owner might suspect that by majority vote his neighbors could allow other kinds of animals—including chickens and even "ratites"—because it allows some animals, namely livestock, it is not reasonable that his neighbors could amend entire classes of common animals out of the statutory definition of livestock. Consequently, the amended section 3.1 limiting livestock to cattle and horses alone, adopted without Kalway's notice or consent, is invalid.

Maintenance

¶38 The amended CC&Rs include a new section 7.2, entitled "Fallen Deadwood," which requires that,

> 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.

While such a provision might be advisable, and might even allow for a lower risk of fire danger benefitting everyone, no language in the original declaration put a property owner on notice that his neighbors would regulate fallen branches on his property—beyond, of course, what any county-imposed health and safety regulation might impose. Section 7.2 is therefore, under *Dreamland*, invalid.

"General Purpose" Justification

¶39 The majority, for many of these new restrictions, relies on the general, stated purpose of the original CC&Rs of "protecting the value, desirability, attractiveness and natural character of the Property" as providing *Dreamland's* required notice. Such a gauzy statement of purpose, in my view, does no such thing. No homeowner's association would, of course, characterize its proposed covenants as calculated to *reduce* the value, desirability, and attractiveness of association properties. But even so, no evidence appears in the record that these changes would protect these features of the properties, or were calculated to do so. Indeed, it is counter-intuitive that *new* restrictive covenants would protect the *existing* character of the properties—they might improve or diminish them—but they certainly change the existing character by either imposing new restrictions that never existed, or removing restrictions that did. Enforcement of current CC&Rs "protects" the existing character of the properties, changing the character of the properties does not. But more important, following the majority on this would allow a subjective general statement of purpose to become a limitless justification for any new amendment and the principles of *Dreamland* would be rendered a nullity.

Remaining Covenants

¶40 As to the remaining amendments objected to by Kalway—those as to the new section allowing for "special assessments" in the first paragraph of section 4.2 and the limitation on the total number of livestock per lot in section 3.1—I conclude that there was sufficient notice under *Dreamland* that such changes could be imposed by majority vote. Annual assessments may be imposed under the original CC&Rs, sections 1.1 and 4.1. Annual assessments under the original CC&Rs may be increased or decreased by the manager subject to majority vote. The new "special assessment," also requiring majority vote and a specific proper purpose, has the same effect as a mere increase in annual assessments. Whether an

imposed assessment of some amount is called a separate special assessment or a larger annual assessment, makes no material difference.

¶41 As to the total livestock limitation, while the added limitation places a heavier burden on Kalway, given the relative larger size of his property, the number of livestock are already limited under the current CC&Rs, and this provided Kalway sufficient notice that those limits could be changed. Consequently, I agree with the decision that the first paragraph of new section 4.2 and the total livestock limitation in amended section 3.1 (although not its revised definition of livestock), are valid.