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8 **IN THE COURT OF APPEALS**  
9 **STATE OF ARIZONA**  
10 **DIVISION TWO**

11 MAARTEN KALWAY,  
12 Appellant,  
13 v.  
14 CALABRIA RANCH HOA, LLC, *et al.*,  
15 Appellees.

No. 2 CA-CV 2019-0106

Pima County Superior Court  
No. C20181284

**MOTION FOR PUBLICATION**

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18 Appellant moves pursuant to ARCAP 28(g) for publication of the  
19 memorandum decision herein as an opinion for the reasons that the decision:

20 (1) establishes, alters, modifies or clarifies a rule of law,

21 (2) involves legal issues of substantial statewide importance to the many

22 Arizona subdivisions and homeowners subject to CC&Rs, and

23 (3) is accompanied by a dissent.  
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1 **Memorandum of Points and Authorities**

2 **1. The decision establishes, alters, modifies or clarifies a rule of law.**

3 A. The decision establishes as a new rule of law that "entirely new"  
4 definitions and restrictions may be adopted by a majority vote of lot owners  
5 whenever the original declaration provides for amendment by the majority:

6 Although the definitions and restrictions within the amended CC&Rs  
7 may be *entirely new* or include additional specificity, Kalway took  
8 title to his lot with notice, pursuant to section 8.5, that the original  
9 declaration could be amended by a majority vote of lot owners.

9 (¶14, emphasis added.) Although the decision's next sentence states that "[t]his  
10 *includes* defining terms and specifying restrictions included or implied in the  
11 original declaration" (¶14, emphasis added), citing *Dreamland*, the sentence  
12 quoted above is broader and not limited to definitions and restrictions included or  
13 implied in the original declaration. The decision therefore makes law rather than  
14 merely restating existing law, and should be published.

15  
16 B. The decision also establishes as a new rule of law that a broad statement  
17 of the general purpose of a declaration of CC&Rs gives proper notice to support  
18 the later adoption of specific amendments:

19 ¶6 [T]he trial court ... evaluated the amended declaration's  
20 "reasonableness and foreseeability" under the lens of Calabria's  
21 residential community purpose – "[to] protect[] the value,  
22 desirability, attractiveness and natural character of the Property"....

23 \* \* \* \*

24 ¶15 \* \* \* Because the original declaration expressly provided that  
25 "all residences constructed on Lots will be Single Family  
26 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

1 structures and avoiding obstruction of mountain views is reasonable  
2 and consistent with protecting value, desirability, attractiveness and  
3 natural character of Calabria and does not unforeseeably alter the  
nature of the covenants as described in the original declaration."

4 ¶16 \* \* \* Further, in the original CC&Rs, in section 3.7, the  
5 owners were permitted to "construct any structures of any kind,  
6 including but not limited to corrals," presumably encompassing non-  
7 dwelling structures, improvement plans, further subdivision, and  
8 improvements. The amended declaration both specifies and restricts  
9 the previously mentioned "structures of any kind" within sections  
10 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.

11 Because no authority is cited for such reliance on a declaration's statement  
12 of purpose to give the required notice of possible amendments, the decision  
13 breaks new ground and should be published.

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15 C. The decision clarifies the law regarding the "uniform application" of  
16 CC&Rs to individual lots. As the decision explained in the course of  
17 distinguishing *La Esperanza Townhome Ass'n, Inc. v. Title Sec. Agency of*  
18 *Arizona*, 142 Ariz. 235 (App. 1984):

19 ¶18 \* \* \* Although we used the term "uniform application," we  
20 did so in the context of describing our holding in another case that  
21 "an amendment which purported to modify the restrictions only as to  
22 one lot or a number of lots, but not all the lots, was null and void."  
23 *Id.* At 238 (referring to holding in *Riley v. Boyle*, 6 Ariz. App. 523  
24 (1967)); *see also Villas at Hidden Lakes Condos. Ass'n v. Geupel*  
25 *Constr. Co., Inc.*, 174 Ariz. 72, 77 (App. 1992) ("the court [in *La*  
26 *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

1 uniform application). In none of these cases did this court suggest  
2 "uniform application" meant "uniform effect."

3 Without a published opinion, this court's interpretation of *La Esperanza*  
4 and the cases it cites will not be settled and Kalway's non-uniform effect  
5 argument is certain to be repeated in future cases.

6  
7 **2. The decision involves legal issues of substantial statewide**  
8 **importance to the many Arizona subdivisions subject to CC&Rs.**

9 CC&Rs are commonplace in residential subdivisions. Accordingly, what  
10 has come to be known as "community association law" is said to "appl[y] to a  
11 significant percentage of American housing." RESTATEMENT (THIRD) OF  
12 PROPERTY (SERVITUDES) 6 Intro. Note (2000). Thus, our legislature has found it  
13 necessary to regulate planned communities, including their amendment of  
14 declarations of CC&Rs. A.R.S. §§ 33-1801 – 1818.

15 The decision herein could add to the growing body of community  
16 association law if published as an opinion. And it should because, as discussed  
17 above, the decision states new and clarified rules of law.

18  
19 **3. The decision is accompanied by a dissent.**

20 The fact of a dissent in any case illustrates that there is more than one  
21 perspective and more than one possible outcome. Even after a given case  
22 becomes final, a dissent can serve as food for thought in future cases. As Chief  
23 Justice Hughes once wrote: "A dissent ... is an appeal to the brooding spirit of  
24 the law, to the intelligence of a future day, when a later decision may possibly  
25 correct the error into which the dissenting judge believes the court to have been  
26 betrayed." CHARLES HUGHES, THE SUPREME COURT OF THE UNITED STATES 68

1 (1936). A dissent therefore deserves to be preserved in an opinion. That is true in  
2 this case.

3 The dissent herein does more than take a different view in applying  
4 *Dreamland* to the amended CC&Rs. It underscores the "proper notice"  
5 requirement of *Dreamland* and clarifies that the power of the majority of owners  
6 to amend CC&Rs does not evade that requirement:

7 ¶24 In *Dreamland*, this court, under a different factual scenario,  
8 concluded that new burdens may not be imposed on a property  
9 owner under a general power to amend CC&Rs where the property  
10 owner lacked "proper notice" under the existing CC&Rs "that such  
11 servitudes could be imposed non-consensually." 224 Ariz. 42, ¶ 38.  
12 It cited favorably to the statement of this principle in an Illinois case,  
13 *Lakeland Property Owners Ass'n v. Larson*, 459 N.E.2d 1164, 1170  
14 (Ill. App. 1984), that a court should "not enforce changes [of  
15 restrictions] where a grantee takes title without proper notice that a  
16 majority of the lot owners may impose an assessment upon his  
17 property at some future time. Such a grantee can only be bound by  
18 what he had notice of..." 224 Ariz. 42, ¶ 35 (alteration in  
19 *Dreamland*) (quoting *Lakeland Prop. Owners Ass'n*, 459 N.E.2d at  
20 1170). *Consequently, notwithstanding the general power of the  
21 Calabria Ranch property owners to amend the original CC&Rs by  
22 majority vote alone, our task is to determine whether the provisions  
23 of the original CC&Rs gave sufficient notice to Kalway (that is, to a  
24 reasonable property owner) that the new restrictive covenants (or  
25 servitudes) challenged here could be imposed without his consent.*

20 (Emphasis added.)

21 Moreover, the dissent provides a critical assessment of the propriety of  
22 relying on a "general purpose" statement in a declaration of CC&Rs to give the  
23 required notice of the scope of future amendments:

24 ¶39 The majority, for many of these new restrictions, relies on the  
25 general, stated purpose of the original CC&Rs of "protecting the  
26 value, desirability, attractiveness and natural character of the  
Property" as providing *Dreamland's* required notice. Such a gauzy

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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.

Therefore, the fact of the dissent herein is reason enough to publish the decision.

Respectfully submitted on March 27, 2020.

GUST ROSENFELD P.L.C.

By: /s/ Charles W. Wirken – 004276  
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**Certificate of Compliance**

Pursuant to ARCAP 22, I certify that this motion uses proportionally spaced type of 14 points, is double-spaced using a Times New Roman font, and contains 1,450 words. The word count was determined by the word processing system used to prepare this motion.

Dated: March 27, 2020

**GUST ROSENFELD P.L.C.**

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/s/ Adriana Taylor