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9 **ARIZONA COURT OF APPEALS**
10 **DIVISION TWO**

11 MAARTEN KALWAY,

12 Plaintiffs/Appellants,

13 v.

14 CALABRIA RANCH HOA, LLC, an
15 Arizona limited liability company;
16 MICHAEL A. REID and FLORENCE J.
17 CLARK, husband and wife; EDWARD A.
18 PHLAUM and DIANE LYN PHLAUM,
19 husband and wife, and as Co-Trustees of the
20 EDWARD A. AND DIANE LYN
21 PHLAUM REVOCABLE TRUST, dated
22 April 10, 2017; and STUART J.
23 SCIBETTA, an unmarried man; and as
24 Trustee of the STUART J. SCIBETTA
25 LIVING TRUST dated April 1, 2015;

26 Defendants/Appellees.

No. 2 CA-CV 2019-0106

Pima County Superior Court
Cause No. C20181284

**RESPONSE TO MOTION FOR
PUBLICATION**

27 Defendants/Appellees, Calabria Ranch HOA, LLC, *et al.*, by and through their
28 undersigned counsel, and pursuant to Rules 28 and 22, *Arizona Rules of Civil Appellate*

1 *Procedure* (“ARCAP”), hereby respond in opposition to Plaintiff/Appellant Maarten
2 Kalway’s (“Kalway”) Motion for Publication (“Motion”). As more fully established by
3 the accompanying Memorandum of Points and Authorities, Kalway’s Motion does not
4 adequately establish that the publication of this Court’s Memorandum Decision is
5 warranted under Arizona law and the Motion should thus be denied in its entirety.
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8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. STANDARD OF REVIEW.**

10 Rule 28(b), ARCAP provides, in pertinent part that:

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12 An appellate court will issue an opinion if a majority of the judges deciding
13 the appeal determines that the court’s disposition does one or more of the
14 following:

- 15 (1) Establishes, alters, modifies or clarifies a rule of law;
- 16 (2) Calls attention to a rule of law that is generally overlooked;
- 17 (3) Criticizes existing law; or
- 18 (4) Involves a legal or factual issue of unique interest or substantial
19 public importance.

20 Kalway’s Motion asserts that this Court’s Memorandum Decision should be published
21 because it satisfies the factors enumerated within this rule.
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23 Appellate courts “will consider a motion for publication of a memorandum
24 decision as a motion for reconsideration” under Rule 22, ARCAP. Rule 28(g), ARCAP.
25 A motion for reconsideration “requests an appellate court to consider whether its decision
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1 contained erroneous determinations of fact or law.” Rule 22(a), ARCAP. A well-taken
2 motion for reconsideration “must state with particularity the points of law or fact that the
3 party believes the appellate court has erroneously determined, or any changes in the law
4 after briefing or oral argument that may entitle the party to relief.” Rule 22(b), ARCAP.
5 Here, Kalway’s Motion neither establishes that any of the Rule 28(b) factors it cites are
6 satisfied by this Court’s Memorandum Decision, nor does it substantiate the existence of
7 a genuine legal error within the majority decision.
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10 **II. THE MEMORANDUM DECISION DOES NOT ESTABLISH NEW LAW, NOR**
11 **DOES IT ALTER, MODIFY OR CLARIFY EXISTING ARIZONA LAW.**

12 Kalway first argues that the Memorandum Decision establishes as a new rule of
13 law that “entirely new” definitions and restrictions within an amended set of CC&Rs may
14 be enacted whenever the original declaration allows for amendment by a simple majority
15 of lot owners. In issuing its decision, this Court closely adhered to the well-established
16 common law of this state which provides that amendments to a declaration cannot
17 unreasonably alter the underlying covenants. *Nickerson v. Green Valley Recreation,*
18 *Inc.*, 228 Ariz. 309, 320 (App. 2001).
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22 As Kalway correctly notes in his Motion, the Court clarified that valid
23 amendments to the Declaration included “defining terms and specifying restrictions
24 included or implied in the original declaration.” Memorandum Decision, ¶ 14 (*citing*
25 *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, 51, ¶¶ 35-36, 38, 226 P.3d
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1 411, 420 (App. 2010)). Accordingly, when read in its proper context, the majority
2 decision only approves those amendments which were expressly provided for or
3 contemplated within the underlying covenants or restrictions – not amendments which
4 bear no relation to the underlying declaration, as Appellant Kalway suggests.
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6 This reasoning arises from the direct application of settled Arizona law which
7 requires courts to ascertain whether amendments to a declaration “unreasonably alter
8 the nature” of the underlying covenant. *Dreamland*, 224 Ariz. at ¶ 38, 226 P.3d at 420.
9 This is precisely what the majority did here. It is also important to emphasize that this
10 Court limited its approval of the amendments to the Declaration to those provisions
11 which were not stricken by the trial court as not properly arising from the the
12 Declaration. Consequently, this discussion within the Memorandum Decision does not
13 create new law, nor does it change the inquiry that Arizona courts must perform in
14 evaluating amendments to a declaration under *Dreamland* and *Nickerson*.
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18 Second, Appellant Kalway asserts that the majority decision “establishes as a
19 new rule of law that a broad statement of the general purpose of a declaration of CC&Rs
20 gives proper notice to support the later adoption of specific amendments.” *See* Motion,
21 p. 2, lns. 16-18. However, the provisions of the Memorandum Decision that Kalway
22 cites to in support of this argument clarify that the Court closely adhered to the
23 reasonableness and foreseeability test imposed by *Dreamland* in evaluating whether
24 the amendments to the Declaration were viable in relation to the stated purpose of the
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1 Declaration. Put another way, the Court properly determined the question of whether
2 the amendments to the Declaration that are at issue in this appeal adhered to the stated
3 purpose of the Declaration, which contemplates a “general plan for the improvement,
4 development, use and enjoyment of the Property” with the objective of “protecting the
5 value, desirability, attractiveness and natural character of the Property.” ([ROA 16](#) ep
6 2, at Recitals B.); Memorandum Decision, ¶¶ 6, 15-16.
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9 In finding that the amendments to the Declaration did not alter its nature and
10 stated purpose, this Court engaged in a straightforward application of the principles
11 espoused in *Dreamland*. Whether its analysis was based upon a provision in the
12 Declaration which sets forth the declarant’s statement of purpose for the planned
13 community as opposed to some other component of an original declaration, such as,
14 for example, an amendment to a definitional section contained within an original
15 declaration is of no moment. The Court’s determinations in this regard do not modify
16 established Arizona law.
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20 Third, Appellant Kalway argues that the majority decision creates a new reading
21 of *La Esperanza Townhome Ass'n, Inc. v. Title Sec. Agency of Arizona*, 142 Ariz. 235,
22 689 P.2d 178 (App. 1984). Throughout the briefing and argument of this appeal,
23 Appellant Kalway interchangeably used the terms “uniform effect” and “uniform
24 application” in an effort to argue that the Amended Declaration disproportionately
25 impacted his property. The majority’s decision does nothing more than discuss the
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1 reach of case law addressing the application of declaration amendments that was
2 discussed and applied in *La Esperanza*. The majority decision therefore does not
3 modify the case law that controls this issue.
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5 In *La Esperanza*, the Court of Appeals characterized its holding in *Riley v. Boyle*,
6 6 Ariz.App. 523, 434 P.2d 525 (1967) to mean that “any amendment to a set of
7 restrictive covenants must have uniform application to all lots in the subdivision and
8 an amendment which purported to modify the restrictions only as to one lot or a number
9 of lots, but not all the lots, was null and void.” *La Esperanza*, 142 Ariz. at 238, 689
10 P.2d at 181. It further reasoned that in *Riley*, “[w]e held that to construe the amendment
11 language to permit 51 percent of the lot owners to exempt their property from some or
12 all the restrictions while leaving the remainder of the subdivision subject to those
13 restrictions would lead to an unintended result,” in the form of “a patchwork quilt of
14 different restrictions according to the views of various groups of 51 per cent.” *Id.*
15 (*citing Riley*, 6 Ariz.App. at 526, 434 P.2d 525).
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20 Here, the Court referred to the holding in *La Esperanza* for the purpose of
21 highlighting the reported decisions that came after *La Esperanza* and which applied the
22 principles underlying the Court of Appeals’ holding therein. *See* Memorandum
23 Decision, ¶ 18 (*citing Villas at Hidden Lakes Condos. Ass’n v. Geupel Constr. Co.*,
24 Inc., 174 Ariz. 72, 77 (App. 1992); *Camelback Del Este Homeowners Ass’n v. Warner*,
25 156 Ariz. 21, 27 (App. 1987)). The substance of these cases is clear, as is A.R.S. § 33-
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1 1817. This Court properly found that the Amended Declaration is applicable to all five
2 Lots within the subdivision against the backdrop of these authorities. Moreover, it also
3 properly rejected Kalway’s attempts to conflate “uniform application” with “uniform
4 effect” in this appeal. Appellant Kalway’s argument that addressing these authorities
5 somehow modifies the holding of *La Esperanza* is therefore misplaced and should be
6 discounted.
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9 **III. THE LEGAL ISSUES ADDRESSED IN THIS COURT’S MEMORANDUM**
10 **DECISION HAVE PREVIOUSLY BEEN CONFRONTED BY ARIZONA COURTS**
11 **AND OUR LEGISLATURE.**

12 Appellees concur with Appellant Kalway’s argument that planned communities
13 are commonplace in Arizona, as are the use of CC&Rs to regulate the conduct of their
14 membership. However, the issues presented in this appeal are not matters of first
15 impression. The authorities which address the procedure for and validity of amendments
16 to a declaration are governed by *Dreamland*, *La Esperanza*, and the Arizona’s
17 legislature’s subsequent enactment of A.R.S § 33-1817(A), which all parties to this appeal
18 have conceded. While the regulation of planned communities is undoubtedly an
19 important area of Arizona law, the Memorandum Decision applies these authorities in a
20 manner that neither modifies their scope nor creates new law. As such, Rule 28(b)(4),
21 ARCAP is not a compelling factor warranting publication.
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1 Memorandum Decision, ¶ 23.

2 While the dissent ultimately viewed the statement of purpose contained within the
3 Declaration as being insufficient to “provid[e] *Dreamland*’s required notice,” it does not
4 call the holding of this case into question. Memorandum Decision, ¶ 39. Despite their
5 analytical divergence, the majority and dissent both applied existing Arizona law and did
6 not criticize *Dreamland* or A.R.S. § 33-1817. Publication is thus unwarranted on this
7 basis, as well.
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10 **V. CONCLUSION.**

11 While this Court’s majority decision was persuasive, well-reasoned and the
12 Memorandum Decision would be suitable for publication in its current form, Appellees
13 submit that Kalway has not sufficiently established that this Court’s Memorandum
14 Decision should be published under Rule 28(b) and (g), ARCAP. Appellant Kalway has
15 also certainly failed to shown that reconsideration of this Court’s decision is warranted,
16 as required by Rule 22(b), ARCAP. Appellees thus respectfully request that this Court
17 deny Kalway’s motion.
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21 RESPECTFULLY SUBMITTED May 5, 2020.

22 THOMPSON•KRONE, P.L.C.

23
24 By: /s/Craig L. Cline
25 Craig L. Cline
26 Attorneys for Defendants/Appellees
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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Civil Appellate Procedure (ARCAP) 22, I hereby certify that this brief uses proportionally spaced type of 14 points, is double-spaced using Times New Roman font, and contains 2,028 words. The word count was determined by a word processing system.

Dated May 5, 2020.

THOMPSON•KRONE, P.L.C.

By: /s/Craig L. Cline
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CERTIFICATE OF SERVICE

I, Craig L. Cline, certify that on May 5, 2020, the foregoing Response to Motion for Publication, was e-filed with the Court of Appeals, Division Two, and a copy was mailed and emailed to the following:

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