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CC&R Amendment Update from the Arizona Supreme Court



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With COVID-19 in the rear view mirror and communities returning to “normal” operations, the Arizona Supreme Court has presented community associations a new challenge, this one with respect to CC&R amendments. Based on this recent case law, CC&R amendments must be reasonable and foreseeable in order to be enforceable. In other words, community associations can no longer amend CC&Rs to create new obligations where the original CC&Rs did not provide owners notice that they may be subject to the new obligations.

This new challenge comes from the Arizona Supreme Court’s decision in the case of *Kalway v. Calabria Ranch HOA, LLC, et. al.*, No. CV-20-0152-PR, March 22, 2022. This case considered whether nine separate CC&R amendments were reasonable and foreseeable in light of the general amendment provision in the original CC&Rs. For those amendments the Court found to be unreasonable and not foreseeable, the Court invalidated the amendments. **Thus, we strongly recommend that any community association that is considering amending its CC&Rs consult with the CHDB team to analyze whether the proposed amendments are permissible under the Calabria Ranch standard.**

This is significant because many community associations have amended their CC&Rs over the years, and many more are in the process of amending their CC&Rs today or contemplating future amendments. Some of the amendments may be considered “new” obligations, some may be reasonable and foreseeable in light of the original CC&Rs provisions, and some may be close calls. The risk with this new Arizona Supreme Court decision is that CC&R amendments may be more prone to invalidation.

The following is a list of the CC&R amendments the Arizona Supreme Court considered in the *Calabria Ranch* case and the Court's decision on whether the amendments were valid or invalid. We are including this list to provide an idea of what Arizona courts may consider when determining whether a CC&R amendment is valid in light of the *Calabria Ranch* case. Please note that these amendments are specific to *Calabria Ranch* and its CC&Rs. In other words, an amendment that the Arizona Supreme Court found invalid in the *Calabria Ranch* case may be found valid for a different community association. Again, we strongly recommend consulting with the CHDB team to analyze your community association's specific CC&Rs and any proposed, or previously adopted, amendments.

1. Amending the definition of "dwelling" to provide that a dwelling must be 60% living space and 40% garage space. The Court found this amendment **invalid** because the original CC&Rs did not include limitations on the sizes of garages or living spaces and only required residences to be "single family dwellings."
2. Adding a definition for "garage." The Court found this amendment **valid** because the original CC&Rs referenced garages, so adding a definition for "garage" was reasonable and foreseeable.
3. Changing the word "structures" to "improvements" in the section on setbacks, and defining "improvements" 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." The Court found this amendment **invalid** because it drastically changed what an owner could do in the lot setback areas. Before the amendment an owner could not build a "structure" in the setback areas. After the amendment an owner could not even plant a tree in the setback areas.
4. Amending to include a provision that in the event an owner subdivides a lot, the newly created lot is not entitled to any votes, and that the total votes in the association shall remain the same. The Court found this amendment **invalid** because the original CC&Rs were silent on the effect subdivision would have on vote allocation.
5. Amending to define "livestock" as "chickens, horses, and cattle only," and limiting the total number of livestock for each lot to fifteen. The language permitting livestock in the original CC&Rs included, but was not limited to, horses and cattle. The Court found that it was reasonable for owners to believe, under the original CC&Rs, that chickens were not considered livestock. Therefore, adding chickens to the definition of livestock and limiting the number of chickens, when added to the number of other livestock permitted, was not reasonable or foreseeable.
6. Amending to limit "non-dwelling structures" to 2,500 total square feet. The Court found this amendment **invalid** because the original CC&Rs did not include any limitations on non-dwelling structures or provide notice that the owners may impose such a restriction.
7. Amending to require owners to submit construction plans for improvements for approval by a majority vote of the owners. The Court found this amendment **invalid** because the original CC&Rs did not include an approval process or give owners notice that an otherwise permissible use of the owner's lot may be subject to approval by a majority vote.
8. Amending to require a majority vote of the owners to approve the subdivision of any lot, to require an owner to submit improvement plans at least thirty days before improving a lot, imposing limits on the number of non-residential structures on lots, controlling construction sequencing on lots, restricting the environmental impact in riparian areas, and regulating view obstruction. The Court found these amendments **invalid** because the original CC&Rs did not put owners on notice that an owner approval process may be required in conjunction with constructing improvements, did not require the submission of improvement plans, did not mention limitations on non-residential structures or sequencing of development, and did not contain any language indicating that regulating riparian areas or views might be adopted in the future.
9. Amending to require owners to maintain dried undergrowth and fallen deadwood on their lots. The Court found this amendment **invalid** because the original CC&Rs did not put owners on notice that their

undergrowth or deadwood would be subject to regulation. The Court invalidated this amendment despite the fact that it served to prevent the spread of wildfires.

As a result of the Arizona Supreme Court's decision in the *Calabria Ranch* case, community associations may face more challenges with CC&R amendments. As such, we strongly recommend consulting with the CHDB team with respect to your community association's specific CC&Rs and any proposed amendments.

The information contained in this article is not intended to be legal advice and is provided for educational purposes only.

About the author



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Allison Preston transitioned from real estate and property management to a legal career. Her prior work managing residential rental properties, homeowner associations, and real estate portfolios provides her a unique understanding of both legal intricacies and day-to-day management. With expertise in homeowners' associations, real estate, landlord/tenant, civil litigation, and general business law, Allison effectively bridges legal matters and practical management.

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