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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

VILLAGE OF OAKCREEK ASSOCIATION, Plaintiff, vs. LANCE BONHAM; JOHN DOES I-V, INCLUSIVE; JANE DOES I-V, INCLUSIVE; BLACK CORPORATIONS I-V; WHITE PARTNERSHIPS I-V, inclusive; Unknown Heirs and Devisees of each of the above-names Defendants, if deceased, Defendants.	Case No. V1300-CV2022-80081 **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** (Assigned to Hon. Linda Wallace)

Plaintiff, Village of Oakcreek Association, ("Plaintiff" or the "Association"), hereby responds in opposition to Defendant Lance Bonham's ("Defendant") Motion to Dismiss (the "Motion"). Plaintiff respectfully requests that the Court deny Defendant's Motion because

Kalway does not apply and the Amendment passed pursuant to the amendment requirements of the Declaration and the Planned Community Act. This request is supported by the following Memorandum of Points and Authorities, and the entire record before the Court, which is incorporated herein by this reference.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BRIEF BACKGROUND

It is undisputed (see *Stipulation of Material Facts and Exhibits*, filed June 8, 2022) that the Association is a planned community in Yavapai County, Arizona, governed by the Master Declaration of Restrictive Covenants for all Property in the Village of Oakcreek Restated & Amended, recorded at Document Number 2014-0021505 on May 13, 2014, as amended ("the Declaration"). Defendant is the record owner of the real property at 40 Rio Circle, Sedona, Arizona, 86351 ("the Property"), which is located within the Association and thus is subject to its Declaration. Defendant's mother originally acquired title to the Property in 1989 and the Property was ultimately vested to Defendant by virtue of a Quit Claim Deed on January 23, 2017, by Defendant as the Trustee of his mother's trust.

Defendant stipulates that he does not live at the Property as his primary residence, instead, he rents or leases the Property for terms of less than thirty days, and does so for monetary gain. It is also undisputed that between May 1, 2021 and February 28, 2022, Defendant has rented the Property for a period of less than thirty days, on more than five occasions.

Furthermore, it is not in dispute that the Association recorded an amendment, first in 2016, then re-recorded on May 3, 2017, which amends Article 4, Section 4.23 to the Declaration regarding Leasing of Lots and Units; Restrictions and Limitations.

There are only two issues in dispute that are the subject of the Motion to Dismiss. First, it is Defendant's contention that the amendment is not valid. Plaintiff vehemently disagrees as the facts support the validity of the Leasing of Lots and Units; Restrictions and Limitations Amendment. Second, Defendant claims that the Leasing of Lots and Units; Restrictions and Limitations Amendment fails under *Kalway v. Calabria Ranch HOA, LLC*, 2022 506 P.3d 18 (Ariz. 2022). The Leasing of Lots and Units; Restrictions and Limitations Amendment survives Defendant's *Kalway* challenge because at the time that the Defendant became record owner of the Property the Amendment had already passed and was recorded.

At the time the Property was conveyed to him in 2017, Defendant had actual and record notice of the Declaration, including the 2016 Amendment recorded on November 17, 2016 recorded with the Yavapai County Recorder on November 17, 2016, at Document No. 2016-0058316, that adds Section 4.23 to the Declaration. The 2016 amendment to Article 4 of the Declaration to include Section 4.23 passed by a vote of 564 "for" and 452 "against." See Exhibit A. Further, the Planning and Zoning Ordinances of Yavapai County ("PZOs") had been in effect since 2000, and prohibited short-term rentals county-wide. As such, even before the 2016 Leasing of Lots and Units; Restrictions and Limitations Amendment, the County prohibited lease terms of less than thirty (30) days within the Association.

II. ARGUMENT

A. Plaintiff's Complaint Survives a Rule 12(b)(6) Motion.

The Motion to Dismiss should be denied in its entirety because Arizona courts disfavor Rule 12(b)(6) motions and because the allegations in the Complaint must be taken as true, and all reasonable inferences from those allegations must be drawn in the Association's favor in evaluating the Motion. "Dismissal for failure to state a claim is appropriate only if as a matter of law ... plaintiffs would not be entitled to relief under any interpretation of the facts susceptible to proof. *Rowland v. Kellogg Brown & Root, Inc.*, 210 Ariz. 530, 534, ¶ 15, 115 P.3d 124, 128 (App. 2005); *State ex rel. Corbin v. Pickrell*, 667 P.2d 1304, 1309 (Ariz. 1983). When evaluating a Rule 12(b)(6) motion to dismiss, "courts look only to the pleading itself and consider the well-pled factual allegations contained therein." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7 (2008). "In determining if a complaint states a claim on which relief can be granted, courts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts." *Murrell v. Taylor*, 1 CA-CV 20-0334, 2021 WL 982577, at *3 (App. Mar. 16, 2021) (*quoting Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 9 (2012)). A "defect in the pleading, however, is not sufficient to support a motion to dismiss." *Pickrell*, 667 P.2d at 1309. "The motion should be denied unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Newman v. Maricopa Cnty.*, 167 Ariz. 501, 503 (App. 1991).

The governing set of facts, therefore, are solely the allegations in the Complaint, along with all reasonable inferences that may be drawn in the Association's favor. Taking such allegations as true, the Complaint is more than sufficient to state claims against Defendant in order to survive a Rule 12(b)(6) motion to dismiss.

B. The Amendment passes the "*Kalway*" test since it was reasonable and foreseeable.

In the recent Arizona Supreme Court case, *Kalway v. Calabria Ranch HOA, LLC*, 2022 506 P.3d 18, 23 (Ariz. 2022), the Court held that a homeowners association cannot place restrictions on a landowner's use of their land if the declaration of the association in effect at the time of purchase did not provide "sufficient notice" to homeowners that such a restriction could occur. *Kalway* at ¶10, 23 (Ariz. 2022). *Kalway* requires that the amendment in dispute was foreseeable at the time of purchase. *Id*. at ¶15, 24.

Construed in a light most favorable to the Plaintiff, the facts as presented in the Complaint show that the Amendment *was* foreseeable because it was already in effect. Defendant became record Owner[1] of the Property on January 23, 2017. *See* Stipulation to Material Facts and Exhibits ¶5. As such, Defendant had full record notice of the 2016 Amendment adding Section 4.23. Conveniently, Defendant's Motion repeatedly refers to the Amendment as "the 2017 Amendment," in reference to its date of re-recordation. Notwithstanding the creative labeling attempt, the fact remains that Section 4.23 was recorded as part of the Amendment to the

[1] Owner is defined by the Declaration to mean "the record owner, whether one or more persons of Legal, beneficial or equitable title to fee simple interest to a Lot or Unit". Declaration at 2L.

Declaration on November 17, 2016, which predates Defendant becoming the record owner of the property via Quit Claim Deed recorded January 23, 2017. Further, the "2017 Amendment" expressly states that the instrument is being "re-recorded for the sole purpose of correcting Section 2 of the Amendment to the Restated and Amended Master Declaration of Restrictive Covenants for All Property in the Village of Oakcreek previously recorded on November 17, 2016 as document number 2016-0058316, by **removing** provisions…which were not approved by the members of Village of Oakcreek". Specifically, the Tenant Registration Form and the Grandfather Provision were struck out and the Amendment's minimum lease term of thirty days, along with the remaining seven sections, remained.

Kalway also states:

> The restriction itself does not have to necessarily give notice of the particular details of a future amendment; that would rarely happen. Instead, it must give notice that a restrictive or affirmative covenant exists and that the covenant can be amended to refine it, correct an error, fill in a gap, or change it in a particular way. *See Armstrong*, 633 S.E.2d at 87, 360 N.C. 547. But future amendments cannot be "entirely new and different in character," untethered to an original covenant. *Lakeland Prop. Owners Ass'n v. Larson*, 121 Ill.App.3d 805, 77 Ill.Dec. 68, 459 N.E.2d 1164, 1167 (1984).

Id. 18, ¶17, 25.

As discussed in the Complaint, Section 4.03 of the original Declaration prohibits business of any kind from being conducted from or located on properties subject to the Declaration. A short-term rental conducted for monetary gain is certainly a business, and such a business that is conducted from or located on, a property subject to the Declaration. Defendant cannot argue that Section 4.23 was not foreseeable as arising out of Section 4.03, and indeed he does not – his

Motion conveniently fails to address Section 4.03 of the Declaration at all. Clearly, renting or leasing property is a business, and that was already a restriction in effect before Defendant was record title owner of his Property.[2] Therefore, the Amendment is not "entirely new or different in character" or untethered to the original Declaration, as *Kalway* describes.

C. The prior Yavapai County ordinance prohibiting short-term rentals made it even *more* foreseeable that such rentals were prohibited.

Defendant had significant notice of restrictions of short-term rentals even before he took title of his mother's property: the Planning and Zoning Ordinances of Yavapai County ("PZOs") had been in place since 2000 – well before Defendant was designated beneficiary and trustee of his mother's trust. Thus, it would be disingenuous to argue total ignorance of restrictions on short-term rentals.

Nor is the Amendment a departure from the original intent of the Declaration. While Defendant argues that the original Declaration's silence on the issue of short-term rentals suggests that such rentals were contemplated in the original contract, [section re: compliance with local ordinances] makes it clear that the contractual intent was to incorporate the PZOs in effect at the time of the original Declaration's recordation. Moreover, it is entirely foreseeable that when A.R.S. §11-269.27 invalidated the PZOs, an Amendment would be necessary to preserve the original character of the Declaration.

[2] *See* unpublished opinion *Timothy T. Caggiano et. al v. Village of Oakcreek Association*, Case No. P1300CV201700261.

Far from being a "substantial and unforeseeable" amendment that would trigger the Restatement's suggestion of a unanimous approval requirement, Section 4.23 was a foreseeable restriction arising out of the clear contractual intent of the parties to incorporate the PZOs in effect at the time of the original Declaration – in effect, prohibiting short-term rentals within the Association. The Amendment was not "an entirely new section of the Declaration" meant to "eviscerate a property right," or any of the other overzealous mischaracterizations Defendant describes. *Motion* at 4, 8. Instead, the function of the Amendment was merely to preserve the Declaration's ability to reflect the parties' intent by filling the gap left by A.R.S. §11-269.27.[3]

D. The Amendment was properly passed pursuant to the requirements within the Declaration.

Defendant misrepresents the Association's voting procedure. Whether intentional or not, the Motion is incorrect as to the voting procedure and the percentages required to pass the vote. The Amendment did not pass by a 24% vote, as Defendant suggests. It passed by a 53% vote: 564 in favor out of 1067 votes. *See* Exhibit A. It is irrelevant that not all members of the Association participated in the vote – indeed, it is difficult to imagine a homeowners' association of that size could conjure up 100% attendance at a vote.

Defendant's appeal to equity and fairness is misplaced. Those who did not vote *chose* not to vote – they were not precluded from exercising their rights as members of the Association. Of

[3] Defendant's contention as to the legislative intent of A.R.S. §11-269.17 is misguided. Had the legislature intended to disallow Associations from prohibiting short-term rentals, it would not have specified counties, cities, or towns in the plain statutory language.

those who did vote, more than half approved the Amendment, thus fulfilling the requirements of Section 9.04.[4] The Leasing of Lots and Units; Restrictions and Limitations Amendment is valid as it passed in accordance with the Declaration's Amendment Provision.

E. Previous courts in this jurisdiction have already held that the Amendment was valid and short-term rentals may be restricted.

In the unpublished, nonbinding but persuasive case, *Timothy T. Caggiano et. al v. Village of Oakcreek Association*, Case No. P1300CV201700261, in the Superior Court in and for the County of Yavapai, the Honorable Don Stevens held in favor of the Association, ruling that the homeowners "had actual or constructive notice that short-term rentals were subject to various County ordinances and Declaration restrictions." See page 2 of Exhibit B.

The Court also found that:

> [T]he enactment of A.R.S §11-269.17 (SB 1350), which prevented counties from prohibiting short-term rentals, does not change the terms and conditions of the Declaration. The Association is a distinct legal entity that, barring express conflict with a specific statute directed at Associations, may govern itself and adopt such measures as it sees fit, if done according to the governing documents. The CC&Rs constitute a contract. *McDowell Mountain Ranch Cmty. Ass'n, Inc. v. Simons*, 216 Ariz. 266,269, 1 14, 165 P.3d 667, 670 (App. 2007). In interpreting a contract, the goal is to give effect to the intent of the parties. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). The Court must look to the plain language of the agreement and if that language is clear, the Court will enforce the contract as written. *Mining Inv. Group, LLC v. Roberts*, 217 Ariz. 635, 639, 1 16, 177 P.3d 1207, 1211 (App. 2008). Plaintiffs could not reasonably rely on the change in a statute governing counties to validate their use of their property beyond what was allowed in the Declaration. The Court finds that whatever public

[4] Section 9.04, Amendment of Master Declarations, provides: "These Master Declarations may be amended by a majority vote of the members of the Association voting at any meeting of the membership noticed pursuant to the By-Laws of the Association, provided the proposed amendment is included in the notice of the meeting."

> policy decisions that led to the change in the law governing Yavapai County do not benefit the Plaintiffs as member of the Association.

Exhibit B, at 3.

In the unpublished, nonbinding but persuasive case *Scott S. Servilla v. Village of Oakcreek Association*, in the Office of Administrative Hearings, No. 18F-H1817018-REL, Administrative Judge Tammy L. Eigenheer, held that the vote to amend the Declaration and include Section 4.23 was valid:

> [T]he vote at the November 10, 2016 meeting was valid in that a quorum of members voted and a majority of the members voting voted in favor of the proposed amendment.

See Exhibit C at 5.

III. CONCLUSION

For the reasons discussed above, Defendant's Motion to Dismiss lacks merit and should be denied in its entirety. Opposition to the Motion is made on the grounds that taking all the factual allegations as true and all reasonable inferences arising therefrom, the Association can prove a set of facts to support the Association's claims for relief.

If the Court concludes that the Association's Complaint is inadequate in any respect, then the Association requests an opportunity to correct any such deficiency. Leave to amend, although discretionary, should be liberally granted. *Owen v. Superior Court*, 133 Ariz. 75, 79, 649 P.2d 278, 282 (1982). "Before the trial court grants a Rule 12(b)(6) motion to dismiss, the non-moving party should be given an opportunity to amend the complaint if such an amendment cures its defects." *Wigglesworth v. Mauldin*, 195 Ariz. 432, 439, 990 P.2d 26, 33 (App. 1999). Therefore,

if the Court is inclined to grant Defendant's Motion, the Association requests leave to amend its Complaint to correct any deficiency.

Additionally, Plaintiff respectfully requests its attorney fees and costs associated with drafting and filing this Response.

RESPECTFULLY SUBMITTED this 8th day of June , 2022.

CARPENTER, HAZLEWOOD, DELGADO & BOLEN, LLP

By: /s/ Tessa Hustead
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THE FOREGOING electronically filed
This 8th day of June, 2022, with:

Clerk of the Court
Yavapai County Superior Court
www.AZTurboCourt.gov

COPY of the foregoing delivered
via TurboCourt E-Service Notification
this 8th day of June, 2022, to:

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By: /s/ Katie M. Lilje

EXHIBIT A

Village of Oakcreek Association

Minutes – Special Meeting of Members
Report on Vote on Leasing and Schedule of Fines Amendment
November 10, 2016

CALL TO ORDER: Meeting called to order at 2:00 pm. Present were Rob Schaefer, Joe Jansen, Ken Root, Jan Lisowski, Rick Comfort, and Deb Brewer. Jim Kautz arrived at 2:20 pm.

Rob Schaefer stated that he had been designated to chair the meeting in Earl Svenningsen's absence. He also mentioned that the meeting was being video recorded by a VOCA member.

Agenda:
Rob Schaefer opened the meeting and stated that the purpose of this special meeting was to report the results on the vote on both the Leasing and Schedule of Fines Amendments to the Master Declaration of VOCA. A final call for ballots was issued and, and after receiving any outstanding ballots, the election was closed at 2:04 pm. Approximately 75-80 persons attended the meeting.

The tally committee consisted of Vaughan Hall, George Shelley, and Nancy Shelley. Rob Schaefer, VOCA Board member, oversaw the tally process.

Member Forum on voting process:

- Several members reported having phoned the VOCA office requesting additional info on the ballot measures, and claimed they got no response.
- One member complained that there was no discussion of the potential fines for violating the leasing restriction.
- One member felt confused about the Amendment vs. the recent change in the Arizona law.
- Some members felt the Boards recommendation to approve the Amendments was inappropriate.
- One member felt the board should have presented a detailed Pro and Con statement on the proposed Amendments.

The final results from the tally committee were as follows:

Total properties in VOCA	2345	
Members not eligible to vote	98	(lot assessments past due, outstanding fines, etc)
Total eligible votes	2247	
Quorum Requirement (20%)	449	
Total ballots received	1067	(Quorum achieved!).
Number of ballots disqualified	51	(no signature, no vote, double vote)

Number of votes FOR the Amendments 564
Number of votes AGAINST the Amendments 452

Based on the simple majority requirement; the Amendments are approved. The Amendments will now be added to the Master Declaration.

Meeting adjourned at 3:13 pm
Submitted November 14, 2016 by Joseph Jansen, Secretary

EXHIBIT B

SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI

Timothy T. Caggiano and Karen K. Caggiano, as Trustees of The Timothy T. Caggiano and Karen K. Caggiano Revocable Trust Agreement dated May 13, 2008 and any amendments thereto, Plaintiffs, vs. Village of Oakcreek Association, an Arizona non-profit corporation, Defendant.	**Case No.** P1300CV201700261 **UNDER ADVISEMENT RULING AND ORDER RE: APPLICATION FOR PRELIMINARY INJUNCTION**	**FILED** **DATE:** SEP - 7 2017 4:44 **O'Clock** P **. M.** ✓ ***DONNA MCQUALITY, CLERK*** **BY:** K MORTENSON **Deputy**

HONORABLE DON STEVENS	**BY:** Felicia L. Slaton, Judicial Assistant
DIVISION PTB	**DATE:** September 7, 2017

The Court received and considered Plaintiffs' *Application for Preliminary Injunction*, Defendant's *Response to Application for Preliminary Injunction*, and Plaintiffs' *Reply in Support of Application for Preliminary Injunction*. On August 31, 2017, the Court conducted an evidentiary hearing and received sworn testimony regarding the disputed issues. Exhibits 1-38 were admitted by stipulation. The parties submitted a separate pleading entitled *Stipulated Facts and Exhibits* ("SFE"), which the Court accepts and adopts as undisputed facts and part of the record, and is included as part of the factual basis for this decision, whether or not specifically referenced.

Based on the facts and testimony submitted, the Court makes the following findings of fact:

1. Plaintiffs took ownership of their property ("Sugarloaf") in 2007 at a time when the property was governed by and subject to the Master Declaration of Restrictive Covenants ("Declaration"). (SFE #2, 3, 4).

    a. Plaintiffs were aware that Sugarloaf was in a deed restricted community. (SFE #5).

    b. All properties within the Village of Oakcreek Association ("Association") were governed by the Declaration. (SFE #9, 10, 11).

    c. It is undisputed that Sugarloaf is within an area designated as a 'Residential R1L" District. (PZO Chapter 4).

    d. The Court finds that although there were different versions of the Declaration in effect as a result of various amendments, those changes do not materially affect the Court's decision.

2. The Court takes judicial notice of the Planning & Zoning Ordinances ("PZO") of Yavapai County

in effect at the time Plaintiffs acquired Sugarloaf in 2007. These include:

a. "Lodging" is defined as "the rental, lease or sale of a dwelling unit on a daily or weekly basis or any other basis for less than thirty (30) consecutive days." (PZO §301)

b. "Dwelling Unit" is defined as "a room (or group of rooms) designed for one (1) or more persons living and cooking as one (1) homogeneous body (see FAMILY) and containing one (1) interior accommodation for preparation of meals. A dwelling unit does not include lodging as defined in this Ordinance."

c. "USE (PRIMARY)" is defined as "a use that is conducted as the principal use of the lot on which it is situated. For example a single-family dwelling unit shall be deemed to be the primary use on a residentially zoned parcel or lot on which the unit is situated."

d. "USE (PRIVATE)" is defined as: "a use restricted to the occupants of a lot or building together with their guests, where compensation is not received and where no commercial activity is associated with same."

e. "USE (RESIDENTIAL) shall be deemed to include single and multiple dwelling units, guestrooms, rooming and boarding houses, fraternity and sorority houses, convents, homes for the aged and similar."

f. It is undisputed that the Sugarloaf property is in an area designated as "residential district" as defined in Section 410, R1L District. Permitted uses in an R1L District do not include a provision for short-term rentals.

g. In a Section 420 C1 District, the following uses are permitted:

    i. ¶M. Bed & Breakfast Country Inns - As defined under Section 301(Definitions).
    ii. ¶N. Hotel/Motel/Resorts.
    iii. ¶P. Lodging and Timeshares.

h. In July 2000, Yavapai County amended §103 of the PZO to include the following: "This is an amendment to the Planning & Zoning Ordinance to specify that the rental, lease or sale of dwelling units in less than thirty (30) day increments is prohibited in residential zones." Section 109H.C1 –2p. Added a new item to read: "Lodging and Timeshares." (See §701 Ordinance Amendments, p.220).

i. In June 2001, §103 amended the definition of Dwelling Unit to delete weekly & daily rentals. (Id. P.221).

The Court therefore finds that before Plaintiffs purchased Sugarloaf, they had actual or constructive notice that short-term rentals were subject to various County ordinances and Declaration restrictions.

3. The Court takes judicial notice that based on readily available internet resources, including the Trip Advisor site referred to by Mr. Caggiano, the issue of enforcement of the short-term rental ordinance by Yavapai County prior to the passage of A.R.S §11-269.17 (SB 1350), was a matter of public knowledge and was included in publications of general circulation in Yavapai County, particularly in and around Sedona, Arizona, as early as 2011. Regardless of public knowledge, however, Plaintiffs were not excused from compliance with applicable ordinances as well as restrictions in the Declarations, regardless of whether Yavapai County was uniformly or aggressively enforcing the ordinances applicable to Plaintiffs' rental activities. The Court finds that Plaintiff could not reasonably rely on lack of enforcement to justify the decision they made while the ordinance was in effect.

4. The Court finds that the enactment of A.R.S §11-269.17 (SB 1350), which prevented counties from prohibiting short-term rentals, does not change the terms and conditions of the Declaration. The Association is a distinct legal entity that, barring express conflict with a specific statute directed at Associations, may govern itself and adopt such measures as it sees fit, if done according to the governing documents. The CC&Rs constitute a contract. *McDowell Mountain Ranch Cmty. Ass'n, Inc. v. Simons,* 216 Ariz. 266, 269, 1 14, 165 P.3d 667, 670 (App. 2007). In interpreting a contract, the goal is to give effect to the intent of the parties. *Taylor v. State Farm Mut. Auto. Ins. Co.,* 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). The Court must look to the plain language of the agreement and if that language is clear, the Court will enforce the contract as written. *Mining Inv. Group, LLC v. Roberts,* 217 Ariz. 635, 639, 1 16, 177 P.3d 1207, 1211 (App. 2008). Plaintiffs could not reasonably rely on the change in a statute governing counties to validate their use of their property beyond what was allowed in the Declaration. The Court finds that whatever public policy decisions that led to the change in the law governing Yavapai County do not benefit the Plaintiffs as member of the Association.(See also SFE ¶¶9, 10, 11).

5. Mr. Caggiano testified that when he became aware of the Yavapai County ordinance, he learned that he could apply for a conditional use permit from the County to allow use of the property for short-term rentals. (See SFE 10, p. PL00121). He understood from the County that such a permit would be granted but only if the Association consented. Mr. Caggiano subsequently determined informally that such an application to the Association would not be viewed favorably, so he decided not to apply for the permit at all. The Court finds that the failure to exhaust administrative remedies by getting the permit would likely be considered by the trier of fact in determining whether Plaintiffs should prevail, and whether the equities favor Plaintiff. Likewise, Plaintiffs' failure to give the Association the opportunity to review and consider Plaintiff's proposal is another fact that would be considered by the trier of fact in determining whether Plaintiffs should prevail.

6. Plaintiffs also submitted exhibits relating to efforts to lobby legislators to pass legislation to amend A.R.S. §11-269.17 to refer to the economic benefit to the community beyond the Association, particularly for small businesses that help service and maintain rental properties such as Sugarloaf. The Court finds that as a matter of law, such economic benefits to others, though true, are not relevant to whether the Declaration may be enforced or modified. The Association is organized for the benefit of all owners. The Association is not required to weigh or consider the economic benefit of anyone other than the owners.

7. Section 4.02 of the Declaration (all versions) provides language that puts owners on notice that the intent is to prohibit "...any purpose other than for personal residential purposes." The Court finds that the addition of the words "Single Family" does not change the residential character of the property. The words "personal" must reasonably be interpreted to mean personal residential purposes of the owner. As noted in ¶2, above, a plain reading of the Yavapai County Zoning requirements does not support Plaintiffs' argument that short-term renters are "residing" in the rental property and the short-term rental is therefore a "residential" purpose. The use of the word "lodging" in the Ordinance describes Plaintiffs' use of the property. This interpretation is supported by the fact that bed & breakfast businesses, hotels, motels, lodging and timeshares are permitted uses only in a commercial zone. The Court expressly rejects Plaintiffs' argument that §4.02 "*expressly allowed members of the Association to rent their properties.*" (Application p.3, §C). There are no words in any version of §4.02 that support that position.

8. Plaintiffs argue that the term "guest" in Section 4.01 must include all persons or entities listed in the definitions §2(G) (2010 version) which include tenants. However, §2(L) (2010 version) states that "Owner shall not include... lessee". The prohibition that is the subject of this lawsuit is short-term rentals. Plaintiffs are still able to offer and rent the Sugarloaf property for rentals longer than thirty days. The Court finds that the single term "tenant" or "lessee" can refer to permitted uses longer than thirty days. The definition of "guest" should be given its ordinary meaning. In this case, for instance, Plaintiffs allowed friends and family members to use their property without charging them a commercial rate. That would clearly fall within the common understanding of the word "guest." The Court finds that Plaintiffs' extension of the word guest to include tenant or lessee is strained and does not support the conclusion that leases shorter that thirty days were not expressly prohibited. The language of the Declaration must be read in its entirety, given common meanings to commonly used words.

9. Section 4.03 provides: "No business of any kind or character whatsoever shall be conducted from or on any Lot or Unit." The Court finds that short-term rentals of the kind being operated by Plaintiffs are a business, complete with marketing, agents and contracts. For instance,

    a. Plaintiffs formed an LLC in 2009, called Sugar Loaf Butte Enterprises, LLC. Plaintiffs provide short-term rentals of the Caggiano Property through their LLC (See Exhibit 10).

    b. Plaintiffs produced a spreadsheet (Exhibit 32), which showed Plaintiffs' income from the property. The Court finds that the income is not incidental or occasional, and that the property is being used as a business.

    c. The Exhibit also demonstrates that for each the last four (4) years, the "Nights Leased" was roughly two-thirds of the entire year. Plaintiffs own property that they want to rent out as frequently as possible to third parties in order to maximize the economic value of their property. The Court finds that such use is a business that is prohibited unless the "business" is for leases longer than thirty days.

d. Mr. Caggiano testified that he and his wife do not live in Sugarloaf on any regular or long-term basis, and their principal residence is in the Greater Phoenix metro area. Mr. Caggiano testified that if permitted to offer short-term rentals, he would be able to increase the gross income derived from this business, and would be able to increase the nights that were rented until full occupancy was achieved.

The Court therefore concludes that Plaintiffs' rental of their Sugarloaf property is for business purposes, not a residential use. The common meaning of the term "residence" requires more than simply occupying the space for a limited period of time. The zoning laws clearly characterize this type of activity as a commercial business. (See ¶2, above), and Plaintiffs' successful short-term rentals are no different than hotels, motels, or similar short-stay rentals that must be located in an area zoned for commercial use. The Court finds that a jury would be convinced that Plaintiffs are operating a business and that Plaintiffs would likely not prevail; and the jury would likely not find that the equities favor Plaintiff. This possibility is made more likely if Plaintiffs' have reported their income as a business expense on their tax returns.

10. Under the Declaration section entitled General Land Use, §4.04, home businesses are allowed, but "...conducted as a matter of grace resting in the sole discretion of the Board and shall be allowed only as long as the rules permit such occupation." This language leads the Court to conclude that whatever rental activities Plaintiffs were engaged in, they had no reasonable expectation that they were free to rent for any duration they decided upon, or that the Declaration could not be amended to restrict their right to rent their home as a business for short-term rentals.

11. The Court finds that the general flaw in Plaintiffs' argument regarding fundamental property rights of owners of land is that those rights can be surrendered as a condition of buying property subject to documents such as the Declaration in this case. The Declaration imposes many restrictions, and include penalties for non-compliance. It is common knowledge that homeowner associations are self-governed and routinely enforce the restrictions found in the Declaration in order to preserve the common interests and benefits for all owners in the association. Plaintiffs agreed to comply with the Declarations and are bound by them regardless of whether they read them.

12. The Court finds that Plaintiffs have not challenged the process used by the Association in presenting the issue for a vote by notifying owners of the proposed change, setting a date, sending out notices and ballots in a timely fashion, establishing a deadline for receipt of ballots, verifying that only authorized persons could vote, and counting the ballots cast, after rejecting non-complying ballots. In an undated memo from the Association President (Ex. 13, in evidence), the Court finds that flyers and a paid ad had been distributed against the proposed amendment in this case, and a point-by-point response to the "Vote No" flyer was provided by the VOCA Board, along with its recommendation. The issue was the topic at several meetings following the passage of SB1350, which became A.R.S. §11-269.17 in 2017. (See, Ex. 17, pp. PL00395, CIC.VillageOak00828, Ex. 18, PL00794, PL00799, PL00800, Exhibit 20, PL00805 (public forum); Exhibit 21, PL00796, (ballot approval), Exhibit 22, PL00789, Ex. 22, CIG.VillageOak01081 (status of ballots), Exhibit 23, PL00009 (member forum and vote results), Ex. 24, PL00393, Ex. 25 (fines), Ex. 27 (results). The Court therefore finds that the Association

provided the owners entitled to vote with a full and fair opportunity to be informed, to be heard, and to take such action as they felt was necessary. The Court rejects Plaintiffs' position that the Association improperly amended the Declaration in the fall of 2016.

13. The Court finds that but for the multiple-issue ballot, all other aspects of the action taken by the Association are valid and binding.

14. With respect to the provisions of A.R.S. §33-1812(A), the Court finds that the ballots used for the amendments that are the subject of this lawsuit do not comply with the requirements of the statute. That statute requires that absentee ballots should be limited to single issues on which each voter may cast a separate vote, for or against. The policy for this statute is clear. If absentee ballots are used, there is no opportunity for a member to exercise the rights available when there is an open meeting where various parliamentary procedures can be used. Therefore, the Court finds that the ballots used to make the change to the rental provisions and fines did not comply with the requirements of A.R.S. §33-1812(A).

    a. Plaintiffs argue that as a result the ballots are void, the vote is void, and the decision reached as a result of that vote cannot be enforced. The Court finds that the statute requires that the Association "shall comply" with the statute, but includes no enforcement penalty.

    b. The Court finds that the advance notice of the proposed actions that was given to owners (See e.g. ¶12, above) was sufficient to place owners on notice of the intended ballot procedure and the issues that would be voted on.

        i. The fine process was discussed and included in the information provided to owners.

        ii. The need for a "substantial" fine was considered to enforce compliance. (See Ex. 20, PL00805 (fine amount), Ex. 24, PL00393 (process), Ex. 25, PL000396 (process, fine amount and ballot recount).

        iii. Had any owner, including Plaintiffs, objected to the ballot, in writing or otherwise, because of the requirements of the statute, the Association could have reprinted the ballots and/or rescheduled the vote.

        iv. There is no evidence that Plaintiffs or any owner formally contested the form of the ballot because it did not comply with A.R.S. §33-1812A.

    c. Plaintiffs also contend that the amount of the fine is unreasonable and excessive because the original fine amount was limited to $50.00 per day for many years. The Court finds that the issue was properly put to a vote and that the Association had a reasonable and good-faith basis to establish a fine that was sufficient in size to obtain compliance. The Declaration includes an enforcement process that ensures due process and review.

(Declaration §§ 5.09, 10, 11, 12, and 13, (Recorded 1988 Amendments, Book 2023, pp. 810-816.)

The Court rejects the Association's argument that these two discrete and unrelated provisions are part of a single "action." Although the Association's meeting records demonstrate that the amount of the fine was discussed in connection with the short-term rental provision, the Court finds that the owners, including Plaintiff, waived strict compliance with A.R.S. §33-1812(A) by voting without express protest or objection. The Court also finds that the risk of confusion about substantial fines was minimal to non-existent.

The Court therefore finds that the *Application for Preliminary Injunction* must be denied. The Court finds that although Plaintiffs have raised good faith arguments to support their position of the public policy expressed in A.R.S §11-269.17 (SB 1350), their position is contrary to the plain and express language of the provisions in the Declaration that are at issue in this case. The Court finds that the Association adopted and implemented reasonable procedures for ensuring fairness to the process and notice to the owners. The Court finds that Plaintiffs did not establish sufficient evidence to justify the issuance of a Preliminary Injunction, including the following elements:

1. **Plaintiffs did not prove a strong likelihood of success on the merits**. Based on the foregoing, the Court finds that a jury would likely find that Plaintiffs are sophisticated business people who understandably would like to obtain an economic benefit from Sugarloaf when they were not there.

   a. The Court finds that the jury would likely be persuaded that engaging in a short-term rental business without determining that such rentals were prohibited by the then-existing ordinances for Yavapai County was not reasonable.

   b. The jury would understand that Plaintiffs profited from their business activities in violation of Yavapai County ordinances from the time they first started the business until 2017 when the County ordinance was formally enacted.

   c. Likewise, the jury would be likely to find that engaging in such business activities without the express permission of the Association or even asking the Association for specific clarification before engaging in the rental activity was not reasonable or justified under the circumstances.

   d. The Court finds that the credibility and motives of the Plaintiffs might be challenged by the Association when Plaintiffs argue that they are complying with the letter of the requirement by leasing for 30 day periods, even though Plaintiffs advertise for short-term rentals. Although Plaintiffs label the contracts "30 day contracts", the evidence from Mr. Caggiano was that Plaintiffs only charge for the days the client actually uses, not the days that the unit is "occupied". The jury might find that Plaintiffs continue to be in violation of the limits imposed by the owners at a properly called, noticed and regular process, and in spite of a majority vote of the other owners.

e. In addition, the undisputed fact that almost all of the rentals are only occupied for approximately half the time they are leased would likely cause a jury to find that the arrangement is an intentional profit-making business, not a "residential" use. The undisputed evidence is that Sugarloaf is not being used as a residence by Plaintiffs themselves, except for occasional short term stays when the property is not otherwise occupied. The trier of fact would likely find that renting Sugarloaf is a business that is limited by the express provisions of the Declaration.

f. Plaintiff's argument that they hold the property off the market for the full 30 days and are therefore complying with the letter of Associations requirement would probably not be considered good faith compliance with the Declarations.

2. **Plaintiffs did not establish irreparable harm**. Plaintiffs argue that deprivation of property rights and the limitation of their freedom to rent to third parties constitutes irreparable harm. The Court finds that irreparable harm does not flow as the result of any law or provisions in the Declaration that are validly adopted and uniformly enforced. The Court specifically finds that all of the damages that might be caused by enforcement of the short-term rental limit can be quantified quite easily. It is not necessary to prove a negative. Plaintiffs offered various calculations of the losses they claim to have sustained, and the method by which those losses were calculated. An economist could easily compare short-term rental rates in the areas, estimate occupancy rates, and average those over a year and then express opinions about any losses sustained by Plaintiffs as a result of being expressly unable to rent for periods less than thirty days. The Court finds that the actions by the Association were not the cause of any economic loss to Plaintiffs. The Court finds that any damages claimed by Plaintiffs are purely economic and therefore not irreparable.

3. **The balance of hardships do not favor Plaintiffs**. Plaintiffs are only one set of owners out of 1,000 or more. The inability to use one's single-family residence for what the Court finds is a commercial business purpose, operated for a profit, in violation of express limitations of the Declaration, is not a hardship. The balance of hardships favors the Association because it modified the Declaration to protect the integrity of the Association in a way that affects and benefits all owners equally. Plaintiffs' argument, in effect that all owners could benefit financially from the rule that they want to have adopted, ignores the reality of the impact that short-term rentals could have on the overall character of the community. Those very issues were raised (by Plaintiffs and others) during the forums, discussions, and meeting before the vote, and were rejected by the owners who voted.

4. **Plaintiffs did not establish that the relief that was sought advances the public interest.** Plaintiffs argue that the passage of SB1350 (embodied in A.R.S. §11-269.17) is a recognition that the public policy of Arizona supports the idea that limitations on private property interests should not be restricted by regulations. Plaintiffs' argument ignores the statutes that establish various property regimes for common ownership, including restrictions on the use of property within an association. Plaintiff's argument that there may be additional legislative changes in the future is insufficient as a matter of law to support the argument that the current case advances the public interest. For the reasons described elsewhere in this opinion, the Court finds that this case seeks to advance the personal financial interests of Plaintiffs, not the community as a whole.

The Court has carefully considered the decision in *Dreamland Villa Community Club v. Raimey*, 224 Ariz., 42, 226 P.3rd 411 (App. 2010) and related case law. The Court finds that Plaintiff came into the Association subject to the Declarations. The vote of the Association did not "strip away" any rights that were not already subject to the Declarations; and that were also subject to valid Yavapai County ordinances in effect during almost the entire time that Plaintiffs have owned Sugarloaf. The vote of a "simple majority" was all that was required by the governing documents, once a proper quorum was established. The Court therefore finds that this case is not governed by *Dreamland* which involved markedly different facts not present in this case.

For each of the foregoing reasons, **IT IS THEREFORE ORDERED** Plaintiff's *Application for Preliminary Injunction* is DENIED.

DATED this 7th day of September, 2017.

Don Stevens

HON. DON STEVENS
Judge of the Superior Court, Division PTB

cc: John A. Buric/Peter J. Foster- Warner Angle Hallam Jackson & Formanek PLC (e)
Mark K. Sahl/Charlene Cruz- Carpenter Hazlewood Delgado & Bolen, PLC (e)

EXHIBIT C

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Scott S. Servilla, Petitioner, vs. Village of Oakcreek Association, Respondent	**No. 18F-H1817018-REL** **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: June 26, 2018

APPEARANCES: Petitioner Scott S. Servilla appeared on his own behalf. Respondent Village of Oakcreek Association was represented by Mark K Sahl.

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

FINDINGS OF FACT

1. Village of Oakcreek Association (Respondent) is an association of 2436 homeowners located in Arizona.

2. Scott S. Servilla (Petitioner) filed a petition with the Arizona Department of Real Estate (Department) on or about November 13, 2017, alleging that Respondent had violated A.R.S. § 33-1817(1); A.R.S. § 1812(B)(2); and the community's Master Declaration.

3. Initially, Petitioner filed a single issue petition and paid the corresponding $500.00 filing fee. Upon an order from the undersigned Administrative Law Judge instructing Petitioner to identify the single issue upon which he wished to proceed or to pay the additional filing fee for multiple issues, Petitioner paid an additional $1000.00 filing fee and set forth the three issues he wished to be heard at the hearing.[1]

4. The three issues Petitioner identified were as follows:

> (1) the vote November 10, 2016 violated A.R.S. § 33-1817[(A)](1) and Declaration because a majority of vote required 1173 votes to amend the declaration as set forth in section B.1 of the Petition, and, therefore, requests an order that the amendment to the declaration is invalid and a civil penalty to be imposed on Respondent;

[1] Petitioner asserted that he believed he had set forth a single issue—Respondent failed to comply with the governing documents (Master Declaration and By-Laws) with respect to the Amendments to the Declaration voted on at the November 10, 2016 meeting.

(2) the vote November 10, 2016 violated A.R.S. § 33-1812(B)(2) and the Declaration because the written ballot used did not provide a separate opportunity to vote for or against each proposed action as set forth in section B.2. of the Petition, and, therefore, requests an order that the amendment to the declaration is invalid and a civil penalty to be imposed on Respondent; and

(3) the Respondent has violated and continues to violate By-Laws Section 8, Article VIII by imposing fines in excess of $50 per violation before and after the Members of the Association voted against a proposed Amendment to Section 8 of Article VIII of the By-Law to raise the fines as set forth in section B.2. of the Petition, and therefore, requests an order that the Association cannot levy fines in excess of $50 per violation and a civil penalty to be imposed on Respondent.

All errors in original.

5. Section 9, Subsection 9.04 of the Declaration provides as follows:

These Master Declarations may be amended by a majority vote of the members of the Association voting at any meeting of the membership noticed pursuant to the By-Laws of the Association, provided that the proposed amendment is included in the notice of the meeting.

6. Article IV, Section 1 of the By-Laws provides as follows:

A majority of affirmative votes cast shall be required for passage of any resolution and twenty (20) percent of the registered memberships shall have voted to constitute a quorum unless stated differently in the Articles of Incorporation, these By-Laws, or Declarations of the Association.

7. Respondent issued a Notice of Special Meeting of Members (Notice) indicating a meeting would be held on November 10, 2016, and that "[t]he sole purpose of the Special Members Meeting is to [v]ote on the approval of the Leasing and Schedule of Fines Assessment." Included with the Notice was an absentee ballot setting forth the proposed amendment. No allegation was raised that that notice provided to the members was improper under the governing documents.

8. The proposed amendment listed changes to the Master Declaration including the addition of a new section, 4.23 Leasing of Lots and Units; Restrictions and Limitations and the complete replacement of an existing section, 5.08 Schedule of Fines. The proposed amendment established a minimum lease term of 30 days, prohibited

leases of less than the entire lot or unit, and permitted the committee to adopt a schedule specifying the recommended fines or range of fines for violations.

9. The absentee ballot allowed the member to cast a vote "FOR THE LEASING AND SCHEDULE OF FINES AMENDMENT" or "AGAINST THE LEASING AND SCHEDULE OF FINES AMENDMENT." Petitioner returned an absentee ballot voting against the proposed amendment.

10. On November 10, 2016, the special meeting of members was held. In total, 1067 ballots were received on the proposed amendment, constituting approximately 44 percent of the members voting. Of those voting, 564 voted in favor of the proposed amendment, constituting approximately 53 percent of the votes cast.

11. This vote was the subject of a lawsuit brought by a different homeowner in Yavapai County Superior Court. In that matter, the Yavapai County Superior Court denied an Application for Preliminary Injunction and, in so doing, made extensive preliminary findings and rulings. Of note, Petitioner requested that the Administrative Law Judge give weight to the findings of the Yavapai County Superior Court as it related to the alleged violation of A.R.S. § 33-1812(A), but ignore the other findings of the court that were contrary to his position.

12. At hearing, Petitioner argued that a majority of members needed to vote in favor of an amendment to the governing documents. Thus, Petitioner stated that for the proposed amendment to pass, 1219 members would have to vote in favor of it. Petitioner argued that Respondent's interpretation, that for an amendment to pass only a majority of the quorum needed to vote in favor, would result in 10 percent of members being able to make a major change to the governing documents.

13. Petitioner also argued that because the By-Laws have a limitation on fines of $50.00 per day and a proposed amendment to the By-Laws to eliminate that limitation was voted down in April 2017, the homeowners expressed their opposition to that part of the proposed amendment at issue in this matter. Petitioner asserted that had the proposed amendment been broken into two parts, the part of the proposed amendment dealing with the fines most likely would have failed.[2] Petitioner acknowledged that he did

[2] Notably, Petitioner indicated that the vote as to this issue was 735 total ballots were received with 387 voting "No" and 361 voting "Yes".

not raise any objections to the manner in which the November 10, 2016 vote occurred until April 2017 and did not file the instant petition until November 13, 2017. Petitioner urged that the fines should remain at $50.00 per violation.

14. At hearing, Respondent argued that Petitioner had waived any right to object to the vote by not raising his objection prior to the vote occurring. Respondent maintained that the governing documents are clear that a majority of the members *voting* are necessary to approve a proposed amendment. Respondent also asserted that, even if Respondent violated A.R.S. § 33-1812(A)(2), the statute does not include an enforcement provision so no remedy exists. Respondent indicated that the fines are $50.00 per day per violation and not per occurrence.

CONCLUSIONS OF LAW

1. The Department has jurisdiction to hear disputes between a property owner and a homeowners association. A.R.S. § 32-2199 *et seq.*

2. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated the governing documents and statutes. A.A.C. R2-19-119.

3. A preponderance of the evidence is "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force." BLACK'S LAW DICTIONARY 1220 (8th ed. 2004).

4. A.R.S. § 33-1817(A)(1) provides as follows:

> 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.

Emphasis added.

5. The clear and unambiguous language of the Master Declarations provides that the "Master Declarations may be amended by a majority vote of the members of the Association *voting* at any meeting of the membership." Petitioner's argument would necessitate ignoring the word "voting" in the applicable language. While Petitioner cited other cases in support of his reading of the Master Declaration, those other cases involve

the interpretation of significantly different language in the applicable governing documents.

6. Thus, the vote at the November 10, 2016 meeting was valid in that a quorum of members voted and a majority of the members voting voted in favor of the proposed amendment.

7. Petitioner's first claim must fail.

8. A.R.S. § 33-1812(A) provides that absentee ballots may be used for voting and requires that "[t]he ballot shall set forth each proposed action" and "shall provide an opportunity to vote for or against each proposed action."

9. Respondent argued that the "proposed action" was to amend the Master Declaration. Petitioner argued that the "proposed actions" were 1) to add the new section 4.23 Leasing of Lots and Units; Restrictions and Limitations and 2) to completely replace the existing section, 5.08 Schedule of Fines.

10. Petitioner's argument that the absentee ballot did not provide an opportunity to vote for or against each proposed action is well taken. However, the statute does not provide for any enforcement mechanism.

11. Petitioner's second claim is granted, but there is no remedy that the Administrative Law Judge may order.

12. Petitioner identified his third issue to be that "Respondent has violated and continues to violate By-Laws Section 8, Article VIII by imposing fines in excess of $50 per violation . . . ." However, Petitioner presented no evidence that Respondent had, in fact, imposed such fines.

13. Given that Petitioner failed to establish that the fines underlying his third issue actually occurred, Petitioner is essentially asking the Administrative Law Judge to render a declaratory judgement that the imposition of such fines would be a violation. Such a remedy is not available from the Administrative Law Judge.

14. Petitioner's third claim must fail.

15. The Administrative Law Judge does not find that a civil penalty is warranted in this matter.

ORDER

In view of the foregoing,

IT IS ORDERED that Petitioner's petition is granted in part and is denied in part.

IT IS FURTHER ORDERED that Respondent pay Petitioner his filing fee of $500.00, to be paid directly to Petitioner within thirty (30) days of this Order.

Pursuant to A.R.S. § 32-2199.02(B), this Order is binding on the parties unless a rehearing is granted pursuant to A.R.S. § 32-2199.04 based on a petition setting forth the reasons for the request for rehearing, in which case the order issued at the conclusion of the rehearing would be binding on the parties.

Done this day, July 19, 2018

/s/ Tammy L. Eigenheer
Administrative Law Judge

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Arizona Department of Real Estate

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