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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 E. BONHAM; JOHN DOES
I-V, inclusive; JANE DOES I-V,
inclusive; BLACK CORPORATIONS
I-V, inclusive; WHITE
PARTNERSHIPS I-V, inclusive;
Unknown Heirs and Devisees of each
of the above-names Defendants, if
deceased,

Defendants.

Case No.: V1300-CV2022-80081

**DEFENDANT LANCE BONHAM'S
REPLY IN SUPPORT OF MOTION TO
DISMISS**

Defendant Lance E. Bonham ("Bonham" or "Defendant"), by and through undersigned counsel, hereby replies in support of his Motion to Dismiss Plaintiff Village of Oakcreek Association's ("Association" or "Plaintiff") Complaint.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

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3 **I. The Amendment Fails the Sufficient Notice Test of Kalway.**

4 The Association is not entitled to relief under any interpretation of the facts
5 susceptible of proof. Fid. Sec. Life Ins. Co. v. State Dep't of Ins., 191 Ariz. 222, 224
6 (1998). In its response, the Association does not even attempt to assert facts it can
7 establish to defeat the motion. Instead, the Association takes illogical, nonsensical legal
8 positions. None of the legal positions of the Association have merit. Interpreting the facts
9 that are established by the Association's Complaint and public records result in the
10 inevitable conclusion that the Association has failed to state a claim. Cullen v. Auto-
11 Owners Ins. Co., 218 Ariz. 417 (2008)(the court may consider public records regarding
12 matters referenced in the complaint without going outside the pleadings).

13 The sufficient notice test of Kalway is dispositive. An Association cannot "create
14 new affirmative obligations when the original declaration did not provide notice to the
15 homeowners that they might be subject to such obligations." Kalway at ¶14, 24. A
16 general amendment provision is inadequate to provide the requisite notice.
17 "[A]mendments cannot be entirely new and different in character untethered to an
18 original covenant." Kalway at ¶17, 25. The Association has attempted to implement a
19 restriction on rentals when the Original Declaration did not impose any such restriction.
20 The Amendment is "untethered" and the Court must order that the Amendment is
21 unenforceable.

22
23 **A. Bonham Did Not Purchase the Property After the Proposed Amendment.**

24 The Association's primary argument is that the Amendment is valid
25 because it was recorded prior to the recording of Bonham's quitclaim deed. That,
26 however, is an incorrect analysis. Bonham became an Owner of the Subject Property
27 when Bonham acquired equitable title in 2003. Furthermore, Bonham is a successor in
28 interest and retains the same rights as his mother.

1 The Association admits that Kalway holds that an HOA cannot place restrictions
2 on a landowner's use of their land if the declaration in effect at the time of purchase did
3 not provide sufficient notice. Kalway at ¶10, 23. The Association has failed to recognize
4 that Bonham did not purchase the property when it was quitclaimed to him in 2016.
5 Rather, Bonham's mother purchased the property in 1989 (*See* Exhibit 1 to Motion to
6 Dismiss). In 2003, the Subject Property was transferred by his mother into his mother's
7 trust with Bonham named as a trust beneficiary. (*See* Exhibit 2 to Motion to Dismiss).
8 Bonham took sole title to the Subject Property as an individual in 2017 by Quit Claim
9 Deed in which he, as the sole Trustee of the Bette Simons Living Trust, deeded the
10 Subject Property to himself as an individual. (*See* Quit Claim Deed, Plaintiff's
11 Complaint, Exhibit A). Bonham or his mother, through a trust or otherwise, have owned
12 the Subject Property since 1989. In 1989, there was no rental restriction. Moreover,
13 although largely irrelevant, the Yavapai County Ordinance was also not in place. Thus,
14 Bonham, through his predecessor, or otherwise, was not on notice of a 30-day rental
15 restriction at the time the Subject Property was originally acquired and the restriction is
16 invalid.

17 "In a trust, the trustee holds legal title and the beneficiaries hold equitable title."
18 Williamson v. PVOrbit, Inc., 228 Ariz. 69,72, 263 P.3d 77, 80 (Ariz. App. 2011).
19 Pursuant to the Original Declaration at Section 2(xii), "Owner" means the record owner,
20 whether one of more persons or entities of equitable title (or legal title if equitable title
21 has merged therewith) to a lot or unit." (*See* Exhibit 3 to Motion to Dismiss). Thus,
22 Bonham, as equitable title holder, was an owner nearly fifteen (15) years before the
23 Amendment was recorded. The recording of the quitclaim deed simply merged equitable
24 title into legal title and does not fundamentally alter his property rights as suggested by
25 the Association.

26 Moreover, Bonham is a successor in interest and retains the rights acquired by his
27 mother in 1989. A successor in interest is one who follows another in ownership or
28 control of property and retains the same rights as the original owner. Home Builders

1 Ass'n v. City of Maricopa, 215 Ariz. 146, ¶ 18 (App. 2007). A successor in interest
2 retains the same rights as the original owner, with no change in substance. Miller v.
3 Hehlen, 209 Ariz. 462, n. 7, 104 P.3d 193, 200 n. 7 (App.2005). Bonham is the successor
4 in interest and is afforded all the rights of the original owner. In 1989, there was no rental
5 restriction in the Original Declaration, no restriction through the County, and no notice in
6 the Original Declaration that a fundamental change to the Original Declaration could be
7 imposed to drastically restrict property rights. Thus, the sufficient notice test of Kalway
8 was not met and Bonham is entitled to utilize the Subject Property consistent with the
9 restrictions contained in the Original Declaration.

10
11 **B. The Business Use Provision does not Prohibit Rentals and Further is**
12 **Insufficient to Put Bonham on Notice that Rentals could be Restricted.**

13 The Association contends that Bonham was on notice that rentals could be
14 restricted because commercial use is restricted. That position is inconsistent with the
15 express terms of the Original Declaration and Amendment. The Original Declaration
16 allows for residential use of the properties. Bonham's use of the Subject Property is
17 residential. Further, the Association's Amendment solely restricts leases for a lease term
18 of less than thirty (30) days. All other leases are allowed. The Association cannot
19 characterize short-term leasing as a business while allowing long-term rentals. To
20 interpret the commercial use restriction in the Original Declaration to prohibit residential
21 use is contrary to the intent of the Original Declaration.

22 Section 4.03 of the Declaration does not restrict rentals. Section 4.03 is entitled
23 "Commercial Business" and states,

24 No store, office or other place of business of any kind and no hospital,
25 sanitorium or other place for the care or treatment of the physically or
26 mentally ill shall be erected or permitted, and no business of any kind or
27 character whatsoever shall be conducted from or located on any lot or
28 unit....

There is no business being conducted from or located on Bonham's property. Bonham is
simply using the property consistent with the Original Declaration which allows

1 “residential purposes by the Owner, his family or guests.” (See Original Declaration at
2 Section 4.02, Exhibit 3 to Motion to Dismiss). When drafting the Original Declaration,
3 the Association could have stated that rentals are considered a business and prohibited the
4 same. The Association did not include any such language and the Court should not
5 expand the scope of a restriction.

6 Finally, in Horton v. Hartsook, the court of appeals agreed that residential rentals
7 in a residential community are not a business activity. 2009 WL 2244503. (unpublished
8 decision cited per Sup. Ct. Rules, Rule 111(C).). Horton clarified that residential rentals
9 are not inconsistent with residential use. Thus, residential rentals do not transform the
10 property into commercial use which is the purpose of the restriction. In Horton, the court
11 allowed vacation rentals because the Declaration did not prohibit them. Here, the
12 Original Declaration does not restrict rentals and rentals are allowed.

13 **C. County Zoning is Irrelevant and Insufficient to put Bonham on Notice**
14 **of the Amendment.**

15 Prior county zoning ordinances are irrelevant with respect to the
16 amendment of a private deed restriction. The zoning ordinance cannot constitute notice
17 because the original interest in the Subject Property was purchased in 1989, nearly eleven
18 (11) years before the implementation of the zoning ordinance.

19 Moreover, the Association’s position is contrary to the intent of A.R.S. §11-
20 269.17. That statute was implemented to encourage tourism in Arizona and states, “A
21 county may not prohibit vacation or short-term rentals.” Interpreting a now defunct
22 zoning ordinance which was implemented over ten (10) years after a property was
23 originally purchased as constituting notice to a buyer that his property could be restricted
24 in that regard is nonsensical. The prior existence of a zoning ordinance does not allow the
25 Association to pass an illegal private deed restriction. The Association cannot replace a
repealed zoning ordinance through an illegally adopted amendment.

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1 **D. The Amendment was Not Passed Pursuant to the Amendment**
2 **Provision**

3 The Amendment passed with only the approval of 24% of the membership.
4 The Original Declaration at Section 9.04 requires a “**majority vote of the members of**
5 **the Association** voting at any meeting of the membership” to pass an amendment. The
6 Amendment did not have a majority vote. The Association admits that a majority of the
7 members did not vote in favor of the Amendment. Rather, only 24% voted in favor of the
8 Amendment. The Association’s interpretation that only a majority of those who cast votes
9 is needed to amend the Declaration is incorrect and would lead to absurd results. If only
10 half of the members that vote were needed to pass the Amendment, the Amendment
11 could, in theory, be passed by two members if only three members voted. Obviously, that
12 was not the intent of the Original Declaration.

13 “It is the duty of the court to adopt a reasonable interpretation of a contract which
14 will harmonize all of its provisions and any conflicting provision on the face of the
15 instrument must be reconciled if possible to meet the purposes for which the contract was
16 intended.” LeBaron V. Crismon, 100 Ariz. Ariz. 206, 412 P.2d 705, (1966). Thus, the
17 only reasonable interpretation is that the Association must hold a vote at a meeting and
18 obtain a majority vote of the members (in total) in order to pass an amendment. The
19 purpose of the amendment provision is to ensure that amendments have sufficient support
20 from a majority of Association members. Here, the Amendment does not have the
21 support of the majority of its members. The Amendment does not even have the support
22 of a quarter of the members. Approval requirements are developed to provide safeguards
23 for the reliance interest of those who find themselves in the minority. Restatement (Third)
24 of Property (Servitudes) §6.10 cmt. A (2008). The interpretation offered by the
25 Association would allow a handful of members to implement changes as a result of the
26 complacency of members who are not concerned with or affected by the particular item
27 being voted upon.

28 Additionally, contract interpretation requires that an ambiguity be resolved against
the drafter. Polk v. Koerner, 111 Ariz. 493, 533 P.2d 660, (1975). Thus, to the extent

1 there is an ambiguity, it must be resolved against the Association. Further, Kalway stated,
2 “any doubts are to be resolved against the validity of a restriction.” Kalway at 25.

3 The amendment provision should be applied as written, which requires a majority
4 of the Association members to pass an amendment. To the extent there is any ambiguity,
5 principles of contract interpretation and the Arizona Supreme Court has indicated doubts
6 are to be resolved against the Association.

7 **E. Trial Court Minute Entries and Administrative Rulings are Not**
8 **Proper Authority.**

9 The minute entries and administrative ruling relied on by the Association
10 are not valid authorities and the entirety of the Association’s response referencing the
11 same should be struck and not considered by this Court. This Court must consider the
12 relevant binding authority such as the Arizona Supreme Court.

13 Although the Court should not consider the minute entry improperly attached to
14 the Association’s response, there are critical differences that make the logic contained in
15 the Caggiano v. Village of Oakcreek Minute Entry inapplicable. First, the minute entry is
16 a ruling on Plaintiff’s Application for Preliminary Injunction and denies the injunction in
17 part because “Plaintiffs didn’t establish irreparable harm.” The minute entry is not a
18 ruling on the merits of the claim. Second, Caggiano took ownership of their property in
19 2007 or after the property was restricted by a Planning and Zoning Ordinance. Here,
20 Bonham’s ownership interest began in 1989 before the Planning and Zoning Ordinance
21 was enacted to restrict short-term rentals. Thus, Bonham, through his predecessor or
22 otherwise, was not on notice that there was any restriction regarding short-term rentals.
23 Third, Caggiano was decided in 2017 before the Kalway decision was issued. Had the
24 mandate of Kalway that a general amendment provision is insufficient to impose
25 restrictions applied, the Court should have resolved the matter in favor of Caggiano.

26 **II. CONCLUSION.**

27 For the foregoing reasons, the Court should dismiss the Association’s Complaint
28 and allow Bonham to apply for his attorney’s fees and costs.

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RESPECTFULLY SUBMITTED this 20th day of June, 2022.

THE BAINBRIDGE LAW FIRM, L.L.C.

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Clerk of the Court
Yavapai County Superior Court
<http://www.azturbocourt.gov>

COPY of the foregoing emailed and e-served
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