

1 **CARPENTER, HAZLEWOOD, DELGADO & BOLEN, LLP**

Attorneys at Law

2 1400 East Southern Avenue, Suite 400

Tempe, Arizona 85282-5691

3 P. 480-427-2800; F. 480-427-2801

minuteentries@carpenterhazlewood.com

4 Charlene Cruz 026692

Charlene@carpenterhazlewood.com

5 Tessa Hustead 034014

tessa.hustead@carpenterhazlewood.com

6 VILLAGEOAK.0067

Attorneys for Plaintiff

8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

9 **IN AND FOR THE COUNTY OF YAVAPAI**

10 VILLAGE OF OAKCREEK
11 ASSOCIATION,

12 Plaintiff,

13 vs.

14
15 LANCE BONHAM; JOHN DOES I-V,
16 INCLUSIVE; JANE DOES I-V,
17 INCLUSIVE; BLACK CORPORATIONS I-
18 V; WHITE PARTNERSHIPS I-V, inclusive;
Unknown Heirs and devisees of each of the
above-names Defendants, if deceased,

19 Defendants.
20

Case No. V1300-CV2022-80081

**PLAINTIFF'S MOTION FOR
RECONSIDERATION OF ORDER
GRANTING DEFENDANT'S
MOTION TO DISMISS**

21 Plaintiff, Village of Oakcreek Association, ("Plaintiff" or the "Association"), by and
22 through undersigned counsel, hereby submits its Motion for Reconsideration of the Court's Order
23 Granting the Defendant's Motion to Dismiss. Plaintiff respectfully requests that the Court
24

1 reconsider its Order granting Defendant’s Motion because the Court’s order references the
2 Amendment at issue, which was recorded with the Yavapai County Recorder on *November 17,*
3 *2016*, at Document No. 2016-0058316 as the “2017 Amendment”.

4
5 I. The Restriction was In Effect at the Time Defendant Became Owner

6 “The notice requirement relies on a homeowner's reasonable expectations based on the
7 declaration **in effect at the time of purchase...**” *Kalway v. Calabria Ranch HOA, LLC*, 252
8 Ariz. 532, ¶ 15, 506 P.3d 18, 24 (2022) Emphasis Added. Defendant did not become record
9 owner of the Property subject to this lawsuit until *January 23, 2017*, after the 2016 Amendment
10 was passed and recorded. As such, pursuant to *Kalway*, the Declaration including the 2016
11 Amendment was in effect at the time Defendant became record owner. Therefore, Defendant had
12 actual and record notice of the Declaration restricting rentals.

13
14 Attached to Plaintiff’s original Complaint, and here for reference as **Exhibit A**, the 2016
15 Amendment states, in part:

16
17 **2. Minimum Lease Term. No Owner shall lease a Lot or a Unit for a Lease**
18 **term of less than thirty (30) days.**

19 As outlined in Plaintiff’s Response to the Motion to Dismiss, Defendant refers to the
20 Amendment as “the 2017 Amendment” in reference to its date of re-recording. The re-
21 recording was to correct a clerical error of the 2016 Amendment. In doing so, Defendant
22 purposely misled the court to fit the facts of *Kalway* by labeling the Amendment with the incorrect
23 year, to make it appear that he purchased the property prior to the Amendment’s recording.
24
25
26

1 Although Defendant improperly called the Amendment the
2 “2017 Amendment”, the Defendant also stipulated in the joint Stipulation of Material Facts and
3 Exhibits that “On May 3, 2017, the Association recorded with the Yavapai County Recorder, at
4 Document No. 2017-0021951, *another amendment for the sole purpose of correcting the 2016*
5 *recorded Amendment by removing the text that was not part of the original Leasing and Fines*
6 *Amendment voted upon by the members.”* Emphasis added. In this stipulation, Defendant admits
7 that the Amendment was recorded in 2016, and only re-recorded the following year to correct an
8 un-related error.
9

10 The Court is correct that *Kalway v. Calabria Ranch HOA, LLC*, 2022 506 P.3d 18 (Ariz.
11 2022) and *Dreamland Villa Community Club, Inc. v. Raimey*, 224 Ariz. 42,226 P.3d 411 (*App.*
12 *2010*) require that homeowners have “sufficient notice” that such a restriction could occur.
13 However, the 2016 Amendment *was* foreseeable to the Defendant because it was already in effect
14 at the time the Defendant became record Owner of the Property. The Court’s strict interpretation
15 of “at the time of purchase” would result in any owner who obtains title other than by a traditional
16 purchase, including but not limited to successful bidders at foreclosure (judicial and non-
17 judicial); parties who obtained title through estate/probate transfers, or even as part of settlement
18 in divorce decrees, would all be subject to a Declaration that was in effect before they became
19 record owner of the property – this was not contemplated by the *Kalway* Court, upon which this
20 Court based its ruling.
21
22
23
24
25
26

1 The governing set of facts are solely the allegations in the Complaint, along with all
2 reasonable inferences that may be drawn in the Association’s favor. Taking such allegations as
3 true, the Complaint is more than sufficient to state claims against Defendant in order to survive
4 a Rule 12(b)(6) motion to dismiss and the Plaintiff respectfully requests this Court reconsider
5 and rescind its Order granting Defendant’s Motion to Dismiss.
6

7 II. Conclusion

8 Applying *Kalway*, the 2016 Amendment prohibiting lease terms of less than 30 days was
9 in effect at the time Defendant became owner of the subject property. The rental restriction in the
10 2016 Amendment was a restriction that was enforced by the Plaintiff for at least 15 years prior to
11 the Amendment. Additionally, Plaintiff respectfully requests its attorney fees and costs associated
12 with drafting and filing this Motion.
13
14

15 RESPECTFULLY SUBMITTED this 21st day of September, 2022.

16
17 **CARPENTER, HAZLEWOOD, DELGADO & BOLEN, LLP**

18 By: /s/ Tessa Hustead
19 Charlene Cruz, Esq.
20 Tessa Hustead, Esq.
21 1400 East Southern Avenue, Suite 400
22 Tempe, Arizona 85282-5691
23 *Attorneys for Plaintiff*
24
25
26

1 **THE FOREGOING** electronically filed
this 21st day of September, 2022, with:

2
3 Clerk of the Court
Yavapai County Superior Court
www.AZTurboCourt.gov

4
5 **COPY** of the foregoing delivered
via TurboCourt E-Service Notification
this 21st day of September, 2022, to:

6
7 Mark J. Bainbridge
THE BAINBRIDGE LAW FIRM
8 Office: 8161 E. Indian Bend Road, Suite 103
Scottsdale, AZ 85020
9 Mailing: 7000 N. 16th St., Suite 120 #424
Phoenix, AZ 85020-5547
10 mark@bainbridgelawfirm.com
info@bainbridgelawfirm.com
11 *Attorney for Defendant Lance E. Bonham*

12 By: /s/ Katie M. Lilje
13
14
15
16
17
18
19
20
21
22
23
24
25
26

EXHIBIT A

Recorded at the request of:
James D. Atkinson

When recorded mail to:
James D. Atkinson
Carpenter, Hazlewood, Delgado & Bolen, PLC
1550 Plaza West Drive
Prescott, AZ 86303

THIS IS A CONFORMED COPY OF INSTRUMENT/
RECEPTION # 2016-0058316
RECORDED ON 11-17-2016 AT 2:33 pm
LESLIE M. HOFFMAN, YAVAPAI CO. RECORDER
James J. King DEPUTY

AMENDMENT TO
THE RESTATED AND AMENDED MASTER DECLARATION OF RESTRICTIVE
COVENANTS FOR ALL PROPERTY IN THE VILLAGE OF OAKCREEK

THIS AMENDMENT TO THE RESTATED AND AMENDED MASTER DECLARATION OF RESTRICTIVE COVENANTS FOR ALL PROPERTY IN THE VILLAGE OF OAKCREEK (the "Leasing and Schedule of Fines Amendment") is adopted as of the date of its recording in the Official Records of Yavapai County, Arizona.

RECITALS

A. WHEREAS, on June 17, 1981, the Master Declaration of Restrictive Covenants for All Property in the Village of Oakcreek was recorded in Book 1389, Pages 950-976, of the Official Records of the County Recorder of Yavapai County, Arizona.

B. WHEREAS, on March 9, 1988, those certain Amendments to Master Declaration of Restrictive Covenants for All Property in the Village of Oakcreek were recorded in Book 2023, Page 810 of the Official Records of the County Recorder of Yavapai County, Arizona.

C. WHEREAS, on October 7, 1996, those certain Amendments to Master Declaration of Restrictive Covenants for All Property in the Village of Oakcreek were recorded in Book 3290, Page 298 of the Official Records of the County Recorder of Yavapai County, Arizona.

D. WHEREAS, on November 6, 1998, those certain Amendments to Master Declaration of Restrictive Covenants for All Property in the Village of Oakcreek were recorded in Book 3614, Page 976 of the Official Records of the County Recorder of Yavapai County, Arizona.

E. WHEREAS, on January 3, 2012, the Restated and Amended Master Declaration of Restrictive Covenants for All Property in the Village of Oakcreek – September 6, 2003 was recorded in Book 4854, Page 98 of the Official Records of the County Recorder of Yavapai County, Arizona.

F. WHEREAS, on January 3, 2012, the Restated and Amended Master Declaration of Restrictive Covenants for All Property in the Village of Oakcreek – April 17, 2010 was recorded in Book 4854, Page 99 of the Official Records of the County Recorder of Yavapai County, Arizona.

G. WHEREAS, on May 13, 2014, the Restated and Amended Master Declaration of Restrictive Covenants for All Property in the Village of Oakcreek (the “Third Restated Master Declaration”) was recorded in as document 2014-0021505 of the Official Records of the County Recorder of Yavapai County, Arizona.

H. WHEREAS, pursuant to Section 9.04 of the Third Restated Master Declaration, the Third Restated Master Declaration may be amended by a majority vote of the members of the Association voting at any meeting of the membership noticed and held pursuant to the By-laws of the Association.

I. WHEREAS, at a meeting of the membership noticed pursuant to the By-laws of the Association and duly held November 10, 2016, a majority of the members of the Association voting at such meeting voted to amend the Third Restated Master Declaration as hereafter set forth.

NOW THEREFORE, the Third Restated Master Declaration is hereby amended as follows:

1. The foregoing Recitals are hereby incorporated as part of this Leasing and Schedule of Fines Amendment as if fully restated herein.
2. Article 4 of the Third Restated Master Declaration is hereby amended to add a new section numbered 4.23 and titled “Leasing of Lots and Units; Restrictions and Limitations” to provide as follows:

4.23 Leasing of Lots and Units; Restrictions and Limitations

The leasing of Lots and Units shall be subject to the following restrictions and limitations:

1. “Lease” defined. As used herein, the term “Lease” is defined to include all agreements, contracts, grants, memorandums, conveyances, lets, assignments, or rents that give a non-Owner of a Lot or Unit access to or right to use a Lot or a Unit. A Lease may exist whether it is in writing, or not, and regardless of the amount or nature of consideration exchanged to enjoy the benefit of a Lease. The Board’s determination of what constitutes a Lease and what constitutes the leasing or subleasing of a Lot or a Unit shall be conclusive and binding on the Owner of the Lot or Unit.

2. Minimum Lease Term. No Owner shall lease a Lot or a Unit for a Lease term of less than thirty (30) days.
 3. Lease of Entire Lot and Unit. No Owner may lease less than the Owner's entire Lot or Unit.
 4. Lease to Single Family. An Owner may lease his Lot or Unit only to a Single Family.
 5. No Sublease. No Lot, Unit or any portion thereof may be subleased.
 6. Tenant Registration Form. The Association may require that an Owner who is leasing his Lot or Unit shall within five (5) days following the commencement date of the term of each permitted Lease submit to the Association for each permitted Lease a "tenant registration form" in a form prepared from time to time by the Board. The Association may charge a reasonable review and processing fee for the review of the tenant registration form.
 7. Grandfather Provision. Notwithstanding the Minimum Lease Term restriction set forth in Subsection 2 of this Section 4.23, any Owner that has, as of the date of the recording of this Leasing and Schedule of Fines Amendment, entered into a Lease with a Guest for the leasing of his Lot or Unit for a term of less than thirty (30) days and who provides to the Board within fifteen (15) days of the date of the recording of this Leasing and Schedule of Fines Amendment, evidence satisfactory to the Board of the existence of such Lease shall not be prevented from leasing said Lot or Unit pursuant to such Lease so long as the term of such Lease commences no later than December 31, 2016.
 8. Owner Responsibilities. The Owner of the leased Lot or Unit shall remain responsible for compliance by the Owner's Guests and the Guest's family and guests with the Master Declaration, the By-Laws of the Association, the Rules of the Association and all applicable federal, state and local statutes, ordinances and regulations and shall be responsible for any violations thereof by his Guest or his Guest's family or guests.
 9. Leasing Rules and Regulations. Subject to the provisions of this Master Declaration, the Board shall be entitled to adopt, amend and repeal rules governing the leasing of Lots and Units.
3. Section 5.08 of Article 5 of the Third Restated Master Declaration is hereby amended in its entirety to provide as follows:

5.08 Schedule of Fines

The Committee, by majority vote or written consent, shall adopt a schedule specifying the recommended fines (or ranges of fines) for particular violations (or categories of violations) of the restrictions. The schedule may be amended from time to time by the Committee by majority vote or written consent. The Committee may from time to time also adopt, amend, and repeal, by majority vote or written consent, such procedures, rules and regulations, not inconsistent with the Master Declaration, Declaration, or By-Laws as may be desirable for the performance of its duties.

4. Except as specifically modified by this Leasing and Schedule of Fines Amendment, the Third Restated Master Declaration shall remain in full force and effect in accordance with its terms. In the event of any conflict or inconsistency between the terms of this Leasing and Schedule of Fines Amendment and the Third Restated Master Declaration, the terms of this Leasing and Schedule of Fines Amendment shall control.

