

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

VISTA DEL CORAZON HOMEOWNERS ASSOCIATION,
AN ARIZONA NON-PROFIT CORPORATION,
Plaintiff/Counter-Defendant/Appellee,

v.

DEANNA SMITH AND MYCHAL A. KINTZ,
Defendants/Counter-Claimants/Appellants.

No. 2 CA-CV 2023-0071
Filed March 8, 2024

Appeal from the Superior Court in Pinal County
No. S1100CV202200011
The Honorable Joseph R. Georgini, Judge

VACATED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Brearcliffe authored the decision of the Court, in which Judge Kelly concurred and Judge Eckerstrom concurred in part and dissented in part.

B R E A R C L I F F E, Presiding Judge:

¶1 Deanna Smith and Mychal Kintz appeal from a permanent injunction in favor of the Vista Del Corazon Homeowners Association (“the HOA”) which compels their compliance with the HOA’s amended Declaration of Covenants, Conditions, Restrictions, and Grant of Easements (“CC&Rs”). Smith and Kintz contend the superior court erred in concluding the HOA had validly adopted amendments to the CC&Rs. Because we conclude that certain of the amendments to the CC&Rs were invalid, we vacate the injunction and remand for further proceedings.

Factual and Procedural Background

¶2 Vista Del Corazon is a planned residential community in Pinal County, Arizona. Smith and Kintz have owned a home (Lot 89) within the community since 2020. Properties within Vista Del Corazon, including Smith and Kintz’s, are subject to the CC&Rs first adopted in 1997. Since purchasing the home, Smith and Kintz have leased it out from time to time for short terms, that is, for periods of less than ninety consecutive days.

¶3 In February 2021, the HOA, through a letter from its board, notified members of the community that it had learned of “short term rental activity occurring in the Vista Del Corazon community,” which had been “the source of noise and other complaints in the past.” The board explained that it had examined the current restrictions on rental activity in the CC&Rs and had been “surprised to discover that this type of use is not currently prohibited.” The HOA declared that it “would like to amend the CC&Rs to expressly state that any rental in Vista Del Corazon must be for a minimum duration of not less than ninety (90) consecutive days.”

¶4 Before the amendments that are the subject of this case, the CC&Rs contained only two provisions regarding renting or leasing of homes within the community. Section 4.18 excepted rental activity from the general prohibition against an owner conducting a “trade or business” on a property. And § 4.22 required any such lease to be of the entire lot (with its improvements), and the homeowner to provide the names of any

VISTA DEL CORAZON HOMEOWNERS ASS'N v. SMITH & KINTZ
Decision of the Court

lessees to the HOA, and to remain liable for a lessee's compliance with the CC&Rs.

¶5 As planned, the HOA purported to amend the CC&Rs in 2021 by repealing § 4.22 and adopting §§ 4.22.1 through 4.22.5 ("2021 amendments"), after receiving many homeowners' written approval but without a formal association meeting and vote. The 2021 amendments covered various uses pertaining to rental activity, including the prohibition of "short-term rentals" – defined as rental periods of less than ninety days – and a related prohibition against advertising or offering any lot for short-term rent. As required by the CC&Rs, the 2021 amendments were recorded in Pinal County. The HOA also updated its enforcement policy to adopt a special fine structure for violation of the new short-term rental restrictions.

¶6 While the parties dispute the extent of Smith and Kintz's short-term rental activities during the relevant times, it is undisputed that the HOA began fining Smith and Kintz for claimed violations following the adoption of the 2021 amendments. Ultimately, the HOA filed a complaint to enforce the amended CC&Rs, collect the accrued fines, and enjoin Smith and Kintz from further violations. Smith and Kintz filed a counterclaim challenging the validity of the adoption of the 2021 amendments, seeking both a declaratory judgment voiding them and an injunction against their enforcement. In their counterclaim, Smith and Kintz asserted the amendments had been improperly adopted because the HOA failed to obtain the percentage of votes required to amend the CC&Rs without a meeting under Arizona law and the CC&Rs.

¶7 After a settlement conference, the parties stipulated to stay the proceedings so that the HOA could conduct a re-vote among HOA members on the amendments. The re-vote was held in April 2022, and eighty percent of the HOA members voted for the amendments ("2022 amendments"). Following their certification by the HOA president on April 28, 2022, the 2022 amendments were first erroneously recorded in Maricopa County on May 2, 2022, but later properly recorded in Pinal County on August 11, 2022.

¶8 After the HOA adopted the 2022 amendments, the parties amended their pleadings. The HOA's amended complaint alleged the 2022 amendments were valid and enforceable; Smith & Kintz's amended counter-claim asserted they were not. The parties also filed competing motions for partial summary judgment.

¶9 Smith and Kintz's motion relied on this court's opinion in *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42 (App. 2010), and our

VISTA DEL CORAZON HOMEOWNERS ASS'N v. SMITH & KINTZ
Decision of the Court

supreme court's opinion in *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532, ¶ 14 (2022), in which it endorsed *Dreamland* and held that "an HOA cannot create new affirmative obligations where the original declaration did not provide notice to the homeowners that they might be subject to such obligations." Smith and Kintz argued that unanimous approval by HOA members was necessary because the 2022 amendments created "entirely new use restrictions" not found in the original CC&Rs. They further argued that, even if valid under *Kalway*, the 2022 amendments were invalid because the HOA had failed to timely record them in the proper county.

¶10 In its motion, the HOA asserted that unanimous approval was not required because it is "manifestly unjust" for owners of one lot to "veto the vote of the community" and the 2022 amendments were passed pursuant to the CC&Rs' amendment provision. The HOA argued that *Kalway* was inapplicable because that case did not involve a short-term rental amendment, many more homeowners voted in favor of the 2022 amendments than did for those in *Kalway*, and the Arizona legislature implicitly rejected *Dreamland's* holding by subsequent legislation. Even if *Kalway* did apply, the HOA asserted, the original CC&Rs contained a restriction on the rental of lots so the 2022 amendments permissibly "refine[]s the restriction," "fill[]s in a gap," and "clarif[y] that short term rentals are not consistent with the Single Family [Residential Use] restrictions and the ban on commercial use." Finally, the HOA argued that it had strictly complied with the requirement to record the 2022 amendments within thirty days and that erroneously recording the 2022 amendments in Maricopa County had not rendered them invalid because it was a clerical error that was cured by recording in the proper county. In any event, the HOA asserts, Smith and Kintz had actual notice of the amendments.

¶11 The superior court granted the HOA's motion for partial summary judgment and denied Smith and Kintz's. Although Smith and Kintz appealed from the denial of their motion, we dismissed that appeal for lack of jurisdiction because the order was not certified as final. After the grant of its motion for partial summary judgment, the HOA moved for immediate entry of a permanent injunction to compel Smith and Kintz's future compliance with each provision of the 2022 amendments. The court granted the motion for permanent injunction and further ordered Smith and Kintz to "immediately cease advertising and renting the Property for short term rentals of less than 90 days." The court also awarded the HOA its attorney fees and costs relating to the motion for permanent injunction. Smith and Kintz appealed from the court's permanent injunction order.

Jurisdiction and Scope of Review

¶12 Although neither party asserts that we lack jurisdiction over this appeal, “we have an independent duty to confirm whether we have jurisdiction over the case before us.” *Santee v. Mesa Airlines, Inc.*, 229 Ariz. 88, ¶ 2 (App. 2012). “Our jurisdiction is provided and limited by statute.” *Id.*; see A.R.S. § 12-2101. While Smith and Kintz properly appealed from the superior court’s order granting the injunction, see § 12-2101(A)(5)(b), they also ask us to review the court’s underlying grant of the HOA’s motion for partial summary judgment and the denial of theirs. However, the appeal of that ruling was dismissed for lack of an appealable judgment, see § 12-2101(A)(1) (appeal may be taken from final judgment), which has yet to be remedied. See Ariz. R. Civ. P. 54. Consequently, we continue to lack jurisdiction over the partial summary judgment rulings.

¶13 Nonetheless, even though this court generally reviews an injunction order for an abuse of discretion, when the superior court’s exercise of discretion rests on an interpretation of the law rather than on the facts, “the appellate court is not as limited in its review and may reverse if it feels that the lower court’s view of the law was erroneous.” *Reiswig v. St. Joseph’s Hosp. & Med. Ctr.*, 130 Ariz. 164, 167 (App. 1981) (quoting 11 Wright & Miller, *Federal Practice and Procedure, Civil* § 2962 (2023)). The permanent injunction here is premised on the court’s legal conclusion, in its ruling on the motions for partial summary judgment, that the 2022 amendments are valid and enforceable. The propriety of the entry of the injunction is therefore “inextricably bound up” with that conclusion. *Id.* As a consequence, we must consider the court’s underlying legal conclusion on the validity of the 2022 amendments even though we do not have jurisdiction to review that summary judgment ruling itself.¹ See *id.*; see also *Smith v. Coronado Foothills Ests. Homeowners Ass’n Inc.*, 117 Ariz. 171, 172 (1977) (permanent injunctions issued after “decision on the merits”). Similarly, we may not address Smith and Kintz’s claim as to any mis-recording of the 2022 amendments in Maricopa County. Such may appropriately be addressed in further proceedings on remand or in any

¹The superior court’s order granting a permanent injunction is sparse and contains no findings of fact or legal conclusions other than that it “considered the allegations” within the HOA’s motion for permanent injunction. See Ariz. R. Civ. P. 65(d)(1) (“Every order granting an injunction . . . must: (A) state the reasons why it issued . . .” (emphasis added)). It is clear that the permanent injunction order is tied to its earlier conclusion that the 2022 amendments are valid and enforceable, as it relied on the HOA’s motion advocating the same and ordered compliance with the amendments’ provisions.

VISTA DEL CORAZON HOMEOWNERS ASS'N v. SMITH & KINTZ
Decision of the Court

appeal of the summary judgment rulings. Even so, we have jurisdiction pursuant to § 12-2101(A)(5)(b).

Discussion

I. Permanent Injunction

¶14 As stated above, we review a superior court's order granting a permanent injunction for abuse of discretion, *Kromko v. City of Tucson*, 202 Ariz. 499, ¶ 4 (App. 2002), and defer to the court's factual findings unless clearly erroneous, while reviewing its legal conclusions de novo, *McNally v. Sun Lakes Homeowners Ass'n #1, Inc.*, 241 Ariz. 1, ¶ 11 (App. 2016). A court that "commits an error of law" in granting an injunction has abused its discretion. *Id.*; see also *TP Racing, L.L.P. v. Simms*, 232 Ariz. 489, ¶ 8 (App. 2013).

¶15 In reviewing the grant of an injunction, we interpret CC&Rs and statutes, as well as the superior court's interpretation thereof, de novo. *Cypress on Sunland Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, ¶¶ 30-31 (App. 2011). As to CC&Rs, they "are generally enforced as written," and "we interpret such restrictions to reflect the reasonable expectations of the affected homeowners" while "[c]onstruing such provisions narrowly." *Kalway*, 252 Ariz. 532, ¶ 1. In interpreting a statute, we rely on the statute's plain meaning. See *State ex rel. Ariz. Dep't of Revenue v. Tunkey*, 254 Ariz. 432, ¶¶ 31-32 (2023) (Bolick, J., concurring); *Roberts v. State*, 253 Ariz. 259, ¶ 20 (2022) ("[C]ourts will not read into a statute something which is not within the manifest intention of the legislature as gathered from the statute itself," and "will not inflate, expand, stretch or extend a statute to matters not falling within its expressed provisions." (quoting *City of Phoenix v. Donofrio*, 99 Ariz. 130, 133 (1965))). Our analysis extends to both substantive provisions and enforcement methods alike. See *Kalway*, 252 Ariz. 532, ¶¶ 18-41 (addressing a wide array of provisions, striking all but one for lack of notice).

A. *Kalway's* Applicability

¶16 The superior court determined, on several bases, that our supreme court's decision in *Kalway* does not apply and that the 2022 amendments were valid. First, the court determined that the legislature had rejected *Dreamland*—the case *Kalway* affirmed and built upon—by enacting A.R.S. § 33-1806.01(A), and thereby directly "authorized amendments that establish rental time period restrictions." This statute, however, did no such thing.

VISTA DEL CORAZON HOMEOWNERS ASS'N v. SMITH & KINTZ
Decision of the Court

¶17 In relevant part, § 33-1806.01(A) states that “[a] member” of a homeowners’ association “may use the member’s property as a rental property unless prohibited in the declaration and shall use it in accordance with the declaration’s rental time period restrictions.” Such language actually ensures the right to lease one’s property but in accord with *validly* imposed restrictions – it does not itself create an unfettered right of HOAs to prohibit or restrict the time period of rentals and create related restrictions. It certainly does not do so in derogation of the common law limitation on amendments to CC&Rs as recognized in *Dreamland*, 242 Ariz. 42, ¶ 38, and affirmed in *Kalway*, 252 Ariz. 532, ¶ 14. See also *Pleak v. Entrada Prop. Owners’ Ass’n*, 207 Ariz. 418, ¶ 12 (2004) (statutes and common law are read as consistent with each other unless express or necessary implication that legislature intended to change or abrogate common law by statute); A.R.S. § 1-201.

¶18 Based on its misunderstanding that § 33-1806.01 abrogated *Dreamland* and explicitly authorized the HOA to impose rental time period restrictions, the superior court incorrectly concluded that the amendments were validly adopted because the HOA followed proper procedures as outlined in A.R.S. § 33-1817(A)(1) and § 12.2 of the CC&Rs. But the fact that the HOA technically complied with the CC&Rs’ amendment procedures as required by § 33-1817(A)(1) is not alone dispositive. While § 33-1817(A)(1) permits amendments to CC&Rs “by an affirmative vote or written consent of the number of owners or eligible voters specified in the declaration,” *Kalway* explains that, notwithstanding § 33-1817(A), the common law requires the unanimous consent of affected property owners unless the CC&Rs “give sufficient notice of the possibility of a future amendment.” 252 Ariz. 532, ¶¶ 10, 36, 39. Unless such proposed amendments are “reasonable and foreseeable” from the existing CC&Rs, “even a broad grant of authority to amend an original declaration is insufficient to allow a majority of property owners to adopt and enforce restrictions on the minority without notice.”² *Id.* ¶¶ 10, 13.

¶19 Finally, the superior court also incorrectly felt free of *Kalway* because that case did not address rental restrictions, and many more members voted in favor of the amendments here than had those in *Kalway*. But the fact that *Kalway* did not explicitly address rental restrictions, or that a significant number of members in the community here voted in favor of

²Of course, this is not to say that the CC&Rs’ amendment provision is irrelevant. See § 33-1817(A). For example, a “reasonable” and “foreseeable” amendment would still be invalid if the HOA failed to abide by the CC&Rs’ amendment procedures or if the votes-in-favor fell below the minimum threshold required by the amendment provision. *Id.*

VISTA DEL CORAZON HOMEOWNERS ASS'N v. SMITH & KINTZ
Decision of the Court

the amendments, does nothing to except this case from *Kalway*'s reach. Our supreme court broadly explained that "[t]he law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants." *Id.* ¶ 15 (quoting *Boyles v. Hausmann*, 517 N.W.2d 610, 617 (Neb. 1994) (alteration in *Kalway*)). Nothing in *Kalway* limited its reach to only certain kinds of property restrictions, or to amendments adopted by bare versus vast majorities.

¶20 Each of the superior court's bases for refusing to apply *Kalway* was in error. *Kalway* controls and, regardless of whether it follows proper procedures in doing so, "an HOA cannot create new affirmative obligations where the [CC&Rs] did not provide notice to the homeowners that they might be subject to such obligations." *Id.* ¶ 14. We can determine the reasonable foreseeability, and thus enforceability, of amendments de novo. *See id.* ¶¶ 8-9, 18 (conducting de novo review of amendments' validity); *cf. In re Estate of Snure*, 234 Ariz. 203, ¶¶ 5-7 (App. 2014) (question of adequate notice reviewed de novo).

B. Reasonable Foreseeability

¶21 For the 2022 amendments to be valid as "reasonable and foreseeable" under the existing CC&Rs, the CC&Rs "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." *Kalway*, 252 Ariz. 532, ¶¶ 10, 17. This is an objective inquiry. *Id.* ¶ 16. First we look to the original CC&Rs' general amendment provision and its general-purpose statement to determine if sufficient notice is provided there. *See id.* ¶¶ 18-21. If not, then we review each challenged amendment individually and assess whether the CC&Rs "put a property owner on notice that the Other Owners could, by majority vote," impose the new restriction. *Id.* ¶¶ 21-22.

1. General Amendment and Purpose Provisions

¶22 The HOA first relies on § 12.2 of the CC&Rs which provides the general amendment power:

Except as provided in Sections 12.3 and 12.4 below, this Declaration may be amended at any time only by the written approval or affirmative vote, or any combination thereof, of Members holding not less than seventy-five percent (75%) of the votes in each class of Membership in the Association. Any amendment approved

VISTA DEL CORAZON HOMEOWNERS ASS'N v. SMITH & KINTZ
Decision of the Court

pursuant to this Section 12.2 shall be signed by the President or Vice President of the Association and shall be Recorded, and any such amendment shall certify that the amendment has been approved as required by this Section.

Although the HOA is correct that this section provides that amendments may generally be adopted with the approval of seventy-five percent of the HOA's members, nothing in this general language is sufficient to provide the needed "fair notice" that new restrictions on rental activity, or indeed any particular new restriction, could be imposed. *See id.* ¶ 19.

¶23 The HOA further argues that two general purpose recitals and a definition of "Declaration" rendered the 2022 amendments reasonably foreseeable. The first recital states, in relevant part, that the declarant seeks to "establish a flexible and reasonable procedure for [the Property's] overall development, administration, maintenance and preservation." The second recital generally states that purchasers of a lot are subject to the CC&Rs. Finally, "Declaration" is defined as "this Declaration of Covenants, Conditions, Restrictions and Grant of Easements, as amended or supplemented from time to time as permitted herein." As recognized in *Kalway*, such general intent or general purpose provisions do not sufficiently signal that *particular* new land-use restrictions can be imposed. *See id.* ¶ 20 (refusing to rely "solely upon a subjective general statement of purpose" that "would provide limitless justification for new amendments"). Those here certainly do not.

¶24 Because nothing identified by the HOA in the amendment provision, recitals, or definition provides notice that the HOA could amend the declaration in any particular way, we review each challenged amendment individually to determine if it is "entirely new and different in character, untethered to an original covenant." *Id.* ¶ 17 (quoting *Lakeland Prop. Owners Ass'n v. Larson*, 459 N.E.2d 1164, 1167 (Ill. App. 1984)). In *Kalway*, our supreme court applied "the blue pencil rule" to strike out unauthorized amendments while leaving valid amendments in place. *Id.* ¶ 21. Because, here, we are addressing an injunction compelling compliance with CC&Rs, rather than a judgment on the validity of the CC&Rs as in *Kalway*, we will not blue pencil the 2022 amendments themselves. *Id.*; *see Reiswig*, 130 Ariz. at 167, 168 (we may reverse superior court's injunction if based on erroneous view of law but scope of review confined to effect of erroneous view on validity of injunction). We will instead merely determine whether the court abused its discretion in

VISTA DEL CORAZON HOMEOWNERS ASS'N v. SMITH & KINTZ
Decision of the Court

ordering compliance with the amendments because they run afoul of *Kalway*.

¶25 In *Kalway*, our supreme court struck amendments that limited the type and number of livestock that could be kept on a property, limited “the location, placement, or size of ‘non-dwelling structures,’” and required homeowners to submit construction plans to their neighbors for approval. *Id.* ¶¶ 30-36. Originally, all livestock were permitted, no limitation on non-dwelling structures existed, and there was no plan approval process. *Id.* In each case, the restriction was struck as entirely new, with our supreme court holding that the CC&Rs did not provide notice to a reasonable homeowner that the restriction could someday be imposed by bare majority vote. *Id.* However, our supreme court did not strike an amendment that defined the term “Garage,” because the term was used in the original declaration and “defining the term was reasonably foreseeable.” *Id.* ¶ 24. We consider each of the provisions of the 2022 amendments consistent with our supreme court’s analysis.

2. Leasing or Renting Entire Lot—§ 4.22.1

¶26 In the 2022 amendments, § 4.22.1 provides:

No Owner may lease or rent less than the entire Lot. For the purposes of this Section 4.22, the use of “lease” or “rent” or any variation thereof, is intended to include those occupancies subject to the Arizona Landlord and Tenant Act, A.R.S. § 33-301 et. seq. and 33-1301 et. seq., or possessory real estate contracts. The Association may require Owners to disclose information regarding the lease or rental agreement within the limits of Arizona law.

The first sentence repeats the pre-existing restriction against partial leases and remains enforceable. The second sentence is new, and defines any term like “lease” or “rent” to be inclusive of the described types of occupancies. Because these terms were used but undefined in the original CC&Rs, an amendment defining these terms is reasonably foreseeable, is tethered to existing provisions, and thus properly within the breadth of an injunction. *Id.*

¶27 The disclosure required by the last sentence of § 4.22.1 could be a foreseeable enforcement mechanism if it were tailored to the existing restriction on partial rentals, or the existing requirement that a homeowner provide the names of his tenants to the HOA. That is, it would be

VISTA DEL CORAZON HOMEOWNERS ASS'N v. SMITH & KINTZ
Decision of the Court

reasonably foreseeable that the HOA might compel a homeowner to disclose information from his lease on the scope of the rental (to ensure it was for the entire property) and reveal the names of the tenants (to which it was already entitled). *See id.* ¶ 17 (amendment is valid if CC&Rs indicate affirmative covenant exists and give notice that “the covenant can be amended to refine it, correct an error, fill in a gap, or change it in a particular way”). However, as written, it is overly broad and potentially requires a homeowner to reveal other private contractual terms, beyond those related to certain uses of the property validly controlled by the CC&Rs. Nothing in the original CC&Rs puts a homeowner on notice that the majority of his neighbors could impose an open-ended right to obtain information regarding his private contractual relationships beyond the scope of the lease and the names of the tenants. *Id.* ¶ 14 (“[A]n HOA cannot create new affirmative obligations where the [CC&Rs] did not provide notice to the homeowners that they might be subject to such obligations.”).

¶28 In *Kalway*, our supreme court addressed an amended provision that required a property owner to submit any construction plans to other property owners for their majority approval or rejection. *Id.* ¶ 36. Although such a procedure might allow the property owners collectively to ensure compliance with existing valid restrictions on lot development, the court nonetheless held that “[n]othing in the original declaration put a reasonable property owner on notice that an otherwise permissible use of his . . . property would be subject to” a majority approval. *Id.* Similarly, the court also struck down a provision that required “the submission of improvement plans to the ‘Owners and Manager, in writing’ at least thirty days before making such improvements” because “[n]o requirement for submission of improvement plans was contained in or implied by the original declaration.” *Id.* ¶ 38.

¶29 Here, although the last sentence of § 4.22.1 addresses disclosure rather than an approval process, it nonetheless makes the community potentially privy to a breadth of private information concerning completely permissible uses. While this new provision would undoubtedly make it easier for the HOA to enforce the CC&Rs, nothing in the original CC&Rs puts a reasonable property owner on notice that specifics of his private contractual affairs could be generally examined by his neighbors. Therefore, pursuant to *Kalway*, because the amendment was not unanimously adopted, the obligations imposed by the last sentence of § 4.22.1 of the 2022 amendments are not enforceable by court order. *See* 252 Ariz. 532, ¶ 21 (provisions not reasonably foreseeable stricken).

3. Prohibition on Short-Term Rentals—§ 4.22.2

VISTA DEL CORAZON HOMEOWNERS ASS'N v. SMITH & KINTZ
Decision of the Court

¶30 Under § 4.22.2 of the 2022 amendments to the CC&Rs, “[n]o lot may be leased, rented, sublet, or assigned for a term of less than ninety (90) consecutive days.” The amendment defines “short-term rental” to mean a lease or rental agreement for less than ninety days, and emphasizes that “[s]hort-term rentals are expressly prohibited.” It requires that “[a]ny sublease or assignment of a lease shall be for the entire remainder of the lease term.”

¶31 Tellingly, the record shows that the HOA itself determined that the pre-2022 CC&Rs did not prevent short-term rentals within the community. In its answer to Smith and Kintz’s amended counter-claim, the HOA “admit[ted] that under the [CC&Rs] short-term rentals were allowed and that it included no time limit on rentals.” The HOA also stipulated that its Board “look[ed] closely” at the community’s CC&Rs and “were surprised to discover” that short-term rental activity was “not currently prohibited.”

¶32 By its own admission, then, when the HOA subsequently amended the CC&Rs to bar short-term rentals of less than ninety days, this was a new obligation that did not exist before. As originally adopted, property owners were free to lease their homes for any period. We must determine whether a short-term rental ban is nonetheless tethered to any existing restriction.

¶33 The HOA asserts that § 4.22.2, unlike the provisions struck down in *Kalway*, was not entirely new or unforeseeable because an amalgam of provisions in the CC&Rs pertaining to “Single Family Residential Use” – in §§ 1.23, 4.1.1, and 4.18 – already worked to essentially prohibit short-term rentals. The superior court agreed and determined that the amendment merely clarified a pre-existing prohibition. This was error.

¶34 Section 1.23 of the existing CC&Rs defines “Lot” as “limited to Single Family Residential Use”; §§ 4.1 and 4.1.1 reiterate that “Single Family Residential Use” is a land use classification that “will apply only to Lots”; and § 4.18 defines permissible residential uses, stating “[a]ll lots may be used only for the construction and occupancy of single family detached Residences and typical residential activities incidental thereto, such as the construction and use of a family swimming pool.”³

³Under § 1.38 of the original CC&Rs, the term “Residence” is defined as “any building, or part thereof, situated on a Lot designated and intended for use as a residence by a single family.” The HOA does not address this definition on appeal, and we do not address it. See *Ritchie v. Krasner*, 221 Ariz. 288, ¶¶ 61-62 (App. 2009) (argument not raised in opening brief with

VISTA DEL CORAZON HOMEOWNERS ASS'N v. SMITH & KINTZ
Decision of the Court

¶35 The use of the term “single family residence,” or “single family residential use,” in the CC&Rs, however, does not restrict the use of each property within the community to use by an *identifiable*, discrete single family, such that no family of renters could ever occupy it. Although undefined in the CC&Rs, “single family residence” is a term of art. *See, e.g.*, A.R.S. § 33-1310(16) (defining “[s]ingle family residence” as “a structure maintained and used as a single dwelling unit”). Generally, a “single-family” residence or dwelling is contrasted with multi-family housing or a “multiple dwelling development” –such as an apartment building, condominium complex, or other structure with multiple residential units. *Compare, e.g.*, Pinal Cnty. Dev. Servs. Code ch. 2.55.010 (permitted uses in “CR-1A Single Residence Zone,” including “One-Family dwelling, conventional construction”), *with* Pinal Cnty. Dev. Servs. Code ch. 2.75.010 (permitted uses in “CR-4 Multiple Residence Zone,” including a “[d]uplex dwelling”), *and* Pinal Cnty. Dev. Servs. Code ch. 2.80.010 (permitted uses in “CR-5 Multiple Residence Zone,” including “[m]ultiple dwelling for any number of families”). Certainly, any mention of single-family residential use in the CC&Rs must be read in harmony with § 4.18 (discussed below) –in which renting one’s property is excluded from the definition of prohibited commercial uses –and § 4.22 –in which renting one’s lot is specifically permitted and no limit on rental duration exists. Consequently, the provisions related to single family residential use in the original CC&Rs do not support the superior court’s legal conclusion that the 2022 amendments merely clarified a pre-existing prohibition.

¶36 Importantly, under § 4.18, “the leasing of a Residence by the Owner thereof” was not restricted by the CC&Rs as a trade or business activity, allowing an owner to believe that a property could be rented at will, even if done as part of a business operation. Indeed, even those limitations specifically imposed on non-rental trades and businesses within the development do not foreshadow the new restrictions on leasing. Business and trade activities generally are permitted under § 4.18 so long as, among other things, they are not apparent by sight, sound, or smell from outside of the residence, they conform to zoning and other general regulations, they are not incompatible with the residential character of the home or neighborhood, or they do not involve non-customary vehicle congestion or foot traffic. Nothing about the short-term rental of a home for residential use would necessarily run afoul of such generalized restrictions, even if leasing were not expressly excepted from the trade or business ban.

legal authority and record citation may be deemed waived); Ariz. R. Civ. App. P. 13(a)(7).

VISTA DEL CORAZON HOMEOWNERS ASS'N v. SMITH & KINTZ
Decision of the Court

¶37 We are not persuaded by the HOA's position at oral argument that these restrictions are permissible because the manner by which people rent homes today could not have been contemplated when the original CC&Rs were established in 1997. Although the online rental services we are familiar with today – such as Airbnb and Vrbo – may not have existed or been as popular then, leasing and subleasing a property – for short or long periods – is not a novel concept. But whether short-term rental services were unforeseen or not, nothing in the original CC&Rs put a reasonable homeowner on notice that short-term rental restrictions such as those in § 4.22.2 could be imposed on his property someday without his consent. Therefore, pursuant to *Kalway*, because the short-term rental restriction in § 4.22.2 of the 2022 amendments was not unanimously adopted, it is not enforceable. *See* 252 Ariz. 532, ¶ 21.

4. Prohibition on Rental Advertising – § 4.22.3

¶38 Under § 4.22.3 of the 2022 amendments to the CC&Rs, a lot may no longer be “advertised, listed, marketed, or otherwise offered in writing or verbally in any form to any party as available on a short-term rental basis, i.e. for a term of less than ninety (90) consecutive days.” The original CC&Rs did not prohibit or limit advertising or marketing one's home for rent. This restriction is entirely new, and, as in our treatment of § 4.22.2, nothing put a homeowner on notice that it could be imposed. Therefore, because it was also not unanimously adopted, the prohibitions of § 4.22.3 of the 2022 amendments are not enforceable by injunction. *Id.* (provisions not reasonably foreseeable stricken).

5. Terms Required in Lease Contracts – § 4.22.4

¶39 Under § 4.22.4 as adopted, certain lease terms become mandatory:

All leases must provide that the terms of the lease are subject in all respects to the provisions of the Declaration, Association Rules, and Restrictions (collectively referred to a[s] “Governing Documents”) and that any violation of the Governing Documents by the lessee, sublessees, assignees, or other occupants shall be a default under the lease.

This restriction is untethered to any existing provision of the CC&Rs. Homeowners, again, were not provided adequate notice in the original CC&Rs that the majority could amend them to mandate terms in their future leases, including terms of default. *Id.* ¶ 17 (“[A]mendments cannot

VISTA DEL CORAZON HOMEOWNERS ASS'N v. SMITH & KINTZ
Decision of the Court

be 'entirely new and different in character,' untethered to an original covenant." (quoting *Lakeland*, 459 N.E.2d at 1167)). We therefore strike any obligation in § 4.22.4 from the scope of the injunction. *Id.* ¶ 21 (provisions not reasonably foreseeable stricken).

6. Compliance With Governing Documents—§ 4.22.5

¶40 Under § 4.22.5, an original obligation is maintained in the first sentence, but new affirmative obligations are imposed thereafter:

Any Owner who shall lease their Lot shall be responsible for assuring compliance by the occupant with the Governing Documents. Failure by an Owner to take legal action, including the institution of a forcible entry and detainer proceeding against their occupant who is in violation of the Governing Documents within ten (10) days after receipt of written demand to do so from the Association shall entitle the Association, acting by and through the Board, to take any and all such actions including the institution of proceedings and forcible entry and detainer on behalf of such Owner against the occupant. Any expenses incurred by the Association, including reasonable attorneys' fee[s] and costs of suit, shall be repaid to it by such Owner. Failure by such Owner to make such repayment within ten (10) days after receipt of a written demand therefore shall entitle the Association to levy a fine against such Owner and the Lot for all such expenses incurred by the Association. In the event such fine is not paid within ninety (90) days of its due date, the Association may resort to all remedies for collection thereof.

¶41 Aside from the first sentence of § 4.22.5, which was carried over from the original § 4.22, no homeowner under the original CC&Rs would be on notice that the majority could impose these provisions in the future. These proposed amendments permit the HOA to step into any homeowner's shoes and take legal action on his behalf. While this no doubt may make enforcement of the CC&Rs easier, it creates an entirely new power that is untethered to any existing provision of the CC&Rs: the power to evict another homeowner's tenants. The HOA does not even enjoy the power to "evict" a property owner for failure to comply with the CC&Rs—

VISTA DEL CORAZON HOMEOWNERS ASS'N v. SMITH & KINTZ
Decision of the Court

it may only seek damages at law and injunctive relief for such violations and foreclosure for past due assessments. Consequently, aside from the first sentence, obligations imposed by § 4.22.5 of the 2022 amendments may not be enforced by injunction. *Id.* (provisions not reasonably foreseeable stricken).

C. Conclusion

¶42 To the extent we have concluded that the above amendments were unforeseeable and unreasonable, the superior court abused its discretion in granting a permanent injunction compelling Smith and Kintz to abide by them. *See McNally*, 241 Ariz. 1, ¶ 11. Under our reasoning here, the only obligations in the 2022 amendments that are valid under *Kalway*, and thus enforceable by court order, are those provisions noted that already existed in the original CC&Rs, and the provision in the second sentence of § 4.22.1 that defined “lease” or “rent,” as it was sufficiently tethered to pre-existing provisions. But it does not necessarily follow that an order enjoining compliance with these remaining valid provisions would be proper such that we should leave it in place, even in part. *See Ahwatukee Custom Ests. Mgmt. Ass’n, Inc. v. Turner*, 196 Ariz. 631, ¶ 9 (App. 2000).

¶43 An injunction compels compliance under penalty of contempt, which extends beyond any contractual liability that might be suffered by an enjoined party. *See Bussart v. Superior Court*, 11 Ariz. App. 348, 350 (1970) (because of severe consequences for violating injunction, including contempt, court must meticulously follow Rule 65, Ariz. R. Civ. P.); Restatement (Second) of Contracts § 357(2) (1981) (describing court’s discretion to issue injunction in contract action). The imposition of an injunction is an equitable remedy that requires the balancing of the rights of the parties and hardships imposed with respect to the enjoined conduct. *See Turner*, 196 Ariz. 631, ¶ 9 (“The enforcement of restrictive covenants through an injunction is not a matter of right, but is governed by equitable principles.”). Given our ruling, the balance before the superior court has changed, and we therefore vacate the injunction in its entirety. We leave it to the superior court in the first instance to determine whether a new injunction enforcing the few foreseeable and reasonable provisions of the 2022 amendments identified above ought to be issued. *See City of Flagstaff v. Ariz. Dep’t of Admin.*, 255 Ariz. 7, ¶ 28 (App. 2023) (“We respect the role of the trial court and trust in its competence to resolve all legal and factual matters before it in the first instance.”).

II. Attorney Fees

¶44 On March 29, 2023, nearly a month after this appeal was initiated, the superior court awarded the HOA its attorney fees and costs

VISTA DEL CORAZON HOMEOWNERS ASS'N v. SMITH & KINTZ
Decision of the Court

incurred from the beginning of this action to the court's order granting its motion for partial summary judgment. As we have explained, the superior court has yet to certify a judgment as final under Rule 54. Although both parties ask us to either affirm or vacate the court's March 2023 fee and cost award, we do not (yet) have jurisdiction to do so. *See Fields v. Oates*, 230 Ariz. 411, ¶ 25 (App. 2012). Nonetheless, because we vacate the court's permanent injunction, we also vacate the corresponding award of attorney fees and costs to the HOA incurred to obtain it. *See Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, ¶ 37 (App. 2007); *Eans-Snoderly v. Snoderly*, 249 Ariz. 552, ¶ 27 (App. 2020).

¶45 Both parties request their attorney fees on appeal pursuant to Rule 21, Ariz. R. Civ. App. P., A.R.S. §§ 12-341, 12-341.01, and § 17.1 of the CC&Rs, which entitles the prevailing party in any action instituted to “enforce any of the provisions of [the] Declaration” to recover his reasonable attorney fees and costs, as determined by the court, from the non-prevailing party. The HOA also seeks attorney fees under A.R.S. § 12-349. Because the HOA did not prevail on appeal, we do not award it attorney fees or costs. Smith and Kintz, as the prevailing parties on appeal, are entitled to their attorney fees and costs incurred in this appeal pursuant to § 17.1 of the CC&Rs upon their compliance with Rule 21. *See McDowell Mountain Ranch Cmty. Ass'n, Inc. v. Simons*, 216 Ariz. 266, ¶ 14 (App. 2007) (“[T]he court lacks discretion to refuse to award fees under [a] contractual provision.” (first alteration added, second alteration in *McDowell*) (quoting *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 575 (App. 1994))).

Disposition

¶46 We vacate the permanent injunction against Smith and Kintz without prejudice. We further grant Smith and Kintz their fees and costs incurred on appeal upon compliance with Rule 21, and remand for further proceedings consistent with this decision.

E C K E R S T R O M, Judge, concurring in part and dissenting in part:

¶47 In *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532, ¶¶ 10-17 (2022), our supreme court did not prohibit all non-unanimous amendments to an HOA's CC&Rs. Rather, it held that, when the original CC&Rs placed prospective owners on notice of a non-unanimous amendment process, that process could only amend the original covenants when such amendments would be “reasonable and foreseeable” in light of the original provisions. *Id.* ¶ 10. In applying this principle, *Kalway* cautioned that the original covenants do “not have to necessarily give notice of the particular details of a future amendment; that would rarely happen.” *Id.* ¶ 17. Indeed, *Kalway*

VISTA DEL CORAZON HOMEOWNERS ASS'N v. SMITH & KINTZ
Decision of the Court

specifically authorized non-unanimous amendments if they merely refined or “fill[ed] a gap” in the original restrictions. *Id.*

¶48 Thus, our supreme court implicitly authorized foreseeable, non-unanimous amendments to make the original covenants effective in application. *Id.* It did so presumably because HOA members not only possess a contractual expectation that new restrictive covenants not be imposed, *see id.*, but also that the existing ones will be enforced and not skirted.

¶49 Applying the above principles, I concur with the majority’s articulation of the pertinent law and its application to the core dispute here—the prohibition on short-term leases. But I cannot agree with its rejection of three specific amendments: (1) that owners include within any lease agreement a provision that places lessees on notice that the terms of the lease are subject to the original CC&Rs;⁴ (2) that any violation of those CC&Rs shall be a default under the lease; and (3) that the HOA may require owners “to disclose information regarding the lease or rental agreement within the limits of Arizona law.”

¶50 To the extent applied to the original covenants, each of these provisions operates only to enforce those covenants, not to create any additional restrictions on the use of the properties within the residential community. Notably, the original agreement includes express restrictions on partial leases. It entitles the HOA to receive the names of any lessees—presumably to enforce that restriction. And, as my colleagues acknowledge, the original agreement allows business and trade activities, such as leasing, only so long as they remain compatible with the residential character of the neighborhood. In furtherance of that provision, it prohibits business activities that would create non-customary vehicle or pedestrian congestion. In my view, the three amendments above, each relating to the disclosure of the rental agreements and requirements as to their contents, reasonably and foreseeably enforce those original, express restrictions on any business use of the properties.

¶51 The majority objects to the disclosure provision on the ground that it potentially makes the community “privy to a breadth of private information concerning completely permissible uses.” But the original

⁴Although these provisions were intended, in part, to enforce a new covenant against short-term rentals, a provision we have stricken, our supreme court has instructed that we apply the “blue pencil” rule to such amendments, preserving any that would remain enforceable as to the original CC&Rs. *Kalway*, 252 Ariz. 532, ¶ 21.

VISTA DEL CORAZON HOMEOWNERS ASS'N v. SMITH & KINTZ
Decision of the Court

CC&Rs already gave the HOA permission to secure the names of any lessees and placed substantial restrictions on the behaviors in which those lessees could engage. Thus, the original CC&Rs provided notice that leases could be monitored and restricted in substantial respects. Under those provisions, owners had no reasonable, contractually based expectation of privacy in the nature of their leasing operations beyond those provided by law.

¶52 Under the common law of our state, even a majority of homeowners in an HOA may not add new restrictions on the use of properties that would infringe on the owners' "expectations of the scope of the [original] covenants." *Id.* ¶ 17. But, by the same token, as represented by the HOA, the homeowners collectively enjoy reasonable expectations arising from the language of the original CC&Rs. That language entitles them to expect that the original covenants will be enforced and that they will have the power, by a vote of eighty percent of their membership, to amend the original CC&Rs to achieve that. I concur with the majority in all other respects.