IN THE

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

SUMMARY SHEET

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THOMPSON THRIFT v. ALBERTSON, et al.

TYPE OF CASE: Civil

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COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

THOMPSON THRIFT DEVELOPMENT, INC., Plaintiffs/Appellee, vs. LELAND C. ALBERTSON, JR. and SHIRLEY D. ALBERTSON, as Trustees of THE ALBERTSON FAMILY TRUST dated August 4, 1990, *et al.*, Defendants/Appellants.	No. 1 CA-CV 23-0082 Maricopa County Superior Court Case No. CV2020-007328

AMICUS CURIAE BRIEF OF COMMUNITY ASSOCIATIONS INSTITUTE (CAI)

(FILED WITH THE WRITTEN CONSENT OF THE PARTIES)

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TABLE OF CONTENTS

AMICUS BRIEF OF CAI

TABLE OF CITATIONS

Cases **Page(s)**

Statutes

Arizona Revised Statutes (ARS)

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE

Community Associations Institute (CAI) is an international organization dedicated to providing information, education, resources and advocacy for community association leaders, members, and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI's more than 43,000 members include homeowners, board members, association managers, community management firms, and other professionals who provide services to community associations. CAI is the largest organization of its kind, serving more than 74 million homeowners who live in more than 355,000 community associations in the United States.[1] CAI is representing not only itself, but also its tens of thousands of members on this important issue.

ISSUES OF BOTH GENERAL AND STATEWIDE CONCERN

Over 2.2 million residents live in one of the approximately 9,900 community associations in Arizona (more than 30% of Arizona residents) and approximately 74.1 million people live in community associations throughout the United States.[2] The issues considered under current Arizona law affecting deed-restricted communities have reaching importance on a nation-wide scale.

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[1] https://foundation.caionline.org/publications/factbook/statistical-review/

[2] *The Community Association Fact Book, National and State Statistical Review for 2021*: Fact Book 2021 Dashboard - Foundation for Community Association Research (caionline.org).

Since its publication in March 2022, this Court has adopted *Kalway v. Calabria Ranch HOA, LLC,* 252 Ariz. 532 (2022) as the legal standard applicable to all deed-restricted communities, including both Arizona condominiums (*see Cao v. PFP Dorsey Invs., LLC,* 74 253 Ariz. 552 (App. 2022)), and Arizona planned community associations (*see MacLeod v. Mogollon Airpark, Inc.*, 1 CA-CV 22-0012 (March 21, 2023)). The scope and extent of *Kalway's* holding is yet to be fully clarified, and it needs explanation.[3] In the meantime, cases with *Kalway* questions must be carefully analyzed – and its application should be limited.

As Appellants point out in their Reply brief, "*Kalway* can determine the outcome of this case." (Reply Brief, p. 9). Indeed, this case presents *Kalway* questions, with an opportunity for close examination and detailed discussion.

Arizona is a leading state when it comes to developing HOA law, and her sister states follow suit.[4] As such, any cases for potential publication as precedent must be given careful consideration, and the application of *Kalway* must be clearly expressed to avoid leading from the font, but in the wrong direction.

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[3] *Cao v. PFP Dorsey* is currently pending review in the Arizona Supreme Court, in which CAI has also filed an *Amicus* brief.

[4] CAI Amicus Curiae Committee members contributing to this brief shared analysis filed in other states (i.e., Utah), in which *Kalway's* "reasonable expectations" arguments are being advanced to judicially challenge voter-passed CC&R amendments.

INTRODUCTION

A lot has changed since Sir Edward Coke is said to have declared a man's home "as his Castle and Fortress."[5] We would expect such a courtly comparison from an English jurist writing in Shakespeare's time. We might also reasonably expect that the legal understanding of property rights has long since evolved from the abstract impenetrable monolithic idea, into a collective bunch of various legal rights, some shared with others, others removable, likened to a "bundle of sticks."[6]

Which stick (or sticks) we might reasonably expect to be affected, amended or even removed from a bundle of CC&Rs, is based on what sticks there are to start with. This, at least, is the current statement of Arizona law under the holding of *Kalway v. Calabria Ranch HOA, LLC,* 252 Ariz. 532, ¶ 17 (2022):

> [F]uture amendments cannot be "entirely new and different in character," untethered to an original covenant. … Otherwise, such an amendment would infringe on property owners' expectations of the scope of the covenants.[7]

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[5] Sir Edward Coke, *The Institutes of the Laws of England*, Part 4, Chapter 7 ("Of the Protection and Defence of the Realm.") (1628).

[6] *See United States v. Craft*, 535 U.S. 274, 278 (2002) ("A common idiom describes property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property.") This modern concept reflects "the principle that each owner, in exchange for the benefits of association with other owners, must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property." *Noble v. Murphy,* 612 N.E.2d 266, 269 (Mass. App. 1993).

[7] Citation omitted, quoting *Lakeland Prop. Owners Ass'n v. Larson,* 459 N.E.2d 1164, 1167 (Ill.App.Ct. 1984).

There is sound law in *Kalway*, but using its "reasonable expectations" language to avoid another otherwise enforceable provision conflicts with clear statutory enabling powers for the majority of collective owners to amend their deed restrictions. *See* A.R.S. §§ 33-440(C) and 33-1817(A). These statutes are clear and need not be trammeled with interpretive ambiguity. These same statutes already protect owners from having *new* and *affirmative* restrictions placed on their lots, despite a majority-owner vote, without that affected owner's express consent. *See* § 33-440(C)(2)(b) (amendments require "the affirmative vote or written consent of all of the owners of the lots or property to which the amendment applies.")[8]

Notions of "reasonable expectations" should not be employed to entirely disregard the general amendment power both preserved to members in their covenants, and by statute. Doing so acts to deny, if not significantly restrain, the power and right of the collective owners affirmatively consenting under proper legal process. Because contractual terms, democratic procedure and statutory proscriptions apply to the amendment process for restrictive covenants, adding tests of "foreseeability," "reasonableness" and "reasonable expectations" is unnecessary, and doesn't always fit. Homeowners, practitioners, and trial courts need clear rules to follow. *Kalway's* "reasonable expectations" notion goes too far, or at least needs to be expressly limited and clarified, or it will be confused and abused.

[8] All amendments naturally apply to all lots. Owners of lots that are changed in character and use by amendment, addition or removal of a restriction must consent.

ARGUMENT AND ANALYSIS

The almost 60-year-old facsimile copy of the recorded CC&Rs, obscured by decades of copying, shows that "B. D. Rogers" appeared before a notary on May 19, 1965 to execute the Tally Ho Farms declaration for recording. This is when Tally Ho Farms subdivision was platted out, struck off in equisized residential plots, and subjected to deed restrictions. *Are all owners' "reasonable expectations" forever locked into what the 1965 covenants say?* According to *Kalway,* yes. "The notice requirement relies on a homeowner's reasonable expectations based on the declaration in effect at the time of purchase – in this case, the original declaration." *Kalway*, 252 Ariz. at 538, ¶ 15. That fit for equitable purposes in *Kalway*, because there was no other version of CC&Rs under which anyone might claim a differing expectation. But expectations and intent can be amended and restated in time.

The court in *Kalway* went on:

> To determine whether the original declaration gave sufficient notice of a future amendment, *we must look to the original declaration itself.* "Because covenants originate in contract, the primary purpose of a court when interpreting a covenant is to give effect to the original intent of the parties" with any doubts resolved against the validity of a restriction. … We apply an objective inquiry to determine whether a restriction gave notice of the amendments at issue.

Id. at 538-39, ¶ 16 (internal citation omitted, emphasis added). Here, like in *Kalway,* the Tally Ho CC&Rs had never before been amended and, therefore, the "original declaration" is the same covenants "in place at the time of purchase" for all owners, whether purchased in 1965 or 2023. That convenience is not always the case.

1. The "Reasonable Expectations" Concept for CC&Rs is Troublesome.[9]

Trying to discern any purchaser's reasonable expectation based on what the CC&Rs said *at different times of purchase* is simply unworkable. In both *Kalway* and here in Tally Ho Farms, all owners are subject to the same covenants in effect at the time of purchase for everyone – so the "time of purchase" analysis works in both cases because it is equally and essentially irrelevant. What is relevant is what the operative covenants say when the *amendment* is made (or proposed), and what the collective owners' expectations are with respect to that proposed amendment. Existing language affirmatively contemplating change – even substantive change – and a procedure to affect that, is equally relevant when considering the collective expectations of deed-restricted property owners.

A. A General Amendment Term is Notice of Potential Change.

Recognizing recorded covenants are generally enforced as written, the *Kalway* court called CC&Rs a "special type of contract" in which "unknown terms which are beyond the range of reasonable expectations" will not be enforced. *Id.,* at

[9] The "reasonable expectations doctrine" was adopted in Arizona in 1982, for purposes of interpreting standardized insurance contracts. *See Sparks v. Republic National Life Insurance Co.*, 132 Ariz. 529 (1982). Two years later, the Arizona Supreme Court recognized the doctrine needed guidance and limits: "If not put in proper perspective, the reasonable expectations concept is quite troublesome, since most insureds develop a 'reasonable expectation' that every loss will be covered by their policy." *Darner Motor Sales, Inc. v. Universal Underwriters Insurance Co.,* 140 Ariz. 383 (1984). Likewise, without guidance here, we can expect every challenge to a CC&R amendment to claim an encroachment on the challenger's reasonable expectations.

¶14. Under strict application of *Kalway,* any restriction <u>*ever*</u> <u>*added*</u> (the "unknown terms"), if not found already existing in the CC&Rs, is *per se* unreasonable and unenforceable. This is not a viable legal standard, and contrary to nation-wide standards. It vitiates Arizona homeowners' rights vested in contract and statute, and undermines venerated democratic process. It elevates the few challengers' now-purported or presumed "expectations" above the collective expectations of the owners voiced as a group. There are statutory protections in place requiring the "affirmative vote or written consent of all of the owners of the lots or property to which the amendment applies." *See* A.R.S. §§ 33-440(C) and 33-1817(A).

B. The "Reasonable Expectations" Standard is Contrary to National Standards for Interpreting Deed Restrictions.

Restrictions found in recorded CC&Rs (including recorded amendments) "are clothed with a very strong presumption of validity." *Hidden Harbour Estates, Inc. v. Basso*, 393 So.2d 637, 639 (Fla. 4th DCA 1981).[10] Valid amendments to existing CC&Rs, even those adding new restrictions, are likewise presumed valid under this common sense, common law approach.

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[10] *See also Beachwood Villas Condo. v. Poor*, 448 So.2d 1143, 1144 (Fla. 4th DCA 1984); *Noble v. Murphy,* 612 N.E.2d 266, 270 - 271 (Mass. App. 1993); *Highland Springs South v. Reinstatler*, 907 N.E.2d 1067 (Ind. App. 2009) (*quoting Villas West II of Willowridge Homeowners Ass'n v. McGlothin*, 885 N.E.2d 1274, 1278 (Ind. 2008)) ("Such restrictions 'are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed.'")

This legal presumption of validity carries with it a high standard for challengers. Courts of other jurisdictions uphold restrictions (and amendments) found in recorded declarations absent a showing that the restriction is clearly ambiguous, arbitrary and capricious in its application, or otherwise violates public policy or some fundamental constitutional right. Florida courts have led the charge on establishing this recurrent standard:

> As we previously noted, Rule 26 was recorded as part of the Condominium Documents. The rule, therefore, is clothed with a very strong presumption of validity because each purchaser has adequate notice of the restrictions to be imposed and thereafter purchases his unit knowing of and accepting the restrictions. *Beachwood Villas Condominium v. Poor*, 448 So.2d 1143 (Fla. 4th DCA 1984); *Hidden Harbour Estates, Inc. v. Basso*, 393 So.2d 637 (Fla. 4th DCA 1981); *Wilshire Condominium Association v. Kohlbrand*, 368 So.2d 629 (Fla. 4th DCA 1979). **Accordingly, courts will not invalidate a restriction found in the recorded condominium documents absent a showing that it is clearly ambiguous, wholly arbitrary or unreasonable in its application, violates public policy, or abrogates some fundamental constitutional right.** *See White Egret Condominium, Inc. v. Franklin*, 379 So.2d 346 (Fla.1979); *Everglades Plaza Condominium Association v. Buckner*, 462 So.2d 835 (Fla. 4th DCA 1984); *Hidden Harbour Estates; Pepe v. Whispering Sands Condominium Association*, 351 So.2d 755 (Fla. 2d DCA 1977).

Constellation Condominium Ass'n, Inc. v. Harrington, 467 So.2d 378 (Fla. App. 1985) (emphasis added). These are clear legal standards, not imaginative ideas of individual purchaser's "reasonable expectations" about the contract. It also supports the collective owners' ability to adopt <u>*new*</u> restrictions that meet this standard.

The reasonable expectations doctrine borrowed from insurance law is not a good fit for interpreting deed restrictions. CC&Rs run with the land, not the

purchaser. Most contracts include provisions that allow the parties thereto to amend the terms of their agreement. Deed restrictions are no exception. Declarations preserving a general amendment provision offer the mechanism to amend the contract consistent with collective expectations. And, "restrictive covenants are enforceable only by the parties thereto." *Highland Springs South v. Reinstatler*, 907 N.E.2d 1067 (Ind. App. 2009). The terms of their contract, therefore, dictate – unless the terms are unconscionable or unconstitutional. Recorded amendments to CC&Rs, likewise, are presumed legally enforceable. This is the expectation of purchasers.

This legal standard, and supporting justification, is clearly explained by the Massachusetts Court of Appeals in *Noble v. Murphy,* 612 N.E.2d 266 (Mass. App. 1993):

> There is sound basis for treating restrictions in the originating documents as being "clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right.... Indeed, a use restriction in [the originating documents] may have a certain degree of unreasonableness to it, and yet withstand attack in the courts." *Hidden Harbour Estates, Inc. v. Basso*, 393 So.2d at 639-640. *See also* Natelson, *Law of Property Owners Associations*, § 4.4.4, at 34 n. 17 (1989 & Supp.1991) (questioning the appropriateness of reasonableness review when the regulation in question was enacted prior to its opponents' acquiring ownership and was known by them at the time of acquisition). Also, unit owners, upon purchase, may pay a premium to procure what they regard as a beneficial restrictive scheme. Note, Judicial Review of Condominium Rulemaking, 94 Harv.L.Rev. 647, 653 (1981). Under this formulation, the value of meeting the

> reasonable expectations of original unit owners and enforcing their right to freely associate by contract with persons of like expectations outweighs the possibility that some owners may purchase into a condominium regime without actual notice and full understanding of its restrictions. …
>
> The defendants do not contend that there is any fundamental public policy or constitutional provision guaranteeing the right to raise, breed, or keep pets in a condominium. By insulating properly-enacted and evenly-enforced use restrictions contained in the master deed or original by-laws of a condominium against attack except on constitutional or public policy grounds, already crowded courts and the majority of unit owners who may be presumed to have chosen not to alter or rescind such restrictions will be spared the burden and expense of highly particularized and lengthy litigation.

Noble v. Murphy, 612 N.E.2d 266, 270 - 271 (Mass. App. 1993). Part and parcel of each owner's bundle of sticks includes relinquishing "a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property" in "exchange for the benefits of association with other owners." *Noble v. Murphy,* 612 N.E.2d 266, 269 (Mass. App. 1993). Creating an unworkable "reasonable expectations" notion to second-guess the voice of the collective owners is unnecessary, and contrary to national trends.

C. *Kalway's* "Time of Purchase" Standard is Patently Erroneous.

Attempting to apply a time of purchase standard for reviewing the enforceability of CC&R amendments becomes a debacle. Under *Kalway,* "[t]o determine whether the [declaration in place at the time of purchase] gave sufficient notice of a future amendment, we must look to the [time-of-purchase] declaration itself." *Id.,* at ¶ 16. Strictly applying this "expectation preserved based on time of

purchase" creates an unmanageable matrix of differing owners' property rights and expectations. Case in point is *Cao v. PFP Dorsey Invest., LLC,* 253 Ariz. 553 (App. 2022), which demonstrates why the time of purchase standard is problematic.

In *Cao,* this Court transposed the *Kalway* expectations analysis onto state statutes in effect at the time of purchase for the homeowner. Applying the expectations analysis, this Court found "[t]he Declaration did not provide sufficient notice of such a substantive [statutory] amendment." *Cao,* at ¶ 22. This Court held, "if there has been substantive post-purchase changes to the statute, the version of the statute in place at the time of purchase controls." *Cao*, at ¶ 2. This results in multiple, different statutory regimes – including ones the legislature has replaced or invalidated – all to apply variably in one common interest community.

The unworkability of this rule is especially pronounced where there have been multiple amendments to the original CC&Rs over time, along with ongoing changes in ownership. Consider a parallel, for example, the Arizona Condominium Act, which has been amended at least 45 times since its enactment in 1985. Under *Cao*'s application of *Kalway'*s time of purchase rule, an Arizona condominium association is required to determine which version of statutes applies to each individual unit owner based on when they acquired title. If *Cao* dictates reasonable expectations based on what is in place at the time of purchase, then under *Kalway* all amendments to CC&Rs over a period of time would likewise need to be archived and applied to each owner based on a patchwork of when each owner purchased. This can't work.

Here is a simple example, and just one of innumerable iterations. Let's assume the following hypothetical facts for this theoretical practice:

- Declarant, owner of 5 acres of land, dreams of creating a residential subdivision.

- In 1965, Declarant subdivides and plats-off 5 equal acre-sized lots, recording deed restrictions that limit all residences on lots to "single family homes," but without any "residential-use-only" restrictions. As a result, owners can live in and work out of their homes. *This is the intent of the "original" CC&Rs.*

- The barebones 1965 covenants also include a general amendment provision, allowing amendment by vote of the majority of lot owners, 1 vote per lot.

- By 1970, Declarant sells Lots 3, 4 & 5 (respectively) to a butcher, baker and candlestick maker, who each build stick-built homes on their lots – and immediately get busy in their respective trades. (Assume all businesses are permitted by zoning regulations).

- In 1971, the zoning ordinances are amended to include Recreational Vehicles (RVs) within the definition of "single family homes."[11] And, the CC&Rs incorporate the zoning laws by reference, "as amended from time to time."

- In 1972, Declarant sells Lots 1 and 2 to The Mighthappen Family Trust.

- By 1975, after several fires breaking out on Lots 4 & 5, the owners of Lots 3, 4 & 5 all agree that baking and candlestick making are too dangerous for their neighborhood, and the 3 lot owners vote as a majority to amend their CC&Rs to include this new restriction prohibiting fire-hazard businesses. The owner of Lots 1 & 2 is given actual notice and votes "no" against the restriction. However, they don't live there, and aren't in the bread or candle business. The majority vote carries and the amendment passes.

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[11] Some of these facts somewhat mirror the case of *Powell v. Washburn*, 211 Ariz. 553, ¶ 1 (2006), an often-cited Arizona case adopting the Restatement (Third) of Property: Servitudes, and holding that "restrictive covenants should be interpreted to give effect to the intention of the parties as determined from the language of the document in its entirety and the purpose for which the covenants were created."

- The First Amended CC&Rs are recorded in 1975, amending the original CC&R, including this new fire-hazard-business restriction.

- The baker (Lot 4) happened to be retiring anyway (with new expectations), so in 1976 he sells his home to a landlord real estate investor.

- The candlestick maker (Lot 5) finally outgrows his expected business production, and sells in 1976 to a new owner.

- In 1977, the owners of Lots 3, 4 & 5 again vote and amend the CC&R. In fact, they entirely amend the original CC&Rs and the first amendment, making an entirely new and "restated" CC&Rs that include several new and updated restrictions, including an express restriction that allows homes to be leased as rentals, but not for "transient or hotel purposes."

- In 1980, The Mighthappen Family Trust sells Lot 2, which until then had remained undeveloped. The new owner builds a family home and moves in.

- In 1982, tired of the smells and sounds of the butcher shop on Lot 3, the new owner of Lot 2 convinces Lots 4 & 5 to amend the CC&Rs to prevent all businesses. They give notice to everyone. Even the owner of Lot 3 agrees that the neighborhood is no longer good for his butchery, and he consents to the amendment. Lot 1 votes against this, but the majority vote carries.

- Between 1985 and 1993, the CC&Rs are amended several times by a majority vote of the owners, once every other year or so, adopting a few trendy aesthetic standards, i.e., minimum landscaping requirements.

- Assume that Lots 2, 3, 4 & 5 are sold and title transfers several times over since then, at differing times during, before and after the many amendments.

- Jump forward to 2023, when a Trustee of the Mighthappen Family Trust decides to drive and park an RV onto Lot 1, and make it his permanent residence to set up his glassblowing business. He also parks a second RV on the lot and advertises it on Airbnb, VRBO and all the other short-term rental websites.

What are the "reasonable expectations" of the Mighthappen Family Trustee? Are they tied to a purchase date of 1972? According to *Kalway*, yes. If so, which

post-purchase amendments are enforceable? And against whom? Does the pre-purchase 1971 change in zoning laws also change the owners' expectations? According to *Cao,* no – "if there has been substantive post-purchase changes to the statute, the version of the statute in place at the time of purchase controls." *Cao*, at ¶ 2. Time of purchase is not proof positive for determining anyone's expectations.

Powell v. Washburn, 211 Ariz. 553 (2006), is a perfect example. In *Powell,* the original CC&Rs (recorded in 1988) permitted single-family, manufactured and mobile homes, but disallowed the use of RVs as residences in an "airpark" community. However, the La Paz County Zoning Code was amended in 1996 to allow RVs as a single-family residence in a manufactured home subdivision. Some owners moved RVs onto their lots to live in them. *Which interpretation serves the expectations of the original owners?* The Arizona Supreme Court upheld the trial court's injunction preventing owners from using RVs as residences, despite the zoning change. *Right result?* Curiously, one of those RV owners was Thomas Washburn, the same declarant who recorded the original CC&Rs that included the RV prohibition. *Id.* at ¶¶ 2 & 4. As *Powell* shows, declaring anyone's "reasonable expectations" based on the purchase date is a bit of pretend work.

Kalway's time of purchase rule creates uncertainty and non-uniformity. It expects that homeowners collectively acting to amend their CC&Rs will discern and catalogue each owner's purchase date, dissect which version of CC&Rs or statutes were in place at that time (if since amended), and decipher whether or not a proposed

amendment might be enforceable or declared unenforceable if judicially challenged. It literally creates a pretended patchwork of differing owners' expectations at differing times, and elevates the *presumed* "reasonable expectations" of a single owner, based on a date of purchase, over the expectations of the collective ownership. This is unrealistic and unworkable – and already resolved by statute. *See* A.R.S. § 33-440(C).

D. *Kalway*'s Application Should be Limited and Clarified.

Owners in deed restricted communities, like Tally Ho Farms, need not be handcuffed with judicially imposed "reasonable expectations" based on language written by a developer platting off home lots in farm land 60 years ago. The recorded covenants itself is the association's "constitution" – a living contract with internal provisions and statutory procedures providing change by democratic process and majority voice of the *then vested owners*. *See Schmidt v. Sherrill*, 442 So.2d 963, 965 (Fla. 4th DCA 1984). By including a general amendment provision, the declaration itself presumes that the same restrictions won't always be in the collective best interest forever, and may sometime warrant amendment, and even removal. These same fundamental principles apply to amending both our state and federal constitutions. A general amendment provision lawfully gives that notice.

Arizona statutes likewise grant homeowners the power to amend their recorded covenants, and further protect lot owners from having new and affirmative restrictions placed on their lot without their written consent. *See* A.R.S. § 33-440(C)

(its application discussed further below). Nebulous notions of "reasonable expectations" are unnecessary when existing statutory provisions offer the same intended protections.

Courts interpret contracts by reading their provisions in light of controlling statutes and decisional law of the state when the contract is formed, renewed or amended. *Balboa Ins. Co. v. State Farm Mutual Auto. Ins. Co*., 17 Ariz. App. 157 (1972); *Touchette v. Northwestern Mutual Ins. Co.,* 494 P.2d 479 (Wash. 1972). This Court has expressly declared "all contracts incorporate applicable statutes and common law principles." *Qwest Corp. v. City of Chandler*, 222 Ariz. 474, ¶ 34 (App. 2009). Recorded covenants need not be excluded from these same rules.

In holding that future amendments cannot be "entirely new and different in character, untethered to an original covenant. … Otherwise, such an amendment would infringe on property owners' expectations of the scope of the covenants," *Kalway* effectively restricts the general amendment stick from the property owners' bundle. Or, at least it more specifically holds that no new sticks can *ever* be added unless the right was expressly inscribed somewhere on a stick to begin with.[12]

This assumes that *every* possible future amendment must be foreseen, foretold or otherwise futureproofed from the start. To presume this is possible is obviously

[12] *Kalway,* at ¶ 17 ("The restriction itself … 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.")

illogical, as *Kalway* readily admits.[13] Other courts have also recognized this impossibility. *See Charterhouse Assocs., Ltd. v. Valencia Reserve Homeowners Ass'n, Inc.*, 262 So.3d 761 (Fla. App. 2018) ("It would be impossible to list all restrictive uses in a declaration of condominium. Parking regulations, limitations on the use of the swimming pool, tennis court and card room—the list is endless and subject to constant modification.")

To say that anything new is unenforceable utterly guts the very futureproofing provision that allows for general amendments by a requisite affirmative owner vote. In this sense, *Kalway* is troublesome and needs limits.

E. Some Room Must be Spared for Entirely New Restrictions.

How can certain sticks be included or reserved if they were impossible to imagine when the covenants were first crafted? By including a general amendment provision allowing future owners to make that collective decision. Arizona statutes further protect directly affected properties. The argument, however, that any amendment is unreasonable if not tied to an existing restriction goes too far without defining what "entirely new, different in character [and], untethered to an original covenant" actually mean. *Id.* Arizona homeowners, legal practitioners and the courts need more clear, concise and exacting rules for enforceability of amendments to deed restrictions in light of A.R.S. § 33-440(C).

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[13] *Id.* ("The restriction itself does not have to necessarily give notice of the particular details of a future amendment; *that would rarely happen*.")

Sometimes things change, and entirely new terms may be what the collective owners want, and need. Particularly when those new terms could not possibly have been "foreseeable" to a developer drafting documents several decades ago. New amendments incorporating rapid advancements in technology and communications are frequently added to governing documents that were not possibly contemplated by prior drafters. Consider the changes in electronic notices and signatures, online voting and assessment payments, absentee ballots and remote video appearances at meetings – never contemplated several years ago – but now authorized by statute and incorporated by amendment into many covenants. Under *Kalway,* without something originally reserved in the CC&Rs, these amendments are "unforeseeable," unreasonable and unenforceable. That is too restrictive.

In reality, the more ancient the original covenants are, the more likely they will eventually call for change that the original drafter did not foresee. This is the purpose for A.R.S. § 33-440(C), without the need to find the restriction reserved in the original covenants. Applying *Kalway* strictly*,* any chance for entirely new change is stymied as "future amendments cannot be 'entirely new and different in character,' untethered to an original covenant." *Id.,* at ¶ 17. This offers lip service to the rules of contract construction while strictly limiting the general amendment covenant itself, ignoring legislatively promulgated procedures for implementing warranted change, and denying in reality what a collective group of owners want,

need and reasonably expect at any relevant time. It also disregards the recognized usefulness of covenants, namely their reciprocal nature.

2. *Kalway*'s Application to "HOAs" (Condominium and Planned Community Associations) Should be Reconsidered and Limited.

The Tally Ho Farms development is not an association of owners functioning as a nonprofit corporation, nor does it own or manage any real property.[14] It has no mandatory membership in any "association," and has no mandatory dues. It has no serving or elected board of directors, and it owns no real property.

In many respects, it is very similar the 5 lot "association" in the Calabria Ranch Estates LLC in the *Kalway* case. What is most similar between them is that neither is very similar at all to the typical "homeowners association" that more than 2.2 million Arizona residents and 74 million people live in throughout the United States.[15] Notwithstanding, the *Kalway* opinion opens up with this statement of the scope of its wide-reaching application to all "homeowners associations,"

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[14] Section 33-1802(1) defines an "Association" as "a nonprofit corporation or unincorporated association of owners that is created pursuant to a declaration and operate portions of a planned community…" A "planned community" is defined under the same statutes as "a real estate development that includes real estate owned and operated by or real estate on which an easement to maintain roadways or a covenant to maintain roadways is held by a nonprofit corporation or unincorporated association of owners, that is created for the purpose of managing, maintaining or improving the property and in which the declaration expressly states both that the owners of separately owned lots, parcels or units are mandatory members and that the owners are required to pay assessments to the Association for these purposes." A.R.S. § 33-1802(4).

[15] *See* fn. 2, supra.

> ¶ 1 In this case, we are asked to decide the extent to which a **homeowners' association ("HOA")** may rely on a general-amendment-power provision in its covenants, conditions, and restrictions ("CC&Rs") to place restrictions on landowners' use of their land.

Id. (emphasis added).

It should be distinguished from applying to <u>all</u> deed restricted communities because different legal protections are in place to avoid amendments by majority vote without the minority's knowledge. That was the issue in *Kalway,* "the other property owners amended the CC&Rs by majority vote without Kalway's consent or knowledge." *Id.,* at ¶ 4. This primary concern is cured with condominiums and planned communities because statutory notice, absentee balloting, membership meeting and voting procedures in both sets of statutes afford protections to avoid an owner-majority amendment without the minority's actual knowledge.

3. A.R.S. § 33-440(C) Allows for General Amendments, and Protects Lot Owners from New and Affirmative Covenants without Consent.

The protections that *Kalway* attempts to afford with its "reasonable expectations" reasoning are already preserved in A.R.S. § 33-440(C). This statute applies to deed restricted communities that are not "planned communities" or "associations" as defined in the planned community statutes (A.R.S. § 33-1801, *et seq.*). Section 33-440(C) is the mirror image of the statutory language in the planned community statutes. Section § 33-440(C)(2)(a) allows less than all the owners of lots in a deed restricted subdivision to amend the CC&Rs by (some) majority vote

by written consent. The statute further protects unsuspecting lot owners, requiring the affirmative vote or written consent "of all the owners of the lots or property to which the amendment applies." A.R.S. § 33-440(C)(2)(b).

This latter language ("to which the amendment applies") can be misconstrued without considering the full context. Naturally, when a community's recorded declaration is amended, it is amended for the effect of all lots bound by the declaration. Any "amendment applies" to all lots; but unanimous consent is not needed for all amendments – even if the amendment only changes a few lots. Appellants, indeed, advance the argument: "Because the restrictions are for the protection of all of the lots, the Amendment that removed selected lots from the restrictions 'applies' to all of the lots and therefore requires the approval of all of the owners." (AOB, p. 26). This turns the statute itself entirely on its head.

Section 33-440(C)(2) does not mandate unanimity or require 100% approval for any amendment. On the contrary, § 33-440(C) expressly allows amendments to declarations, and specifically permits amendments affecting less than all of the lots:

> C. [T]he following apply to an amendment to a declaration:
>
> 1. The declaration may be amended by … an affirmative vote or written consent of the number of owners or eligible voters specified in the declaration….
>
> 2. An amendment to a declaration *may apply to fewer than all of the lots* … if both of the following apply:

> (a) The amendment receives the affirmative vote or written consent of the number of owners or eligible voters specified in the declaration….
>
> (b) The amendment receives the affirmative vote or written consent of all of the owners *of the lots or property to which the amendment applies*.

(*Id.,* quoting pertinent parts) (emphasis added).

This statute both enables collective owners to amend their recorded covenants through a requisite number of votes, and protects lot owners from having new and affirmative restrictions placed on their lots without *those* affected lot owners' affirmative vote or written consent. This logical interpretation and practical application fully serves the purposes and protections afforded in *Kalway* without having to work in presumed "expectations" unworkably tied to a time of purchase.

4. Protections in *Kalway* are Preserved in A.R.S. § 33-440(C), With No Need to Quibble about What is "Reasonable and Foreseeable."

Reasonableness and foreseeability are resolved by the statute's application. Under § 33-440, property owners may enter into private contracts regarding real property "and the private covenant is valid and enforceable according to its terms" if the statutory voting procedures are followed. A.R.S. § 33-440(A). This is a statutory presumption of reasonableness of private covenants on their face. Foreseeability and expectations are infused in the statute requiring the express consent of those lots upon which any new covenants or affirmative obligations will be imposed by the amendment. If those affected lot owners withhold consent, any

new and affirmative restrictions imposing any liability or obligation remain unenforceable. This is the effect of § 33-440(C). This is also *Kalway's* holding.

It is also the same outcome and legal effect of those same cases upon which *Kalway* expressly relied:

> The original declaration must give sufficient notice of the possibility of a future amendment; that is, amendments must be reasonable and foreseeable. *See Dreamland,* 224 Ariz. at 51 ¶ 38; *see also Shamrock v. Wagon Wheel Park Homeowners Ass'n,* 206 Ariz. 42, 45-46 ¶ 14 (App. 2003); *Wilson v. Playa de Serrano,* 211 Ariz. 511, 513 ¶ 7 (App. 2005).
>
> In defining the contours of reasonableness and foreseeability, we find *Dreamland's* reasoning compelling.

Kalway, ¶¶ 10 – 11. Each of these supporting cases – all coming before § 33-440(C) was adopted in 2016 – resulted in the same outcome we would expect now under the application and protections of § 33-440(C). And, without having to consider confusing questions of expectations and reasonableness.

In *Dreamland,* this Court struck down an amendment to covenants requiring new mandatory membership and imposing assessment obligations on all lot owners passed by less than all the owners. *Dreamland Villa Community Club, Inc. v. Raimey,* 224 Ariz. 42, 51 ¶ 38 (App. 2010). Applying the statute, we get the same result. *See* A.R.S. § 33-440(C)(2)(b) (covenants imposed on lots requires the consent "of all of the owners of the lots or property to which the amendment applies.")

The same is true for *Shamrock v. Wagon Wheel Park Homeowners Ass'n,* 206 Ariz. 42, 45-46 ¶ 14 (App. 2003). The Wagon Wheel Park subdivision (like Tally

Ho Farms here) was a deed restricted subdivision without any "HOA" or mandatory assessments. *Amendments* to the original covenants eventually attempted to impose mandatory membership and liability for assessments on 100% of the lots (entirely new restrictions and obligations). This Court held that "mandatory membership in a new homeowners' association can only be imposed on owners of lots within an existing subdivision *by recording deed restrictions to that effect*." *Id.,* at ¶ 1.

"Recording deed restrictions" is not recording an amendment to them. The Court meant such affirmative obligations required all owners' consent to bind their property, just as original recorded deed restrictions require. And, again, applying § 33-440(C)(2), we would expect the same legal result because the new covenants required the consent "of all of the owners of the lots or property to which the amendment applies." For mandatory dues and membership, that is 100%.

Lastly, consider the legal result of *Wilson v. Playa de Serrano,* 211 Ariz. 511 (App. 2005), and the same analysis applying § 33-440(C). In *Wilson*, the association, operating under existing deed restrictions, sought to amend their governing documents to contractually establish an age-restricted community in compliance with the Housing for Older Persons Act (HOPA).[16] Instead of voting to amend their recorded covenants, the members voted to amend the bylaws, declaring the Association an age-restricted community. That doesn't work, as this Court held,

[16] Pub.L. No. 104-76, 109 Stat. 787 (codified as amended at 42 U.S.C. § 3607(b)(2)(C)).

"generally, to impose a restriction on a lot owner's use of the lot, the restriction must appear in the recorded declarations." *Id.,* ¶ 7 (*citing Shamrock*, 206 Ariz. 42, ¶ 14).

This Court continued: "If the recorded declaration does not contain or at least provide for later adoption of a particular restriction or requirement, that restriction or requirement is invalid." *Id.* at ¶ 7. A general amendment provision does provide for later adoption of restrictions; however, under § 33-440(C), no new or affirmative restrictions or liabilities can be imposed by amendment without the consent of those lot owners on which the new restrictions are imposed.

In all Arizona cases supporting *Kalway,* we get the same legal result by applying the logical, practical and workable provisions of A.R.S. § 33-440(C). We get the same result in *Dreamland, Shamrock* and *Wilson.* With *Kalway's* clarification that no new restrictions can be imposed without the consent of affected owners, there is no need to mix in any reasonable expectations analysis. This also demonstrates why *Kalway's* "time of purchase" rule is wholly irrelevant, and should be avoided.

5. Reasonable Expectations are Protected by Statutory Procedures.

Section 6.10, subsection (2), comment f of the Restatement (Third) of Property (Servitudes) provides in relevant part:

> Amendments that do not apply uniformly to similar lots or units and amendments that would otherwise violate the community's duties to its members under § 6.13 are not effective *without the approval of members whose interests would be adversely affected unless the declaration fairly apprises purchasers that such amendments may be made*.

Restatement (Third) of Property (Servitudes) § 6.10(2) (with emphasis). A general amendment provision in the covenants apprises purchasers of potential amendments. Under the Restatement, "adversely affected" owners must give their approval for such amendments. These same protections afforded in § 6.10 or the Restatement are mirrored, and more specifically protected and defined, in Arizona statutes.

Section 33-440(C), discussed in part above, more fully provides:

> C. Except during the period of declarant control, or if during the period of declarant control with the written consent of the declarant in each instance, the following apply to an amendment to a declaration:
>
> > 1. **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.
> >
> > 2. **An amendment to a declaration may apply to fewer than all of the lots** or less than all of the property that is bound by the declaration and **an amendment is deemed to conform to the general design and plan of the community**, if both of the following apply:
> >
> > > (a) The **amendment receives the 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.
> > >
> > > (b) The amendment receives the affirmative vote or **written consent** of all of the owners of the lots or property **to which the amendment applies**.

Id. (emphasis added). Identically, Arizona's planned community statutes, A.R.S. § 33-1817(A), provides for Arizona planned community associations:

> A. Except during the period of declarant control, or if during the period of declarant control with the written consent of the declarant in each instance, the following apply to an amendment to a declaration:
>
> > 1. 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.
> >
> > 2. An amendment to a declaration may apply to fewer than all of the lots or less than all of the property that is bound by the declaration ***and an amendment is deemed to conform to the general design and plan of the community***, ***if both of the following apply***:
> >
> > > (a) The amendment receives the 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.
> > >
> > > (b) The amendment receives **the affirmative vote or written consent of all of the owners of the lots or property to which the amendment applies**.

Id. (emphasis added).

These are the statutory protections, and this is the applicable standard for gauging reasonable expectations; an amendment is "deemed to conform to the general design and plan of the community" if the requisite votes and consents are secured pursuant to said statute. *Id.* This is the legal test that should be applied to Arizona CC&R amendments. The expectations of the collective owners is voiced

through the voting and amendment process, not necessarily concreted to whether or not that newly warranted restriction was possibly foretold in a distant past. To the extent that *Kalway* may be read to forever disallow any restriction not fortunate enough to find itself written into the original CC&Rs, it shouldn't. That is unreasonably restrictive, and *Kalway's* holding should not be read so strictly.

This case before this Court shows that *Kalway's* holding is sufficient enough to avoid entirely new restrictions never before contemplated, without using any foreseeability of reasonableness tests. It's an illogical leap to infer anyone's reasonable expectation based on reading one provision of a contract for the purpose of disregarding another – and particularly to disregard the general amendment provision allowed with the consent of at least a majority of the collective owners. All affected owners to any CC&R amendment are protected from inequitable and unforeseen restrictions by application of A.R.S. § 33-440(C).

6. Reasonable Expectations are Not Locked into a Time of Purchase.

Is there not a time when successive owners' reasonable expectations for the use of certain property might change? Certainly. We have urban development and planning, governmental takings and rezoning hearings. What *is* reasonably foreseeable is that change in use happens with time. This is the quintessential purpose behind a futureproofing amendment provision – to give notice that, if circumstances and time demand change, and the required number of owners approve, their restrictions may be amended (with proper notice and consent

procedures). Arizona statutes have been enacted/amended to further protect owners, requiring the express consent for any new restrictions placed on their land, despite a majority's approving vote. *See* A.R.S. §§ 33-440(C) and 33-1817(A).

Tally Ho Farms is not a HOA. It is a deed-restricted community. It neither owns nor manages common area, and has never functioned as an "HOA." In fact, the Arizona's planned community statutes wouldn't be adopted for almost 30 years (in 1994) after it was platted. Even under those statutory definitions, Tally Ho Farms is not a "planned community association."[17] Since 1965, it has simply been a subdivision of deed-restricted properties, without mandatory dues or assessments. And since that time, the corner lots (Lots 1, 2 and part of 3) have remained vacant, and now unsuited for residential lots. What any owner may have reasonably expected in 1965 cannot, *per se*, be the voice of collective reason today.

What the *original* declarant might have intended, and what owners first *reasonably expected* of the eventual use and improvement of those lots must be considered in the context of time, and reasonableness should be measured by the collective voice, exercising their contractual right to lawfully amend their covenants. Under the terms of A.R.S. § 33-440(C), the three corner lot owners directly released from the restrictions gave their express consent. The trial court got it right.

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[17] *See* A.R.S. 33-1802(1) and (4). The Tally Ho declaration has no mandatory assessment obligations for the purpose of maintaining and improving any commonly owned property.

7. Applying *Kalway* and § 33-440(C) in this Tally Ho Farms Case.

The question before this Court is whether the parties' bundle of sticks in the Tally Ho Farms covenants included an existing right (one "tethered to an original covenant"), and whether that right might be foreseeably affected by a future amendment. Very simply, both the residential-use restriction and the amendment provision of the Tally Ho CC&Rs are existing sticks that were already in the bundle.

The amendment "removing" certain corner lots[18] from the residential-use restriction is directly tethered to the original covenants for all lots. No new restrictions were added, and the existing restrictions equally provided that they could be amended. Reading only the residential-use restrictions to infer a reasonable expectation that all lots will forever remain so restricted directly disregards the equally reasonable expectation that the CC&Rs may amended to lift, redefine, change or even remove the restriction if the majority of the owners so consent.

Indeed, a "covenant can be *amended to refine it*, correct an error, *fill in a gap*, or *change it in a particular way*." *Kalway*, ¶ 17. That's what we have here with the Tally Ho Farms amendment, lifting the residential use restrictions for these lots, so they can finally be developed after 58 years of vacancy. That's the power and right

[18] The vacant lots at the corner of Warner and Rural Roads, platted as Lot1, Lot 2 and the south-half of Lot 3 (referred to as the "Removed Property" in Appellants' Opening Brief, pg. 8). It is not entirely clear whether these lots were removed from the subdivision, or the amendment simply lifted the residential use restrictions as to these lots. Either way, the amendment has the same effect.

of the owners collectively, through a majority vote, if the dictates of time demand it. Both the reasonable expectations of the collective owners, and the protected interests of the affected lots, are effectuated without the need for judicial second-guessing.

CONCLUSION

Under *Kalway*, "future amendments cannot be 'entirely new and different in character untethered to an original covenant." *Id.,* 252 Ariz. 532, ¶ 17. "Untethered" is meaningful, but needs some clarification. We also need clarification on the scope of permissible amendments to covenants that "refine it, correct an error, fill in a gap, or change it in a particular way." *Id.* ¶ 17. This doesn't say "removing" a covenant, but clearly removing an existing covenant is both "tethered" to it, and "refines … or change[s] it in a particular way." This case provides opportunity to clarify this.

Kalway should also be limited to avoid using the "time of purchase" error for presuming any owner's expectations. *Id.,* at ¶ 15 ("The notice requirement relies on a homeowner's reasonable expectations based on the declaration in effect at the time of purchase.") As noted above, the "time of purchase" is irrelevant. Anyone's expectations need not be tied to a purchase date. Nothing in the governing statutes mirrors this, or suggests it. Trying to apply the rule creates an imaginary patchwork of supposed different property rights and expectations. Case in point is *Cao v. PFP Dorsey Invest., LLC,* 253 Ariz. 553 (App. 2022) (review pending).

It is a reasonable expectation that sufficient development and urban change would eventually reach the stretches of Rural Road. We should not pretend that real

estate developers are future-tellers, foreseeing and addressing every possible issue forever. That is the power of the amendment provision – while developers cannot predict everything, they futureproof by including the express provision allowing for amendments to the CC&Rs, when the collective majority of owners so decide.

By express terms of the original CC&Rs, the potential of future amendments by a majority of future owners is not only anticipatable, it is equitable, democratic, sustainable and reasonable. Indeed,

> The success of a community association depends largely on the vision and planning of its members and leaders. Anticipating and planning for future development is a critical component of ensuring the long-term sustainability and success of the community.

See Wayne S. Hyatt, *Community Association Law: Cases and Materials*, (3rd edition, 2014). Part of that anticipation and planning includes the wherewithal to include a process and procedure for the majority of collective homeowners to amend their recorded covenants – and their contractual and statutory right to amend should not be entirely stripped away.

Clarification of *Kalway* and A.R.S. § 33-440(C) is needed. The case before the Court is ripe for this discussion, and the Community Associations Institute respectfully requests this venerable Court's direction and guidance.

RESPECTFULLY SUBMITTED this 18th day of May, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Rule 4(a)–(c) and Rule 14 of Arizona Rules of Civil Appellate Procedure, the undersigned hereby certifies that the foregoing Amicus Curiae Brief of Community Association Institute (CAI) appears in type 14-point text, is proportionately-spaced using a Times New Roman font and in double-spaced, except for footnotes, extended quotes and topic headings, which are single-spaced. The foregoing Brief contains less than 14,000, and does not have an average of more than 280 words per page, excluding the table of contents, table of citations and certificates, in accordance with ARCAP 14(a).

DATED this 18th of May, 2023.

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CERTIFICATE OF SERVICE

Pursuant to ARCAP 4(f) and (g), the undersigned certifies that on May 18, 2023, caused an original of the foregoing Amicus Curiae Brief of Community Association Institute (CAI) to be filed with the Arizona Court of Appeals – Division One; and mailed and emailed separate copies of the foregoing in compliance with Rule 5(c), *Ariz. R. Civ. P.*, to:

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