



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**KALWAY v. CALABRIA RANCH HOA LLC, et al.
CV-20-0152-PR**

PARTIES:

Petitioner: Maarten Kalway

Respondents: Calabria Ranch HOA, LLC; Mark A. Reid and Florence J. Clark; Edward A. Phlaum and Diane Lyn Phlaum, and Stuart Scibetta

FACTS:

In 2015, Calabria Ranch Estates (“Calabria”) was formed and divided into five lots. Kalway owns lot two, and his neighbors own the other lots (“Other Owners”). All owners took title to their respective properties subject to a recorded Declaration of Conditions, Covenants and Restrictions, (“Original CC&Rs).

In January 2018, the Other Owners, without Kalway’s knowledge, recorded an amended declaration by a majority vote, (“Amended CC&Rs).

In March 2018, Kalway filed this action against Calabria and the Other Owners seeking a declaratory judgment that he was not obligated to abide by the terms of the Amended CC&Rs. Kalway filed a motion for summary judgment, and the Other Owners filed a cross-motion.

After a hearing, the trial court issued its under-advisement ruling, granting in part and denying in part both Kalway’s and Calabria’s motions for summary judgment. The court determined that A.R.S. § 33-1817 allows the original declaration to be amended by a majority vote and does not require a unanimous vote. It further evaluated the amended declaration’s “reasonableness and foreseeability” under the lens of Calabria’s residential community purpose— “[to] protect[] the value, desirability, attractiveness and natural character of the Property”—and it concluded that certain amendments were invalid. Because the Amended CC&Rs included a severability clause, the trial court found that the invalid amendments were severable and found “the remaining amendments are valid as a matter of law.” Kalway appealed the determination upholding the validity of the Amended CC&Rs.

Majority: On appeal, the majority agreed with the trial court’s conclusions that Kalway was on notice that the Original CC&Rs could be amended by a majority vote, and also found that the amendments were consistent, foreseeable, and an extension of the Original CC&Rs. The amendments at issue, the majority concluded, coincided “with the purpose of the original declaration, ‘protecting the value, desirability, attractiveness and natural character of the Property.’” Thus, these additional restrictions were foreseeable and reinforce the nature of the covenant.” Also, the Amended CC&Rs

had uniform application, although perhaps not uniform effect, and were therefore valid.

Dissent: The dissent found that the Original CC&Rs did not provide sufficient notice that many of the new covenants imposed by the Amended CC&Rs could be imposed and found that the trial court should be reversed on some of its rulings.

First, the Original CC&Rs only required that “all residences constructed on Lots will be Single Family Dwellings.” The Amended CC&Rs required that a residence be a permanent structure, used for residential purposes by a single family. The amendments also required that the dwelling have at least 60% living space and at most 40% garage, which was also restricted to certain uses.

Second, under the Original CC&Rs, no limitation was placed on the number of “non-dwelling structures” or their location, placement, or size. But in the Amended CC&Rs, non-dwelling structures were limited to 2,500 total square feet in area, limited their height to eighteen feet, and barred from obstructing any “views” of any neighboring lot, including those of the Catalina and Rincon Mountains.

Third, the Original CC&Rs included a provision that structures could not be built within fifty feet of a property line. Under the new setback provision, property owners could not “grade,” “excavate” or “landscape” within fifty feet of any property line. Therefore, under the Amended CC&Rs, a property owner could not even dig a hole within fifty feet of his property line.

Fourth, the Amended CC&Rs also required the submission to and approval by fellow property owners of “construction plans” for improvements on a lot, although there was nothing in the Original CC&Rs about any such requirement.

Fifth, the Original CC&Rs had no definition for “livestock,” but the Amended CC&Rs limited “livestock” to be chickens, horses and cattle only.

Sixth, the Amended CC&Rs included a new provision requiring the removal of fallen deadwood.

ISSUES:

1. Whether a statement of general, subjective purpose gives the notice required for an amendment.
2. Whether A.R.S. § 33-1817(A) permits an amendment that facially applies to all of the lots, but does not apply to them uniformly.
3. Whether notice of the power to amend by majority vote gives notice that "entirely new" or more specific provisions may be adopted.
4. Whether the terms of the Amended CC&Rs, made without the consent of all of

the owners, unreasonably altered the nature of the terms of the Original CC&Rs or were unforeseeable to a purchaser.

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