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PRO-HOA PUBLIC POLICY: NO UNREASONABLE EXPECTATIONS

Public policy — the laws themselves, the court decisions, and executive conduct — are the manifestation of society's values. Fundamental to a healthy democracy and HOA "community" is the necessity that the laws be fair and just in order for the people to obey in their conscience. Obviously, in the real and HOA-Land world failure to obey the law has its harmful consequences forcing obedience in spite of disagreement, objection, or personal ethics or moral values, etc.

A healthy democratic society cannot be said to exist without a representative government making fair and just laws.

Professor Barnett explains (my annotations in sq brackets '[ ]'),

> *"A law may be 'valid' because it was produced in accordance with all the procedures required by a particular lawmaking system, [the HOA amendment procedure, for example] but be 'illegitimate' because these procedures were inadequate to provide assurances that a law is just."*[1]

(This commentary is a lengthy legal exposition. See Disclaimer.[2])

A practical, real-life approach gave rise to the legal concept of reasonableness in an attempt to classify and designate conduct underlying a fair and just administration of the law. This doctrine can be found throughout our judiciary: beyond a reasonable doubt, reasonable suspicion, and in tort law what a reasonable person would do, etc.

The reasonableness doctrine has finally come to HOA disputes in regard to **reasonable expectations**. "*Courts may look at the doctrine of reasonable expectations to determine whether to strike down an adhesion contract*."[3] (There is

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[1] Randy Barnett, *Restoring the Lost Constitution*, Princeton Univ. Press, (2004).
[2] George K. Staropoli, the author, is not an attorney nor works for an attorney, and is not providing legal advice or opinion.
[3] The reasonable expectations doctrine is not defined by specific words or phrases in a contract. Instead, it is defined by what is considered reasonable under the circumstances. The doctrine applies when the adhering party would not have accepted the agreement if they had

good cause to hold, as some courts have, that the declarations of CC&Rs constitute an adhesion contract).

Kalway[4]

In my review of *Kalway* it is apparent that the Court did not look to the doctrine reasonable expectations[5] and ask what a reasonable person under the circumstances would expect. The Court upheld the doctrine as applied to HOA CC&Rs (my emphasis),

> "CC&Rs form a contract between individual landowners and all the landowners bound by the restrictions, as a whole. . . . in special types of contracts, **we do not enforce 'unknown terms which are beyond the range of reasonable expectation . . . . CC&Rs are such contracts**.' . . . **Thus, '[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.'
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> "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*.**"**

If there had been amendments to the covenant in question, then the latest version of the CC&Rs would be the basis for analysis. Is it fair and just to go way back in time that could be as long as 30 years?

Was their sufficient notice to expect and anticipate this amendment that changes the existing contract, going back in time to the unchanged original CC&Rs? 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.

I ask: would a buyer anticipate having to go back to his contract at purchase and explore all the possible changes he could expect his HOA would make? Did you? Get real! A reasonable person would NOT enter into such a one-sided deal! How could the court itself, as a reasonable panel, hold average people with little knowledge of the law to act in some undefinable and unimaginable manner to them, later to be deemed reasonable?

This is a judicial "first instance" for HOA-Land that I am aware; a solid win for homeowners. It removes the openness of uncertain amendments known, in contract law, as invalid "agreeing to agree" contractual provisions. An agreement to agree is, in general, an unenforceable contract.

> *"An agreement to agree can also be a fully enforceable agreement containing sufficiently definite terms and adequate consideration, however leaving certain details to be worked out by the parties. Even though the parties expect to reach*

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known the particular term, or when the term undermines the coverage or benefit that the adhering party expected. In other words, people are bound by terms a reasonable person would expect to be in the contract." (Legal Information Institute, Cornell Law School).

[4] AZ SC in Kalway holds CC&Rs as "special contracts."

[5] *Supra* n 3.

on an agreement regarding the missing terms, what they expect to happen on their failure to reach an agreement is often unclear."[6]

However, the *Kalway* decision raised the controversial question of original intent as the basis to determine a valid notice of reasonable expectations. This opinion has come under fire from the AZ CAI chapter in 2 instances including its amicus brief to the AZ appellate court. (This is not the first time the AZ CAI chapter has vehemently opposed restoring homeowner due process.[7])

Thompson v. Albertson,[8]

In Arizona's Thompson the Arizona Supreme Court ruling in *Kalway* was put to the test and challenged by CAI (Shaw & Lines) in its amicus brief.

"*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.*

"Indeed, a 'covenant can be amended to refine it, correct an error, fill in a gap, or change it in a particular way.' That's the power and right of the owners collectively, through a majority vote, if the dictates of time demand it."

CAI had argued against the reasonable expectations test as being too vague when all was clear and precise in the existing amendment procedures. In other words, let the existing amendment procedure stand regardless of the content. The Court rejected the amicus brief because CAI had the audacity and the arrogance to ask the appellate court to overrule a supreme court decision.

Relevant to this commentary, the Court in a far reaching interpretation upheld that the homeowner notice provisions in *Kalway* were met and that the amendments were valid.

Preston v. Las Sendas[9]

In Arizona's Preston CAI (Carpenter Hazlewood) represented the HOA in this amendment regarding short term rentals. We see here extensive sentence parsing and an unreasonable, in my view, finding of the original intent requirement as specified in

[6] Agreement to Agree Law and Legal Definition, US Legal Forms.

[7] In 2011 CAI AZ had tried 3 times to have the court's decision that OAH adjudication of HOA disputes was unconstitutional. In 2006 in Arizona the Legislature passed a bill[1] providing for the Office of Administrative Hearings, through the DFBLS agency, to resolve HOA disputes. Over the years from 2007 – 2011 its constitutionality was challenged several times by CAI Arizona, resulting in declarations of unconstitutionality. However, in the final case, Gelb, the AZ Supreme Court de-published the ruling as applied to ALL HOAs, making it non-binding precedent. In 2011 the statute was amended, addressing Gelb.

[8] *Thompson v. Albertson*, No. CA-CV 23-0082 (Ariz. App. Div 1) 10-24-2023.

[9] *Preston v. Las Sendas*, No. 1 CA-CV 22-0761 (Ariz. App. Div 1) 10-31-2023.

Kalway. *Las Sendas* is a very strong attack by the infamous Carpenter Hazlewood (esteemed CCAL member) on the application of the reasonableness standard to HOAs based on *Kalway*.

Getting to the heart of *Kalway,* the homeowners in Las Sendas claimed, in regard to the rental amendment, that they "*'relied on the CC&Rs in effect' at the time of their purchases '[i]n deciding whether and how' to rent their homes.*" And argued that *"the original CC&Rs did not provide them with sufficient notice that such a restriction could be imposed*." The trial court rejected their arguments. The homeowners appealed.

The appellate court claimed *to "objectively examine the original CC&Rs and assess whether the amendment falls within the Plaintiffs' 'reasonable expectations . . . at the time of purchase.'"* Then the word parsing began to determine the validity of the amendment *"[as] a foreseeable modification or extension of the restrictions enumerated in the original CC&Rs"* and required the court

> *"to give effect to the original intent of the parties with any doubts resolved against the validity of a restriction. . . . [and] 'to give words their plain and ordinary meaning "in the context of the contract as a whole.'"*

And so, we enter into *reading tea leaves* to arrive at what a reasonable person would expect from an adhesion CC&Rs contract that grants very broad powers to the HOA, and that is short on fundamental and constitutional protections of property rights. The Court made its lengthy way interpreting § 3.12, 1.3, 1.44, and 1.49 of the original CC&Rs, raising more issues of "*durational limitations*" on leases and more questions; adopting the *Restatement of Servitudes* (3rd) §4.1.(1); and Arizona laws 9-500.49 and 42-5076E(1).

As expected from all this legal manipulation of interpretations, the Court found that,

> *Given these substantial use restrictions on residential units and the express durational limit on apartment rentals, we conclude that upholding the short-term rental amendment does not alter the original CC&Rs in any substantial and unforeseen way. In other words, prospective purchasers would have reasonably anticipated the possibility of further restrictions on leases as falling within the scope of the original CC&Rs' regulation*.

Are you scratching your head wondering what is going on? I am, and I'm not an average homeowner. What reasonable person would expect an aggregation of legalese as conducted by the court to be told, in effect, you should have known? The Court's approach is a grossly unjust and a hypocritical analysis expanding words beyond their common meanings, which in itself is highly unreasonable to the average buyer!

Consequently, *Kalway* has been made essentially ineffective and beyond the reasoning of the common homebuyer. **There are no unreasonable amendment expectations in HOA-Land!** Shame on the judiciary!