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Can They Change the Rules Like That? A Look at Amendment of HOA Restrictions

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It is very common for subdivisions and planned communities to be governed by homeowners' associations – often referred to as "HOAs". The lots in these subdivisions are also typically subject to covenants, conditions, and restrictions ("CCRs") contained in the "declarations" that invest the HOAs with the power to govern those communities. Homeowners in these communities may wonder if those CCRs can be changed in the future without their consent. The answer to that question is "yes", although the ability to amend CCRs varies by state.

Minnesota allows most amendments with less than a unanimous vote of the property owners in a community. Minn. Stat. § 515B.2-118 – which applies to most, but not all, planned communities in Minnesota – specifically provides for amendment of declarations creating CCRs with "at least 67 percent of the votes in the association." Further, the statute also requires unanimous written consent for certain major changes such as an increase in the number of units, a change in the boundaries of units, and a change in the authorized use of a unit from residential to nonresidential. Other states, however, have taken different approaches to amendment of CCRs.

In a recent case, the Arizona Supreme Court found that despite language in the declaration allowing amendment by a majority vote, amendments by less than unanimous consent are only permissible if the amendments were reasonable and foreseeable to homeowners. *Kalway v. Calabria Ranch HOA LLC*, 506 P.3rd 18 (Ariz. 2022). Calabria Ranch Estates is a residential subdivision outside of Tucson consisting of five lots, ranging in size from 3.3 to 23 acres. Pursuant to the declaration, the plaintiff was entitled to two votes, while the remaining four lots were entitled to one vote each. Without the plaintiff's consent, the other members of the HOA voted to amend the CCRs in several respects, including limiting the homeowners' ability to convey or subdivide their lots, restricting the size and number of buildings, and imposing restrictions on the number and type of livestock permitted.

The *Kalway* court reached its decision despite the fact Arizona Revised Statute § 33-1817 specifically permits amendment of declarations by less than unanimous vote. The court found that statute did not override Arizona's common law, which required unanimous consent to any amendment to CCRs that is not both reasonable and foreseeable. In *Kalway*, the court found that the amendment providing for future subdivision of the lots was invalid, because the original declaration did not provide

for any further subdivision and because a future subdivision may result in the loss of voting power for the new lot owners. Similarly, the court invalidated the portion of the proposed amendment that required dwellings on the lots to consist of 60 percent living space and 40 percent garage space. The court found that because the original declaration only required residences to be "single-family dwellings," there was nothing to put property owners on notice that the HOA could limit the size of their residences. The court also struck down the portion of the proposed amendment limiting livestock on the lots to "chickens, horses and cattle only." While the original declaration limited the number of livestock in proportion to the size of the lots, it placed no restriction on the type of livestock able to be kept in the community. Interestingly, the court found that a reasonable homeowner may have believed, because the original declaration was silent regarding smaller animals such as chickens, that not only were they allowed, but were also not subject to any size or number limitations.

Unlike Arizona, Minnesota courts have not yet imposed an additional common law limitation on changes to CCRs.

In conclusion, before purchasing a property that is subject to CCRs and governed by an HOA, homeowners should carefully review the governing documents, and should also consider the possibility of future amendments to those CCRs.