

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2023-002424

09/06/2023

HONORABLE TIMOTHY J. RYAN

CLERK OF THE COURT
B. Lopez-Mori
Deputy

RICHARD RUDNER, et al.

CHARLES W WIRKEN

v.

BELLASERA COMMUNITY ASSOCIATION
INC

MARCUS R MARTINEZ

JUDGE RYAN

UNDER ADVISEMENT RULING

The Court has considered Plaintiff's Motion for Summary Judgment and accompanying Statement of Facts filed April 17, 2023, Defendant's Response, Cross-Motion for Summary Judgment and accompanying Statement of Facts filed May 22, 2023, Plaintiff's Reply, Response and Controverting Statements of Fact filed June 6, 2023, Defendant's Reply filed June 26, 2023, and the argument of counsel.

Factual Summary

The parties do not dispute the relevant facts. Plaintiffs are homeowners in the Bellasera Community where they have resided since 2005. Defendant is a homeowner's association that is responsible for monitoring and supervising the Bellasera community consistent with governing CC&Rs. The Original and Amended CC&Rs authorize the Board to "adopt rules which modify, cancel, limit, create exceptions to, or expand the Use Restrictions attached to and incorporated in the CC&Rs.

On September 22, 2022, the Bellasera Board amended the "Vehicles and Parking" Use Restriction set forth in subparagraph (g) of Exhibit C to the Amended CC&Rs. This action was done with a vote of the homeowners. The amendment stated in relevant part,

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“Except as specifically provided in subsections 3 and 8 below, no more than one (1) passenger vehicle, SUV or pickup truck may be parked on a driveway of a home in Bellasera overnight.” The term “overnight” was defined as midnight to 6:00 a.m. Plaintiffs demanded defendant to rescind this change, which defendant refused, leading to this litigation. Plaintiffs do not challenge the language precluding parking overnight parking on the street. They only challenge the prohibition of more than one vehicle parked on private driveways in the community.

Legal Analysis

The Court finds the proper application of the principals set forth in *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532 (2022). Those holdings are substantially briefed and explained in Plaintiffs’ Motion for Summary Judgment and related pleadings which the Court incorporates by reference.¹

The changes set forth at the September 22, 2022 board meeting regarding the number of vehicles on a private driveway was not foreseeable. The CC&Rs and use restrictions did not give Plaintiffs sufficient notice. The subject and character of the previous parking restrictions pertains to parking locations, not number of vehicles or parking hours. The mere fact that the board has a general power to amend does not create foreseeability. The new restriction is unreasonable. It is an unauthorized restriction on the use of private property.

The Court finds that A.R.S. §10-3304 is inapplicable. Plaintiffs have standing to challenge and *ultra vires* corporate act, making a derivative action unnecessary.

IT IS ORDERED granting Plaintiff’s Motion for Summary Judgement.

IT IS FURTHER ORDERED denying Defendant’s Motion for Summary Judgment as moot.

¹ The Court notes that Plaintiffs’ counsel was the prevailing party’s counsel in this decision.
Docket Code 926