

# Arizona's Short-Term Rental Dilemma: A Path to Effective Regulation After *Kalway*

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## INTRODUCTION

The popularity of short-term rental housing has grown exponentially in recent years, especially in Arizona.<sup>1</sup> Short-term rentals (“STRs”), also referred to as vacation rentals or transient lodging, are homes, condominiums, apartments, or other residential units that are rented to paying guests for short periods of time, usually fewer than thirty days.<sup>2</sup> The property owner, or the “host,” typically lists their property on an online accommodation platform to advertise and offer their rental to guests.<sup>3</sup> One such platform, Airbnb, reported over 59,000 active listings in Arizona in 2021, with 5,404 of those listings located within Scottsdale alone.<sup>4</sup> In fact, the New York Times recently recognized Scottsdale as the “bachelorette-party capital of the West,” in part because of the huge availability and popularity of large, luxury short-term rental homes.<sup>5</sup>

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1. *The Hottest Short-Term Rental Cities in the U.S. for 2023*, AIRDNA (May 17, 2023), <https://www.airdna.co/blog/hottest-us-short-term-rental-cities-2023> [https://perma.cc/7E3Z-LM26].

2. *Short-Term Rental Overview*, GOVOS, <https://govos.com/blog/short-term-rental-overview> [https://perma.cc/8TF6-HZQ5].

3. Zoe McKenzie, *Life in a Sharing Economy: What Airbnb, Turo, and Other Accommodation-Sharing Services Mean for Cities*, 8 PENN. ST. J.L. & INT’L AFF. 350, 353 (2020).

4. *Airbnb & Vacation Rental Statistics [2022]*, ALLTHEROOMS, <https://alltherooms.com/resources/articles/get-airbnb-statistics-for-any-market/> [https://perma.cc/4ABJ-J28M]; J. Graber, *Short-Term Rentals Increased in Scottsdale Last Year*, SCOTTSDALE PROGRESS (Oct. 25, 2022), [https://www.scottsdale.org/city\\_news/short-term-rentals-increased-in-scottsdale-last-year/article\\_eaab845a-9688-11ec-8fa7-73c7fd19f779.html](https://www.scottsdale.org/city_news/short-term-rentals-increased-in-scottsdale-last-year/article_eaab845a-9688-11ec-8fa7-73c7fd19f779.html) [https://perma.cc/9HYT-7PKU].

5. Allie Jones, *The Bachelorette Party Comes for Scottsdale*, N.Y. TIMES (June 6, 2022), <https://www.nytimes.com/2022/06/04/style/bachelorette-party-scottsdale.html>.

While some homeowners celebrate the growth of the STR market as a great investment opportunity, others lament the effects that these vacation homes have on their communities.<sup>6</sup> For example, STRs can raise costs of living, reduce affordable housing, worsen traffic, strain public safety resources, and create public nuisances.<sup>7</sup> The United States reached an all-time high of STR listings nationwide when, in May of 2022, over 88,000 new short-term rentals were added to the overall supply.<sup>8</sup> AirDNA forecasts that the nationwide STR supply will grow an additional 8.6% by the end of 2023.<sup>9</sup> These market trends indicate that STRs are here to stay. How, then, should we manage them to minimize their negative effects?

Arizona law prohibits local governments from banning short-term rental housing altogether (e.g., Airbnbs, vacation rentals, home-sharing, etc.).<sup>10</sup> However, in an effort to combat “party houses” and their accompanying nuisances (such as noise, litter, crime, and traffic), local governments, homeowners, and homeowners’ associations (“HOAs”) alike pushed for legislation to increase their ability to regulate STRs.<sup>11</sup> As a result, on June 24, 2022, the Arizona Legislature passed SB 1168, which allows municipalities to govern short-term rentals via licenses, permits, and insurance requirements, and gives them the ability to fine owners or management companies when the rental guests violate community ordinances.<sup>12</sup> For example, cities may impose penalties on STR owners for violation of noise ordinances.<sup>13</sup> SB 1168 was a legislative compromise to allow local cities to regulate STRs for the purpose of public health and safety without too severely restricting STRs.<sup>14</sup> However, residents continue to challenge the regulations

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6. See Tristan P. Espinosa, *The Cost of Sharing and the Common Law: How To Address the Negative Externalities of Home-Sharing*, 19 CHAP. L. REV. 597, 601–03 (2016).

7. See *id.* at 601–07.

8. Adam Zarczynski, *US Short-Term Rental Market Poised for Further Growth*, CoSTAR (Oct. 12, 2022, 5:25 AM), <https://www.costar.com/article/1874040746/us-short-term-rental-market-poised-for-further-growth> [<https://perma.cc/DG2C-M542>].

9. *Id.*

10. ARIZ. REV. STAT. ANN. §§ 9-500.39(A), 11-269.17(A) (2023).

11. See *infra* Part II.

12. S.B. 1168, 55th Leg., 2d Reg. Sess. (Ariz. 2022); S. RSCH., AMENDED FACT SHEET FOR S.B. 1168, 55th Leg., 2d Reg. Sess. (Ariz. 2022).

13. S.B. 1168, 55th Leg., 2d Reg. Sess. (Ariz. 2022).

14. See Paris Achen, *Arizona Legislature Passes Measure To Restore Some Power to Cities*, VRMINTEL (Aug. 1, 2022), <https://vrmintel.com/arizona-legislature-passes-measure-to-restore-some-power-to-cities> [<https://perma.cc/8KLZ-NSNQ>] (explaining SB 1168 adds to the authority of HB 2672, passed in 2016, which gave cities authority to fine STR operations for verified violations of local or state laws).

as being improper and too restrictive, and the regulations often prove unsuccessful in preventing weekend nuisances.<sup>15</sup>

Arizona's governments and many private community associations throughout the state both regulate STRs. The deficiencies in local governments' regulatory abilities, however, highlight the need for private communities to freely self-regulate STRs in their communities as they see fit. For example, common interest communities ("CICs") and HOAs may create restrictive covenants that bind homeowners within a community.<sup>16</sup> Ordinarily, if a community wished to address its STR concerns, it could amend its covenants, conditions, and restrictions ("CC&Rs") using the amendment processes outlined in its governing documents to do so.<sup>17</sup> Via the amendment process, a community could self-regulate and adopt restrictions that cater to its unique needs, without relying on public legislation and its often-problematic enforcement.

In March of 2022, however, the Arizona Supreme Court released a decision that hinders a community's amendment capabilities.<sup>18</sup> In *Kalway v. Calabria Ranch HOA, LLC*, the court held that "a general-amendment-power provision may be used to amend only those restrictions for which the HOA's original declaration has provided sufficient notice."<sup>19</sup> In other words, the court held that for a homeowner's association to amend its governing documents to add a restriction on real property, the amendment must be both reasonable and foreseeable.<sup>20</sup> Under *Kalway*, general purpose statements and general-amendment power provisions in a community's governing documents are insufficient to provide notice for amendments that are not otherwise tethered to an existing covenant.<sup>21</sup> After *Kalway*, communities will be unable to pass amendments targeting short-term rentals.<sup>22</sup>

This Comment argues that the implications of *Kalway*'s sufficient notice requirement and Arizona's STR problem more generally should be addressed by a new statutory remedy. The proposed remedy will enable private

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15. See *infra* Part II.

16. See *infra* note 88 and accompanying text.

17. Note that Arizona Revised Statutes § 9-500.39 and § 11-269.17 do not apply to condominium or HOAs. Section 9-500.39 applies to cities and towns. Section 11-269.17 applies to counties.

18. *Kalway v. Calabria Ranch HOA, LLC*, 506 P.3d 18, 22 (Ariz. 2022).

19. *Id.*

20. *Id.* at 23.

21. *Id.* at 25; Chase Colwell & Jill C. Owen, *Arizona Supreme Court Rejects Unforeseeable HOA Amendments*, JD SUPRA (Apr. 4, 2022), <https://www.jdsupra.com/legalnews/arizona-supreme-court-rejects-6237167> [<https://perma.cc/GQ3W-JLED>].

22. See *infra* Section IV.A.

communities to amend their governing documents to restrict STRs while protecting the interests of individual property owners. The Arizona legislature should place two requirements on any private covenant amendment that adds affirmative restrictions on, or that otherwise targets, STRs. First, such an amendment must be enacted by a supermajority of the private community's association. Second, the STR owner restricted by the amendment must be allowed a five-year amortization period to gradually phase out the operation of their rental unit, make alternative arrangements, and recoup some of their investment. A combination of a supermajority requirement and amortization period would strike a balance between protecting STR owners' rights and expectations and the interests of all other owners in a community. Enabling private associations to effectively self-regulate and restrict STRs will allow communities to address their unique needs and to circumvent the need to rely on the ineffective public regulations a municipality may put in place.

Part I describes the short-term rental problem, the various approaches that states and their municipalities have taken to address it, and common difficulties that arise when enforcing such regulations. Part II discusses Arizona's current approach to STR regulation, paying special attention to recent legislative activity and the legislature's explicit authorization of the private regulation of STRs. Part III explains the recent *Kalway* decision, where the Arizona Supreme Court directly addressed the scope of the authority of HOAs to amend a community's governing documents and CC&Rs. Part IV discusses the implications of the *Kalway* decision on Arizona's current STR approach, specifically the ability of private communities to amend their CC&Rs to self-regulate STRs developing within the community. It then proposes a statutory remedy to circumvent *Kalway* concerns while best serving Arizona's policy choices regarding STRs. Part V briefly concludes.

## I. THE STR PROBLEM AND GENERAL APPROACHES TO REGULATION

STRs present a number of unique concerns that invite myriad regulatory approaches. The nature of the issues created by short-term rentals can be understood in economic terms, namely incentives and externalities.

The STR problem stems from the misaligned incentives of hosts, tenants, and owner-residents in a neighborhood.<sup>23</sup> Hosts are driven by business

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23. Marvin J. Nodiff, *Short-Term Rentals: Can Cities Get in Bed with Airbnb?*, 51 URB. L. 225, 231 (2021) ("The primary business incentive—profit—coupled with the transient occupancy

incentives, namely profit.<sup>24</sup> Meanwhile, owner-residents are incentivized to maintain the residential quality of the neighborhood they live in.<sup>25</sup> Because “weekender” tenants do not have the same incentives as long-term residents, they may cause public nuisances such as noise, trash, and parking issues, that undermine the residential quality of the neighborhood.<sup>26</sup> Some of the other negative effects of STRs include higher costs of living, reduced affordable housing, increased traffic, and increased strain on public safety resources.<sup>27</sup>

Short-term rentals impose negative externalities that are borne on their neighbors in a community.<sup>28</sup> Economists use the term “negative externality” to describe the costs and effects of an economic activity that are borne by unrelated, third parties rather than the parties conducting the activity.<sup>29</sup> These indirect, social costs are generally not reflected in the private cost and price of a good or service.<sup>30</sup> As a result, the producer of a good or service does not consider the social costs, and instead makes decisions based on their private costs and profit opportunities.<sup>31</sup> To avoid overproduction of the good and service and to maximize social welfare by minimizing social costs, some of the social costs should be shifted from third parties onto the producers.<sup>32</sup>

In the STR context, the negative externalities are felt by neighbors. The nature of short-term renting makes it difficult for hosts who violate the STR regulations to be discovered.<sup>33</sup> Consequently, hosts have a reduced incentive to comply with regulations.<sup>34</sup> So, even where regulations prohibit STRs or impose burdensome requirements to discourage them in a specific area, hosts

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inherent in STRs can undermine the quality of residential neighborhoods by creating tensions between host properties and owner-occupants in the neighborhood.”).

24. *Id.*

25. *Id.* at 238.

26. *See id.* at 231.

27. Espinosa, *supra* note 6, at 602–07. *See generally* Josh Bivens, *The Economic Costs and Benefits of Airbnb*, ECON. POL'Y INST. (Mar. 26, 2019) (discussing the economic costs of STRs, namely rising housing costs), <https://www.epi.org/publication/the-economic-costs-and-benefits-of-airbnb-no-reason-for-local-policymakers-to-let-airbnb-bypass-tax-or-regulatory-obligations> [<https://perma.cc/6JBZ-TUNP>].

28. Espinosa, *supra* note 6, at 601.

29. CFI Team, *Externality*, CORP. FIN. INST. (May 30, 2023), <https://corporatefinanceinstitute.com/resources/economics/externality> [<https://perma.cc/6ND6-4ZXQ>].

30. Thomas Helbling, *What Are Externalities?*, FIN. & DEV., Dec. 2010, at 48, <http://www.imf.org/external/pubs/ft/fandd/2010/12/pdf/basics.pdf> [<http://perma.cc/783F-2JNW>].

31. *Id.*

32. *See id.*

33. Espinosa, *supra* note 6, at 598–99.

34. *Id.*

continue to operate STRs in violation of the regulations, because they are motivated by profit and undeterred by the unlikely chance of discovery.<sup>35</sup> Legislation and regulations aim to increase hosts' private costs of short-term renting through taxing, licensing, fines for ordinance violations, etc.<sup>36</sup> However, when these regulatory efforts fail,<sup>37</sup> the costs of STRs are borne by residents in the community who are not involved in its practice.

### A. Approaches to Regulation

States are faced with a difficult task; they must address the negative externalities of STRs without impermissibly infringing on property owners' rights and expectations. States have attempted to strike that balance using approaches that typically fall into one of three categories: (1) prohibition; (2) extensive regulation; and (3) minimal regulation.<sup>38</sup>

#### 1. Prohibition

Some jurisdictions have adopted regulations that completely ban short-term rentals from existing anywhere within the jurisdiction.<sup>39</sup> New York is well known for its hostility towards STRs and provides an example of a statewide prohibition on STRs. Previously, the New York legislature prohibited the short-term rental of most apartments for fewer than 30 days, unless a permanent resident remains in the same unit and no more than two paying guests are present.<sup>40</sup> New York City "also banned 'short-term rentals of entire multiple dwelling units and one- and two-family units occupied for permanent resident purposes,'" with limited exceptions.<sup>41</sup> In 2022, the New

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35. *Id.* at 599.

36. *See id.* at 611–13.

37. Discussed *infra* Section I.A.4.

38. PRAC. L. GOV'T PRAC., REGULATING SHORT-TERM RENTALS (2023), [https://us.practicallaw.thomsonreuters.com/w-0200754?documentSection=co\\_anchor\\_a942216](https://us.practicallaw.thomsonreuters.com/w-0200754?documentSection=co_anchor_a942216).

39. *Id.*

40. Jennifer W. Karp, *To Combat Illegal Short-Term Rentals, NYC Requires Hosts To Register Their Listings. Here's How It Works*, BRICK UNDERGROUND (Sept. 5, 2023, 10:30 AM), <https://www.brickunderground.com/rent/local-law-18-registration-requirements-for-short-term-rental-host-banned-building-list-nyc> [<https://perma.cc/42Z9-66P7>]; Gloria Oladipo, *New York City Could Lose 10,000 Airbnb Listings in Short-Term Rental Crackdown*, GUARDIAN (Jan. 26, 2023, 3:49 PM), <https://www.theguardian.com/us-news/2023/jan/26/nyc-airbnb-short-term-rental-new-law> [<https://perma.cc/HQX5-W34P>].

41. McKenzie, *supra* note 3, at 374.

York City Council passed Local Law 18.<sup>42</sup> The law imposes onerous registration requirements on rental owners to assist the city in identifying STRs and enforcing its strict regulations.<sup>43</sup> Taking effect in March of 2023, the law is expected to remove thousands of illegal NYC listings from online STR platforms.<sup>44</sup>

Jurisdictions' prohibitions vary by coverage area, time, and type.<sup>45</sup> Jurisdictions prohibit short-term rentals on some or all of these bases. Michigan, for example, primarily prohibits STRs by area (i.e., banning their existence from certain parts of a county, city, or zoning district). More than a dozen Michigan cities, including Ann Arbor, Holland, and Spring Lake, prohibit STRs from residential areas.<sup>46</sup> Hawaii, by contrast, prohibits STRs based on time (i.e., rentals must meet a minimum number of days).<sup>47</sup> On the island of Oahu, a requirement that short-term rentals be booked for a minimum of 90 days effectively bans them altogether.<sup>48</sup> Washington, D.C. has several regulations prohibiting short-term rentals according to their

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42. Oladipo, *supra* note 40; *City Adopts Rules Allowing Owners To Apply for Short-Term Rental "Prohibited Buildings List,"* BELKIN, BURDEN, GOLDMAN: NEWS (Feb. 3, 2023), <https://bbgllp.com/new/city-adopts-rules-allowing-owners-to-apply-for-short-term-rental-prohibited-buildings-list> [<https://perma.cc/DP6H-YEZ5>].

43. Oladipo, *supra* note 40.

44. Karp, *supra* note 40.

45. PRAC. L. GOV'T PRAC., *supra* note 38.

46. Jarrett Skorup, *States Should Ban the Bans on Short-Term Rentals*, THE HILL (July 31, 2021, 7:00 AM) [hereinafter *States Should Ban the Bans on Short-Term Rentals*], <https://thehill.com/opinion/finance/565502-states-should-ban-the-bans-on-short-term-rentals> [<https://perma.cc/UV7Q-3R8D>]; Jarrett Skorup, *To Fight Airbnb, Local Government Groups Falsely Say No One Has Banned Them*, MACKINAC CTR. PUB. POL'Y (May 27, 2021), <https://www.mackinac.org/to-fight-airbnb-local-government-groups-falsely-say-no-one-has-banned-them> [<https://perma.cc/V4P7-D483>].

47. Dennis Shirshikov, *A Guide to Airbnb and Vacation Rental Regulations in Hawaii*, AWNING (Oct. 6, 2022), <https://www.awning.com/post/hawaii-short-term-rental-laws> [<https://perma.cc/WP5R-945B>]. Because the definition of a "short-term rental" utilized by this Comment is a "dwelling unit for a rental term of less than 30 days," any requirement that rentals are booked for a minimum of 30 days is an effective ban of a short-term rental. For the full definition, see *Short-Term Rental Overview*, *supra* note 2.

48. Zac Thompson, *Where You Can Still Book Short-Term Rentals Under Honolulu's Strict New Law*, FROMMER'S (Apr. 19, 2022, 5:45 PM), [https://www.frommers.com/blogs/arthur-frommer-online/blog\\_posts/where-you-can-still-book-short-term-rentals-under-honolulu-s-strict-new-law](https://www.frommers.com/blogs/arthur-frommer-online/blog_posts/where-you-can-still-book-short-term-rentals-under-honolulu-s-strict-new-law) [<https://perma.cc/YGX8-YCUP>]. An exception is made for STRs existing on the island of Oahu in areas zoned for resorts. *Id.* In October 2022, a judge blocked the aforementioned STR ban. See Stewart Yerton, *What Happens Now that a Judge Has Blocked Honolulu's Short-Term Rental Law*, HONOLULU CIV. BEAT (Oct. 18, 2022), <https://www.civilbeat.org/2022/10/what-happens-now-that-a-judge-has-blocked-honolulus-new-short-term-rental-law> [<https://perma.cc/6VBQ-UMN7>]. Regardless of the outcome of the litigation, the ban serves as a good illustration of a time-based prohibition.

type.<sup>49</sup> D.C. allows unlimited days of home-sharing when the host is present, but limits rentals when the host is not present or is not residing in the primary part of the residence.<sup>50</sup>

## 2. Extensive Regulation

Some states generally allow the existence of STRs, but their municipalities have developed extensive, onerous regulatory schemes to manage STRs within their jurisdiction. California is one such state.<sup>51</sup> California does not currently have any statewide regulations or restrictions on STRs; rather, municipalities create regulations pursuant to their general police power.<sup>52</sup> For instance, Santa Barbara vigorously manages short-term rentals within its inland area, requiring that each receive a permit from the county and comply with all applicable development standards, including “ownership, compliance with safety codes (fire, building, health), prohibited structures, signs, occupancy, parking, number of visitors, noise, internet listing, proof of ownership or long-term tenancy, and nuisance responses.”<sup>53</sup> Los Angeles, for example, prohibits the short-term renting of any rent-controlled unit or temporary structure (such as an RV, tent, or trailer) and prevents an owner from operating numerous investment properties by requiring that owners rent only their “primary residence.”<sup>54</sup>

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49. See Karl Scarlett, *Short-Term Rental Regulations Goes into Effect! What You Should Know*, GREAT DWELLINGS (Mar. 29, 2022), <https://www.greatdwellings.com/post/short-term-rental-regulations-goes-into-effect-what-you-should-know> [https://perma.cc/MV2N-YVRZ]; *Operating a Short-Term Rental in the District of Columbia*, D.C. DEP'T OF LICENSING & CONSUMER PROT., <https://dlcp.dc.gov/shorttermrentals> [https://perma.cc/F9RT-VAQV].

50. Martin Austermuhle, *D.C. To Start Restricting and Regulating Airbnb and Other Short-Term Rentals*, WAMU 88.5: DCIST (Jan. 5, 2022, 11:20 AM), <https://dcist.com/story/22/01/05/dc-to-start-restricting-and-regulating-airbnb-and-short-term-rentals> [https://perma.cc/8CSQ-64UE].

51. See generally *Guide to Laws for Airbnbs and Other Short-Term Rentals in California*, L. SOUP CAL., <https://cal.lawsoup.org/legal-guides/short-term-vacation-rentals-airbnb-vrbo> [https://perma.cc/M9FK-HZZ2].

52. CAL. CONST. art. XI, § 7; see *Ewing v. City of Carmel-by-the-Sea*, 286 Cal. Rptr. 382, 386–87 (Cal. Ct. App. 1991).

53. *Short-Term Rental Ordinance*, CNTY. OF SANTA BARBARA PLAN. & DEV., <https://www.countyofsb.org/776/Short-Term-Rental-Ordinance> [https://perma.cc/H4EA-GRCW].

54. *Guide to Laws for Airbnbs and Other Short-Term Rentals in California*, *supra* note 51.



### 3. Minimal Regulation

On the other end of the spectrum are states, often considered “short-term rental friendly” states, who adopt a minimal regulatory scheme, rather than a broad form of prohibition against them.<sup>55</sup> These states generally allow the existence of short-term rentals but may have individual cities, towns, or counties that impose some regulations on them—such as a registration or permit requirement, and requirements to pay applicable taxes.<sup>56</sup> Washington provides a characteristic example of a minimal regulatory scheme.<sup>57</sup> Washington generally allows STRs,<sup>58</sup> with few state-wide regulations in addition to the regulations of the applicable city or municipality.<sup>59</sup> Seattle, Washington, for example, imposes additional requirements for owners to obtain a city license and pay licensing fees; the city also limits each owner to operate up to two STRs at a time.<sup>60</sup>

### 4. Difficulties in Enforcement

Irrespective of which approach to regulation a jurisdiction takes, and the extent of the regulations in place, issues often arise in enforcing STR regulations. It is both expensive and burdensome to enforce regulations against STR hosts.<sup>61</sup> The training and resources needed to properly police STRs comes at a high cost. For example, the city of Scottsdale, Arizona has proposed to expend \$621,855 in 2022–23 on a “short-term rental task force” dedicated to this purpose.<sup>62</sup> Governments face barriers to accurate data collection; due to the sheer number of listings, and frequency of inaccurate listings, governments find it difficult to monitor constantly changing online

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55. PRAC. L. GOV'T PRAC., *supra* note 38.

56. *Id.*

57. See generally *Personal Home Rentals*, WASH. ST. DEP'T OF REVENUE, <https://dor.wa.gov/education/industry-guides/lodging-guide/personal-home-rentals> [https://perma.cc/NY6T-DJ6H].

58. See WASH. REV. CODE §§ 64.37.010–.050 (2023).

59. See *id.* (imposing some tax, liability insurance, and information disclosure requirements on STRs state-wide).

60. See SEATTLE, WASH., MUNICIPAL CODE tit. 6, ch. 6.600.040, .090 (2019); *Short Term Rentals*, CITY OF SEATTLE, <https://www.seattle.gov/business-regulations/short-term-rentals> [https://perma.cc/X3BP-RDSM].

61. See Espinosa, *supra* note 6, at 607–08.

62. J. Graber, *Scottsdale Cops To Form Short-Term Rental Squad*, SCOTTSDALE PROGRESS (Oct. 25, 2022), [https://www.scottsdale.org/city\\_news/scottsdale-cops-to-form-short-term-rental-squad/article\\_a945df20-bd0b-11ec-a264-5ba4beb92b9d.html](https://www.scottsdale.org/city_news/scottsdale-cops-to-form-short-term-rental-squad/article_a945df20-bd0b-11ec-a264-5ba4beb92b9d.html) [https://perma.cc/82WX-YYCM].

listing platforms for violations.<sup>63</sup> For instance, due to the general lack of communication between enforcement departments, a report such as a noise complaint may be called in but never properly tied to the host's STR permit.<sup>64</sup>

Further, constitutional concerns may arise due to the governmental role in the regulation. For example, on January 27, 2022, the Paradise Valley Town Council adopted an ordinance attempting to use A.R.S. § 9-500.39's narrow exception allowing local governments to regulate STRs for the purpose of protecting the public's "health and safety."<sup>65</sup> Among other things, the ordinance imposed numerous restrictions on nuisances and property maintenance, that did not apply to non-STR residential properties, and imposed new financial, administrative, and disclosure related obligations on STR owners.<sup>66</sup> An investigation by the Arizona Attorney General found portions of the ordinance invalid as a matter of state law and raised "significant constitutional concerns related to free speech, freedom of assembly, privacy, and due process."<sup>67</sup> As a result, Paradise Valley was required to amend the ordinance, or else it would have to forfeit significant tax revenue.<sup>68</sup>

## II. ARIZONA'S APPROACH TO REGULATION

Arizona's approach to STR regulation is unique and reflects developing compromises on the issue. It is one of the few states that has taken explicit action to protect STRs, while also increasing local governments' abilities to regulate them over time. Arizona is one of six states (including Idaho,

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63. See Christa Watson, *Why Short-Term Rental Ordinances Fail and a Few Ways To Ensure Success*, GRANICUS, <https://granicus.com/blog/why-short-term-rental-ordinances-fail-and-a-few-ways-to-ensure-success> [<https://perma.cc/SS9Z-M4FQ>].

64. *Id.*; see also David Caltabiano, *Phoenix Short-Term Rental Regulation Audit Finds Enforcement, Communication Issues*, ARIZ.'S FAM. (Sept. 8, 2022, 4:00 PM), <https://www.azfamily.com/2022/09/08/phoenix-short-term-rental-regulation-audit-finds-enforcement-communication-issues> [<https://perma.cc/PG3B-EU6P>] ("From noise complaints to out-of-hand house parties, it's all getting jammed up because these rentals aren't registered with the city. As a result, many officers don't know how to flag them as problem properties.").

65. ARIZ. ATT'Y GEN., INVESTIGATIVE REP. NO. 22-001 at 2 (Mar. 30, 2022), <https://www.azag.gov/complaints/sb1487-investigations> [<https://perma.cc/QZ8Y-UDXK>].

66. See *id.* at 2–3.

67. *Id.*; Memorandum from Sen. Warren Petersen to Ariz. Att'y Gen. Off., [https://www.azag.gov/sites/default/files/docs/complaints/sb1487/22-001/PV\\_Doc.docx](https://www.azag.gov/sites/default/files/docs/complaints/sb1487/22-001/PV_Doc.docx) [<https://perma.cc/XC6H-SD2Q>].

68. Jerod Macdonald-Evoy, *Paradise Valley Airbnb Ordinance Violates Arizona Law*, AG SAYS, ARIZ. MIRROR (Mar. 31, 2022, 3:31 PM), <https://www.azmirror.com/2022/03/31/paradise-valley-airbnb-ordinance-violates-arizona-law-ag-says> [<https://perma.cc/X6DG-BDA9>].

Florida, Indiana, Tennessee, and Wisconsin) that has enacted legislation explicitly preventing its local governments from banning STRs outright.<sup>69</sup> Thus, Arizona does not neatly fall into the aforementioned categorical approaches; it lands somewhere between minimal regulation and extensive regulation.

Arizona's recent history of STR regulation is reflective of the legislature's ongoing battle to find the right level of regulation. In 2016, to boost the STR market, Arizona Governor Doug Ducey signed legislation into law that prohibited local governments from enacting any STR regulations except under limited, specific circumstances.<sup>70</sup> Local governments, HOAs, and homeowners opposed the law, fearing it would exponentially increase the number of STRs and exacerbate the negative externalities already felt in their neighborhoods.<sup>71</sup> After the pushback, Arizona's legislature passed another bill in 2018 that required online hosting platforms to collect and remit occupancy taxes.<sup>72</sup> Again in 2019, the legislature passed a bill—HB 2672—to revise the 2018 law; the 2019 bill primarily addressed hosts renting their homes for large events.<sup>73</sup> The new bill provided that rentals could not be used for “nonresidential uses” such as special events, retail operation, and restaurants.<sup>74</sup>

Most recently, the Arizona Legislature endeavored to reach a better legislative compromise that would give local governments increased, but still limited power to regulate STRs.<sup>75</sup> On June 24, 2022, the Arizona Senate passed SB 1168, which allows cities and towns to “govern short-term rentals via licenses or permits, notifications and liability insurance, as well as . . . to

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69. Jerod Macdonald-Evoy, *Arizona Protected Airbnb with a 2016 Law, but Cities and Local Activists Hope To Claw Back Regulating Power*, ARIZ. MIRROR (Apr. 5, 2022, 10:09 AM), <https://www.azmirror.com/2022/04/05/arizona-protected-airbnb-with-a-2016-law-but-cities-and-local-activists-hope-to-claw-back-regulating-power> [https://perma.cc/PL7T-2LJH].

70. *Id.*; S.B. 1350, 52d Leg., 2d Sess. (Ariz. 2016); see also Stefan Etienne, *Arizona's Governor Ducey Signs SB 1350 into Law, Prohibiting the Ban of Short-Term Rentals*, TECHCRUNCH (May 13, 2016, 11:00 AM), <https://techcrunch.com/2016/05/13/arizonas-governor-ducey-signs-sb-1350-into-law-prohibiting-the-ban-of-short-term-rentals> [https://perma.cc/9XBQ-VQRV] (explaining public policy aim was to stimulate local economies and encourage a greater peer-to-peer sharing economy).

71. See Macdonald-Evoy, *supra* note 69 (“[T]he issues at stake go beyond disruptions to neighborhoods: The exploding STR market has led out-of-state investors to flock to Arizona and scoop up housing, exacerbating the state's affordable housing crisis.”).

72. Rob Jackson, *Arizona Short-Term Rental Laws*, SHORT-TERM RENTAL INSIDER, <https://strinsider.com/arizona-short-term-rental-laws> [https://perma.cc/JA62-G6UX].

73. *Id.*; H.B. 2672, 54th Leg., 1st Reg. Sess. (Ariz. 2019).

74. H.B. 2672, 54th Leg., 1st Reg. Sess. (Ariz. 2019).

75. See S.B. 1168, 55th Leg., 2d Reg. Sess. (Ariz. 2022).

fine owners or management companies when their property occupants violate community ordinances.”<sup>76</sup> Now codified in A.R.S. §§ 9-500.39 and 11-269.17, the law allows local governments to regulate STRs for the purpose of “public health and safety.” For example, local governments may impose penalties for violations of noise ordinances.<sup>77</sup> However, owners have challenged or ignored various city regulations of this sort.<sup>78</sup> Further, the municipal ability to regulate for “the purpose of public health and safety” ostensibly targets issues with parties, traffic, and noise. The ability to enact permit, licensure, and liability insurance requirements under A.R.S. §§ 9-500.39 and 11-269.17 arguably provides no solace for a municipality that wishes to ban or cap STRs in their area.

Under Arizona’s statutes, local governments may not prohibit short-term rentals.<sup>79</sup> However, local governments are not entirely powerless. Under A.R.S. § 9-500.39 and A.R.S. § 11-269.17, they can: regulate health and safety issues; enforce residential use regulations, including noise, maintenance, and nuisance ordinances, if short-term rentals are not treated differently; and may limit or prohibit rentals for sex offenders, sober living facilities, drug or alcohol control, or sexually oriented businesses.<sup>80</sup> Additionally, local governments can require property owners to obtain certain licenses and permits.<sup>81</sup> The statutes also allow local governments to institute

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76. S.B. 1168, 55th Leg., 2d Reg. Sess. (Ariz. 2022). The Bill added to the authority of House Bill 2672 passed in 2016, which gave cities authority to fine STR operations for verified violations of local or state laws. *See also* Achen, *supra* note 14; Jennifer Sokolowsky, *Local Arizona Governments Will Have More Leeway To Regulate Short-Term Rental Under New Law*, AVALARA (Aug 2, 2022), <https://www.avalara.com/mylodgetax/en/blog/2022/08/local-arizona-governments-will-have-more-leeway-to-regulate-short-term-rentals-under-new-law.html> [<https://perma.cc/HY33-7AQK>].

77. S.B. 1168, 55th Leg., 2d Reg. Sess. (Ariz. 2022).

78. *See* ELLIOTT D. POLLACK & CO., *THE NEGATIVE CONSEQUENCES OF SHORT-TERM RENTAL – ARIZONA’S RECIPE FOR DISASTER 27–30* (Feb. 2021), <https://blogs.mml.org/wp/short-term-rentals/files/2021/06/STR-White-Paper-The-Negative-Consequences-of-Short-Term-Rentals-Arizonas-Recipe-for-Disaster.pdf> [<https://perma.cc/76KJ-29MG>]; Macdonald-Evoy, *supra* note 68; *see also* Juliette Rihl, *Most Scottsdale Vacation Rentals Are Still Unlicensed, Despite Jan. 8 Deadline*, AZ CENTRAL (Jan. 6, 2023, 8:00 AM), <https://www.azcentral.com/story/news/local/scottsdale/2023/01/06/scottsdale-airbnbs-vrbo-without-licenses-face-fine-despite-warning-deadline/69782452007/> [<https://perma.cc/479X-2UW9>] (explaining less than 20% of listed STRs in Scottsdale have sought out a license under the new requirements imposed with recent regulation).

79. ARIZ. REV. STAT. ANN. §§ 9-500.39, 11-269.17 (2023).

80. *Id.*

81. *Id.*

a “3-Strike” policy to suspend STR permits if three health and safety violations occur within twelve months.<sup>82</sup>

A.R.S. §§ 9-500.39 and 11-269.17 grant Arizona’s municipalities limited regulatory ability but withhold the ability to prohibit STRs altogether. Yet, Arizona’s statutes explicitly allow *private communities* to regulate and prohibit STRs.<sup>83</sup> A.R.S. § 33-1806.01, provides that “[a] member [of a planned community]<sup>84</sup> may use the member’s property as a rental property unless prohibited in the declaration and shall use it in accordance with . . . restrictions.” Thus, Arizona’s legislature left a statutory door open for private communities to take the reins on STR regulation; the statute endorses the existence of STRs in private communities while recognizing a community’s autonomous ability to prohibit or restrict them as it sees fit.<sup>85</sup>

Private communities are widespread in Arizona. Since the first community association developed in the 1950s, there are now over 9,810 community associations within the state.<sup>86</sup> Roughly 31.4% of the population lives in a community governed by an HOA.<sup>87</sup> Under general property law principles, common interest communities (“CICs”) and their associations<sup>88</sup> may, by their

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82. *Id.*

83. ARIZ. REV. STAT. ANN. § 33-1806.01 (2023).

84. Arizona Revised Statute § 33-1802(4) defines a planned community 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.” ARIZ. REV. STAT. ANN. § 33-1802(4) (2019). This Comment’s usage of a “private,” “planned,” and “common interest community” are synonymous and refer to residential developments whose owners are organized into an association of members that governs the community.

85. Compare ARIZ. REV. STAT. ANN. § 33-1806.01(A) (2014), with IDAHO CODE ANN. § 55-3211 (West 2022) (limiting the ability of HOAs to amend CC&Rs to restrict rentals) (“No homeowner’s association may add, amend or enforce any covenant, condition or restriction in such a way that limits or prohibits the rental . . .”).

86. Andrea Hiland, *HOA Communities Not Just an Arizona Thing*, AZ CENTRAL (Sept. 24, 2015, 1:30 PM), <https://www.azcentral.com/story/news/local/asked-answered/2015/09/24/hoa-communities-not-just-arizona-thing/72595318> [<https://perma.cc/XPH8-W9Y6>]; *HOA Facts & Statistics: Arizona*, IPROPERTYMANAGEMENT (Oct. 9, 2022), <https://ipropertymanagement.com/research/hoa-statistics#arizona> [<https://perma.cc/BB38-ZQQJ>].

87. *HOA Facts & Statistics: Arizona*, *supra* note 86.

88. “‘Association’ means a nonprofit corporation or unincorporated association of owners that is created pursuant to a declaration to own and operate portions of a planned community and that has the power under the declaration to assess association members to pay the costs and

governing documents, create restrictive covenants (“CC&Rs”) that bind homeowners within a community.<sup>89</sup> Generally speaking, these private restrictions and CC&Rs may be amended by the amendment processes outlined in the original declarations.<sup>90</sup> Assuming an association retains the ability to amend its restrictive covenants, it is able to react to and address novel issues that arise in the community.<sup>91</sup>

When these CC&Rs are violated, an association may take action against the homeowner in violation.<sup>92</sup> Under Arizona’s Planned Community and Condominium Acts (A.R.S. §§ 33-1803 and 33-1242), associations must give homeowners notice of the violation and an opportunity to be heard before it can impose a fine on them according to its declared fine policy.<sup>93</sup> If warnings and fines are not sufficient to remedy the issue, an association can initiate a lawsuit for breach of contract to enjoin the homeowner.<sup>94</sup>

In some ways, CICs are akin to local governments. CIC Associations perform tasks traditionally performed by the government (including providing “utility services, road maintenance, street lighting”) and finance their operations with membership fees.<sup>95</sup> Any STR regulations implemented by a county or city under A.R.S. §§ 9-500.39 and 11-269.17 will be a one-size-fits-all solution for the entire jurisdiction. There are benefits when the CIC, rather than a county or city, formulates the regulations.<sup>96</sup> First, enforcement is likely to be more effective at the community level because there are “fewer residents to manage.”<sup>97</sup> Further, communities can focus on enforcing their regulations, which are fewer in number than the larger local government that handles the majority of services (such as “fire, police, taxes,

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expenses incurred in the performance of the association’s obligations under the declaration.” ARIZ. REV. STAT. ANN. § 33-1802 (2023).

89. See Gabriela Santos Toscano, *Common Interest Communities and a New Approach to Restriction on Leases as Amendments to the Original Declaration*, 53 U. TOL. L. REV. 549, 551 (2022).

90. *Id.* at 552; ARIZ. REV. STAT. ANN. § 33-1817 (2023) (“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 . . .”).

91. See Toscano, *supra* note 89, at 552.

92. The Brown Law Group, *What an Arizona HOA Needs To Know About Fines and CC&R Violations*, HALK, OETINGER, AND BROWN, PLLC (July 27, 2021), <https://azhoalaw.net/what-an-arizona-hoa-needs-to-know-about-fines-and-ccr-violations> [<https://perma.cc/4SPE-NW52>].

93. *Id.*; ARIZ. REV. STAT. ANN. §§ 33-1803, 33-1242 (2023).

94. The Brown Law Group, *supra* note 92.

95. Toscano, *supra* note 89, at 563.

96. Cai Roman, *Making a Business of “Residential Use”: The Short-Term-Rental Dilemma in Common-Interest Communities*, 68 EMORY L.J. 801, 834–35 (2019).

97. *Id.* at 834.

schools”).<sup>98</sup> Another benefit is the power of property owners and the association to enforce the CC&Rs and their incentives to do so.<sup>99</sup> Property owners and associations have a personal stake in ensuring the rules are enforced to the benefit of the common areas and their own property.<sup>100</sup> Lastly, private communities have an ability that the local governments do not. Due to Arizona’s legislation preventing municipalities from prohibiting STRs,<sup>101</sup> private prohibition is the only option for a community to eliminate STRs from a neighborhood altogether.

### III. THE *KALWAY* DECISION

Under Arizona’s framework for STR regulation, it is critical that CICs and associations retain the ability to effectively self-regulate using their declared amendment provisions. Via the amendment process, a community may adopt new restrictions as needed without relying on public legislation and its often-problematic enforcement. In March of 2022, however, the Arizona Supreme Court released a decision that severely hinders a community’s amendment capabilities.<sup>102</sup> *Kalway v. Calabria Ranch HOA, LLC*<sup>103</sup> reduces the scope of an association’s authority to amend its original declaration and CC&Rs in favor of protecting the reasonable expectations of homeowners.<sup>104</sup>

The case arose out of a conflict between an individual property owner and the other members of his community HOA.<sup>105</sup> Calabria Ranch Estates is a residential subdivision comprised of five lots, each subject to the subdivision’s CC&Rs as recorded in its original declaration.<sup>106</sup> The original declaration contained a general-amendment-power provision, providing that “the CC&Rs could be amended ‘at any time . . . by the [m]ajority [v]ote of the owners.’”<sup>107</sup> Maarten Kalway, the owner of Lot 2, held two of the six total votes among the owners.<sup>108</sup> The other property owners amended the CC&Rs

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98. *Id.*

99. *See id.*

100. *Id.*

101. ARIZ. REV. STAT. ANN. § 9-500.39 (2023) (preventing cities and towns from prohibiting STRs); ARIZ. REV. STAT. ANN. § 11-269.17 (2023) (preventing counties from prohibiting STRs).

102. *Kalway v. Calabria Ranch HOA, LLC*, 506 P.3d 18 (Ariz. 2022).

103. *Id.*

104. *Id.* at 22.

105. *Id.* at 22–23.

106. *Id.* at 22.

107. *Id.*

108. *Id.* Each lot was entitled to one vote, except for Lot 2, which, due to its large acreage, was entitled to two votes. *Id.*

by a majority vote pursuant to the general-amendment-power provision, “without Kalway’s consent or knowledge.”<sup>109</sup> The amendments changed and added definitions, “create[d] new restrictions, and enact[ed] new enforcement measures against owners” in violation of the covenants.<sup>110</sup>

Kalway sued the Calabria Ranch HOA and the four other lot owners to invalidate the amendments.<sup>111</sup> The Arizona Supreme Court granted review to address “the scope of an HOA’s authority to amend CC&Rs,” viewing it as an issue of “statewide importance.”<sup>112</sup> The court held that a “general-amendment-power provision may be used to amend only those restrictions for which the HOA’s original declaration has provided sufficient notice.”<sup>113</sup> Sufficient notice requires that an amendment be both “reasonable and foreseeable.”<sup>114</sup> Thus, even if a community’s governing documents would permit an amendment by majority vote under traditional contract law, this is “insufficient to allow a majority of property owners to adopt and enforce restrictions on the minority without notice.”<sup>115</sup> Proposed amendments that vary significantly from the original covenant will be rejected; communities may fill in a gap, correct an error, or change or refine a covenant, but the amendment “cannot be ‘entirely new and different in character’” and must be “[ ]tethered to an original covenant.”<sup>116</sup>

After the court applied its sufficient notice requirement to the Calabria Ranch HOA amendments, few amendments survived.<sup>117</sup> The court found just one amendment valid; an amendment defining a “garage” was permissible even though it was not defined in the original declaration because the declaration referenced a “garage.”<sup>118</sup> “Thus, a later amendment defining the term was reasonably foreseeable.”<sup>119</sup> Other declarations were stricken in their entirety.<sup>120</sup> The original declaration placed no limitation on the size of “non-

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109. *Id.*

110. *Id.* The new restrictions included a limit on owners’ abilities to convey or subdivide their lots, a restriction on the size and number of buildings permitted on each lot, and a reduced maximum number of livestock allowed on each lot. *Id.* at 22–23.

111. *Id.* at 23.

112. *Id.*

113. *Id.* at 22.

114. *Id.* at 23.

115. *Id.* at 24.

116. *Id.* at 25 (quoting *Lakeland Prop. Owners Ass’n v. Larson*, 459 N.E.2d 1164, 1167 (Ill. App. Ct. 1984)).

117. *Id.*

118. *Id.* at 26.

119. *Id.*

120. *Id.* at 27–28.



dwelling structures.”<sup>121</sup> The court found an entire new restriction invalid for lack of notice because it limited “non-dwelling structures” in square footage and height.<sup>122</sup> The remaining amendments were “blue penciled” by the court to strike portions it found to exceed the “reasonable expectations” of a property owner at the time of their purchase.<sup>123</sup> For several of the provisions, the court simply struck the added language, essentially invalidating the change entirely.<sup>124</sup>

Following *Kalway*, critics raised numerous concerns regarding the potential effect the decision will have on association amendment processes in Arizona.<sup>125</sup> Thus far, only one Arizona court has applied *Kalway*'s holding.<sup>126</sup> In *Cao v. PFP Dorsey Investments, LLC*,<sup>127</sup> the court interpreted *Kalway*'s notice requirement strictly to hold a declaration incorporating the Condominium Act “as amended from time to time” did not provide sufficient notice for an amendment caused by a substantive change in the Act.<sup>128</sup>

In January 2018, the Xias purchased one of ninety-six condominium units within the Dorsey Place Condominiums, subject to the complex's original recorded Declaration and CC&Rs.<sup>129</sup> In November 2018, PFP Dorsey acquired ninety of the units.<sup>130</sup> Under the Declaration, each owner, as a member of the Association, was entitled to one vote per unit.<sup>131</sup> As a result, the individual owners (including the Xias) held a mere 6% of the votes within

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121. *Id.* at 27.

122. *Id.*

123. *Id.* at 25–28.

124. *See id.* at 27.

125. For instance, see *Recent AZ Supreme Court Case's Significant Potential Impact on HOAs*, GALBUT BEABEAU: NEWS (June 24, 2022), <https://www.gb.law/news-and-insights/recent-az-supreme-court-cases-significant-potential-impact-on-hoas> [<https://perma.cc/45KW-VPN2>]; Kelly Broaddus, *Ramifications from the Kalway Case*, BROADDUS PROPS. GRP. (June 1, 2022), <https://www.northernarizonafinehomes.com/blog/ramifications-kalway-case> [<https://perma.cc/TP6N-84NQ>]; Chandler W. Travis, *Amending CC&Rs – Lessons from Kalway v. Calabria Ranch HOA*, TRAVIS L. FIRM (Apr. 8, 2022), <https://www.travislawaz.com/amending-ccrs-lessons-from-kalway-v-calabria-ranch-hoa> [<https://perma.cc/3ZQ6-CLJ5>].

126. *Cao v. PFP Dorsey Investments, LLC* is the only decision, at the time of this writing, that has interpreted and applied *Kalway*. *See Cao v. PFP Dorsey Investments, LLC*, 516 P.3d 1, 5–6 (Ariz. Ct. App. 2022). Two other cases cite *Kalway* for its recent articulation of the standard for summary judgment. *See Molina v. BMO Harris Bank, N.A.*, No. 2 CA-CV 2022-0106, 2022 WL 16736929, at \*1 (Ariz. Ct. App. Nov. 7, 2022); *Gadsden Co., LLC v. Gorman & Co.*, No. 2 CA-CV 2021-0118, 2022 WL 2976310, at \*1 (Ariz. Ct. App. July 27, 2022).

127. *Cao*, 516 P.3d at 1.

128. *Id.* at 6.

129. *Id.* at 3.

130. *Id.*

131. *Id.*

the Association.<sup>132</sup> The Declaration further provided that the Condominium could be terminated with 90% of the Association's approval.<sup>133</sup> With its 94% stake, PFP Dorsey unilaterally terminated the condominiums and forced the sale of the remaining six units to itself.<sup>134</sup>

The parties disputed whether PFP Dorsey properly terminated the Condominiums.<sup>135</sup> At the time of the Xias' purchase, the Declaration incorporated the 1986 version of the Act.<sup>136</sup> However, in 2018, effective at the time of the termination and forced sale, the legislature had amended the Act to change the method of calculation for the fair market value of the unit to which the owner was entitled by the sale.<sup>137</sup> The Xias argued that they had agreed only to the 1986 version and under *Kalway*, there was insufficient notice of the amendments contained in the 2018 version.<sup>138</sup> Thus, the purchase conditions of the forced sale based on 2018 Act were improper.<sup>139</sup>

The court agreed and strictly construed *Kalway's* notice requirement.<sup>140</sup> It found that although the Declaration incorporated the Condominium Act "as amended," the amendments made fell outside the Xias' reasonable expectations.<sup>141</sup> The words "as amended from time to time" gave notice that the Legislature may amend in the future but was not sufficient notice for the substance of the amendments.<sup>142</sup> Rather, "renewed consent" was required to incorporate such amendments.<sup>143</sup> Therefore, *PFP Dorsey*, the only case interpreting *Kalway* at this time, appears to heighten rather than temper the sufficient notice requirement articulated by the Arizona Supreme Court. Together *Kalway* and *PFP Dorsey* illustrate a strict sufficient notice requirement for amendments that tends to protect minority property owners from changes imposed by the majority.

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132. *Id.*

133. *Id.*

134. *Id.* at 4 (changing the locks to the condominiums shortly thereafter).

135. *Id.*

136. *Id.* at 5.

137. *Id.* at 6.

138. *Id.* at 5.

139. *Id.*

140. *Id.* at 5–6.

141. *Id.* at 5 (“[A]lthough the Declaration incorporate[d] amendments to the Condominium Act, an amendment [would] be included only if it [fell] within the Xias’ ‘reasonable expectations based on the declaration in effect at the time of the purchase.’”).

142. *Id.* at 6.

143. *Id.* at 7.

## IV. ANALYSIS

*Kalway* and *PPF Dorsey* severely hinder the ability of private communities and HOAs in Arizona to regulate STRs. With A.R.S. § 33-1806.01, Arizona's legislature left the "statutory door" open for private communities to take the reins on STR regulation. By expressly stating that "[a] member may use the member's property as a rental property unless prohibited in the declaration and shall use it in accordance with . . . restrictions," the legislature endorsed the existence of STRs in private communities as well as a community's ability to prohibit or restrict a short-term rental.<sup>144</sup> *Kalway*, by imposing a strict notice requirement for private covenant amendments, effectively shuts the statutory door left open by the Arizona Legislature. This Part discusses the implications of *Kalway*'s notice requirement on STR regulation in private communities. It then examines Florida's approach, which is similar to Arizona's, to suggest a remedy that better balances the competing interests at hand. This proposed statutory remedy paves a way for private communities to bypass *Kalway*'s high standard to pass STR-related amendments and will reopen the recently closed "statutory door."

A. Implications of *Kalway*

CICs and HOAs are widespread in Arizona. Further, STRs are a recent, growing phenomenon.<sup>145</sup> Because many private communities developed before STRs became popularized (or, in some cases, even before STRs came into being) their original governing documents may not address STRs or may only have vague restrictions regarding rental homes. Therefore, the reasonable expectations of owners who joined the community subject to the original governing documents very likely do not include STR restrictions. *Kalway* will only be implicated if amendments are made to governing documents and those amendments are applied against owners who took title to their property subject to the prior version of the documents. Communities and HOAs may amend their governing documents according to their general-amendment-power provisions and those changes will be binding on any new property owners that take ownership subject to, and with notice of, those provisions, without running afoul of *Kalway*.<sup>146</sup> This distinction is important

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144. ARIZ. REV. STAT. ANN. § 33-1806.01(A) (2023).

145. Zarczynski, *supra* note 8.

146. *See Kalway v. Calabria Ranch HOA, LLC*, 506 P.3d 18, 24 (Ariz. 2022).

to note. *Kalway* issues are likely to arise if property owners purchased their property with, or developed, the expectation they could operate a short-term rental and then later amendments are made to prohibit or restrict STRs in the community.

*Kalway* is clear that sufficient notice of an amendment is required, and that general-amendment-power provisions and general-purpose statements are insufficient on their own to give notice of future amendments.<sup>147</sup> If there are no pre-existing rental restrictions for notice of an amendment to be tethered to—in addition to either a general-amendment-power provision or general-purpose statement—a community will not be able to add a new, affirmative restriction on STRs.

What exists in the original governing documents of the typical Arizona community association is not sufficient to amend to add new restrictions targeting STRs. Take for example the governing documents of the Lone Mountain Village Community in Carefree, Arizona; recorded in 1995, its declaration provides a general-purpose statement to improve the quality of life in the community and to have “mutually beneficial” CC&Rs for the purpose of “enhancing and protecting the value, desirability, and attractiveness” of property.<sup>148</sup>

The Lone Mountain Village declaration does not have any provision that directly addresses short-term rentals.<sup>149</sup> Rather, it contains a general “Rental of Lots” provision requiring that any owner “who leases or otherwise grants occupancy . . . shall be responsible for assuring compliance by the Occupant with all the provisions of [the governing documents].”<sup>150</sup> Other potentially relevant provisions include a section for “Nuisances; Construction Activities” which commands owners and occupants to not “obstruct or

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147. *Id.* at 25 (“[R]elying solely upon a subjective general statement of purpose would provide limitless justification for new amendments . . . the general-amendment-power provision and general-purpose statement were not sufficient to provide notice of future amendments.”).

148. DESERT MOUNTAIN CMTY., DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS FOR DESERT MOUNTAIN VILLAGE OF LONE MOUNTAIN 2 (1995), <https://desertmtcommunity.com/DocumentCenter/View/162/Lone-Mountain-CCR-PDF> [<https://perma.cc/D24Z-P7AJ>] (“[I]t is desirable to have covenants, conditions and restrictions binding upon the Property and each and every portion thereof, and to have certain mutually beneficial restrictions and obligations with respect to the proper use, occupancy and enjoyment thereof, all for the purpose of enhancing and protecting the value, desirability and attractiveness of the Property and enhancing the quality of life within the Property.”).

149. *Id.* at 11–48.

150. *Id.* at 35–36.

interfere with the rights of other Owners . . . or annoy them by unreasonable noises or otherwise.”<sup>151</sup>

All of these provisions will likely fail *Kalway* muster if used as the basis for an amendment or new affirmative restriction targeting STRs in this community. In *Kalway*, where the original declaration stated that livestock was “not limited to” horses and cattle, and the amendment changed the type of acceptable livestock to “chickens, horses, and cattle only,” the change was rejected as not reasonably foreseeable.<sup>152</sup> Similarly, here, although there is both a general rental and a general nuisance provision, a change that would limit the acceptable type of behavior (such as a limit to only long-term rentals) would likely not be reasonably foreseeable.

Even with a pre-existing rental restriction to tether an amendment to, there is no guarantee that the provision will provide the requisite notice given the court’s strict interpretation of the notice requirement. HOAs will not be able to freely amend their declarations and CC&Rs to address their community’s STR issues as they see fit. Rather, they must carefully tailor any amendments so that they are not “entirely new and different in character”<sup>153</sup> and “refine”<sup>154</sup> current covenants within a court’s discretion. A potential implication of this is very likely an implied unanimity requirement. If an amendment is passed by a majority, but not all, of the owners’ votes, the homeowner(s) who voted against the amendment may challenge it and cause a court to invalidate it on *Kalway* grounds. Thus, an amendment may not stand even if it was passed according to the general-amendment-power provision, whereas a unanimously passed amendment, even if it did not have the requisite notice under *Kalway*, will be incorporated due to the lack of challenge. Thus, practically, even one homeowner holding out may prevent an entire community from adding any new restrictions on STRs in their community.

### 1. Case Study: Florida’s Approach

Other states facing similar STR issues have grappled with how to formulate an approach to address them. While each state’s approach is unique, it is beneficial to examine the efficacy of their statutory remedies to better prescribe a remedy that caters to Arizona’s own idiosyncrasies. Here,

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151. *Id.* at 32.

152. *Kalway*, 506 P.3d at 26–27.

153. *Id.* at 25 (quoting *Lakeland Prop. Owners Ass’n v. Larson*, 459 N.E.2d 1164, 1167 (Ill. App. Ct. 1984)).

154. *Id.*

Florida's approach to STR regulation will be discussed in depth. Florida's approach, like Arizona's, does not fit neatly into a single category—it is neither minimal nor extensive.<sup>155</sup> For this reason, it is an illuminating point of comparison for this analysis.<sup>156</sup>

In terms of public legislation, Florida's approach is similar to Arizona's. Arizona and Florida are two of the six states that have enacted legislation that explicitly disallows its municipalities from prohibiting STRs.<sup>157</sup> Florida's municipalities may not prohibit STRs or regulate their duration or frequency.<sup>158</sup> Both states grant their municipalities some authority to regulate for the limited purposes of public health and welfare and safety.<sup>159</sup> Although Florida's courts have broadly interpreted public welfare,<sup>160</sup> local governments may not impose restrictions that amount to prohibitions of STRs.<sup>161</sup> The Florida Attorney General's Office has advised that cities may not impose distance requirements between rentals, limit the percentage or number of rentals in a neighborhood, or impose zoning restrictions that would effectively prohibit STRs in an otherwise residential area.<sup>162</sup> Nor may municipalities impose penalties on unregistered rentals in addition to the penalties prescribed under state law.<sup>163</sup>

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155. *See supra* Section I.A.

156. As compared to a “prohibition” state. *See supra* Section I.A.1. The remedies proposed by states that broadly prohibit STRs (such as New York) are less informative because of the fundamental policy differences. Thus, states that broadly allow, but allow regulation of, STRS, are more appropriate for this discussion.

157. For Arizona, see *States Should Ban the Ban on Short-Term Rentals*, *supra* note 46. For Florida, see Mitch Perry, *Florida Senate Approves New Short-Term Vacation Law; Local Officials Remain Wary*, FLA. PHOENIX (Apr. 28, 2023, 11:23 AM), <https://floridaphoenix.com/2023/04/28/florida-senate-approves-new-short-term-vacation-law-local-officials-remain-wary/> [<https://perma.cc/KA2Y-T3BQ>] (describing proposed new law allowing for local regulation of STRs while acknowledging Florida's current policy of prohibiting local regulation of STRs).

158. FLA. STAT. § 509.032(7)(b) (2023). However, an exemption is made for any prohibitory local laws, ordinances, or regulations that were adopted before June 1, 2011. *Id.*

159. *See supra* Part II; ARIZ. REV. STAT. ANN. §§ 9-500.39, 11-269.17 (2023); *see also* *Moviematic Indus. Corp. v. Bd. of Cnty. Comm'rs of Metro. Dade Cnty.*, 349 So. 2d 667, 671 (Fla. Dist. Ct. App. 1977).

160. *See Lamar-Orlando Outdoor Advert. v. City of Ormond Beach*, 415 So. 2d 1312, 1314–15 (Fla. Dist. Ct. App. 1982).

161. Fla. Att'y Gen.'s Off., Advisory Opinion 2014-09 on Vacation Rentals, Municipalities, Local Governments, and Land Use (Nov. 13, 2014); Fla. Att'y Gen.'s Off., Advisory Opinion 2016-12 on Municipalities, Vacation Rentals, Preemption, and Zoning (Oct. 5, 2016).

162. Fla. Att'y Gen.'s Off., Advisory Opinion 2016-12 on Municipalities, Vacation Rentals, Preemption, and Zoning (Oct. 5, 2016).

163. Fla. Att'y Gen.'s Off., Advisory Opinion 2014-09 on Vacation Rentals, Municipalities, Local Governments, and Land Use (Nov. 13, 2014).

Private communities in Florida, like those in Arizona, do not have an unbridled ability to regulate STRs.<sup>164</sup> However, Florida's approach to private regulation of STRs differs significantly; Florida homeowners' associations have greater authority to regulate STRs than Florida condominium associations.<sup>165</sup> Arizona does not make this distinction.<sup>166</sup> Florida recently enacted a new homeowners' association statute which took effect in 2021.<sup>167</sup> Under the new law, HOAs may amend their "governing documents to prohibit or regulate rental agreements for a term of less than 6 months and may prohibit the rental of a parcel for more than three times in a calendar year."<sup>168</sup> An HOA may make other amendments targeting rentals; however, the amended restrictions will apply only to property owners who take title to the property subsequent to the date of the amendment (i.e., with notice of the restriction) and existing property owners who consent to the amendment.<sup>169</sup> Notably, the law withholds this increased regulatory power from HOAs with fifteen or fewer owners.<sup>170</sup> These smaller associations may only enforce rental restrictions against a property owner if the restriction was established before that owner took title to the property.<sup>171</sup>

Florida condominium associations have less authority than HOAs to enforce new STR-targeted-amendments.<sup>172</sup> An existing condominium owner subject to the association's declaration must affirmatively consent to be bound by an amendment that prohibits renting or changes the duration of rental terms.<sup>173</sup> Consequently, even if the amendment is passed according to the process outlined in the declaration, it cannot be enforced against an owner unless the owner takes title to the condominium after the amendment.<sup>174</sup>

Florida's legislature has prioritized the interests and expectations of individual owners by incorporating some form of a notice requirement throughout its HOA and condominium laws. As it does in Florida's laws, a

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164. PRAC. L. REAL ESTATE, REGULATING SHORT-TERM RENTALS (FL) (2023), Westlaw Practice Note w-020-5689, <https://us.practicallaw.thomsonreuters.com/w-020-5689>.

165. *Id.*

166. *See supra* Part II.

167. FLA. STAT. §§ 720.301-720.407 (2023).

168. *Id.* § 720.306(1)(h)(2).

169. *Id.* § 720.306(1)(h)(1).

170. *Id.* § 720.306(1)(h)(3).

171. *Id.* § 720.303(1).

172. *Compare id.* § 720.306(1)(h)(2) (giving HOAs the power to apply certain prohibitions and regulations "to all parcel owners," including existing owners), *with id.* § 718.110(13) (requiring condominium associations to obtain affirmative consent from existing parcel owners before applying any rental prohibition or regulation to them).

173. *Id.* § 718.110(13).

174. *See id.*

concern for individual property rights and sufficient notice of future amendments underlies the Arizona Supreme Court's reasoning in *Kalway*. Whether an amendment is made by a condominium or homeowners' association, the *Kalway* decision will implicate all private covenant amendments and new affirmative restrictions in Arizona, including those that target STRs. By contrast, Florida's laws specifically address STRs and carve out protections for individual property owners, but they are inconsistent. Florida law differentiates between the type of private communities so that smaller HOAs remain powerless to self-govern and amend as they see fit and condominium associations can only enforce prohibitory restrictions against consenting owners.

In designing its own statutory remedy to complement its current regulatory framework, Arizona can learn from Florida. Both states have taken similar approaches to STRs and both have exhibited an interest in protecting individual property owners' rights and expectations. However, in protecting that interest, the statutory remedy implemented by Florida results in varied levels of protections and gaps where some communities will remain unable to effectively regulate STRs. Arizona can adopt a more effective remedy that would provide consistency and offer a solution to all, not select, private communities. Such a remedy is proposed here.

## 2. Proposed Statutory Remedy

How can Arizona's communities best manage their STR problems? Public regulations are difficult to enforce and are often ineffective.<sup>175</sup> Although private communities may technically prohibit or restrict short-term rentals under current legislation, their ability is severely hindered by the recent *Kalway* decision. A promising solution lies with the Arizona legislature. The legislature should enact a standardized statutory requirement to facilitate private covenant amendments that place affirmative restrictions on, or that otherwise target, short-term rentals. This statutory solution has two main features: 1) a supermajority requirement; and 2) an amortization period.

First, the statute would require that amendments and new affirmative restrictions that target STRs receive a supermajority of association members' approval to pass. A minimum of 75% of the votes would be required, regardless of any existing amendment-power-provision in the governing documents. While 75% is the suggested threshold, any percentage

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175. See *supra* Section I.A.4.



constituting a supermajority will accomplish the goals of the statute. It is commonplace for associations to require a majority vote (greater than 50%) to amend.<sup>176</sup> However, an implication of *Kalway* is an implied unanimity requirement (100%) to successfully amend.<sup>177</sup> A 75% supermajority is the suggested threshold because it meets in the middle of these two standards. In doing so, a supermajority requirement recognizes two presumptions: (1) it is desirable for most of a community to agree to a provision that will affect the entire community, and (2) it is desirable to avoid a situation where one, or a few homeowners can hold out against the majority over an issue affecting the entire community.

Second, the statute would incorporate a five-year amortization period. Amortization is the process of removing a non-conforming use gradually over time to allow a property owner to recover the value of the non-conforming use.<sup>178</sup> The process mitigates private loss by allowing the owner a reasonable period to recoup his or her investment.<sup>179</sup> This five-year period will cushion the economic shock an STR owner will experience when their community association passes an amendment that affirmatively restricts their rental.<sup>180</sup> Between a one- to five-year amortization period is typical for a non-conforming use in an otherwise “conforming building.”<sup>181</sup> Short-term renting, the non-conforming use, occurs in a residential unit, which would otherwise be a conforming building if not for the rental activity. Accordingly, the period suggested here is at the high end of the appropriate amortization period range. A five-year period will allow owners of STRs to gradually phase out the operation of their rental unit, make alternative arrangements, and recoup some of their investment. More importantly, the amortization period serves to increase the fairness of the transition and will aid in reducing STR owner opposition to the statutory proposal.

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176. Christopher D. Lonn, *Arizona Supreme Court Issues Guidance Concerning HOA Amendments*, SACKS TIERNEY P.A. (Apr. 25, 2022), <https://www.sackstierney.com/wp-content/uploads/Arizona-Supreme-Court-Issues-Guidance-Concerning-HOA-Amendments.pdf> [<https://perma.cc/A4YX-E8BR>].

177. *See supra* Part III.

178. Margaret Collins, *Methods of Determining Amortization Periods for Non-Conforming Uses*, 3 WASH. U. J.L. & POL'Y 215, 216 (2000).

179. *Id.* at 217.

180. *See id.*

181. *Id.* at 229 (one-year period for a grocery store use in Louisiana, five years for a plumbing supply store in California, and one to five years for adult stores in various states). These “fixed periods” are appropriate for non-conforming uses that do not involve large investments to create structures specific to the non-conforming use. *Id.* at 228–29. Thus, a fixed-amortization period is appropriate here because the residential structure need not be altered for short-term renting to take place.

*B. Potential Critiques of the Proposal*

Opponents of this remedy may argue the issue doesn't yet warrant such a measure. After all, the decision is relatively fresh off the desks of Arizona's justices. *PPF Dorsey* is the singular case interpreting *Kalway*'s requirements. Further, both *PPF Dorsey* and *Kalway* have rather extreme facts where the minority property owner(s) were antagonized and disproportionately affected by the decisions of a majority.<sup>182</sup> Thus, it is possible that future courts may choose to distinguish the cases that come before them based on these idiosyncratic facts and choose to not apply *Kalway*'s strict notice requirements. However, this seems unlikely. In *Kalway*, the court primarily adopts the reasoning of courts before it, namely *Dreamland Villa Community Club, Inc. v. Raimey*, 226 P.3d 411, 420 (Ariz. Ct. App. 2010),<sup>183</sup> and adds its own clarification regarding the requirements of sufficient notice. The court does not explicitly take any position on the decency of the majority owners' acts towards *Kalway* nor does it condition the holding on the eccentricity of the facts. Thus, while equity and the antagonization of a minority owner may have concerned the court, its overall reasoning and goal of protection of "the reasonable expectations of homeowners" would apply with equal force to less extreme factual scenarios. Further, as a practical matter, why wait in uncertainty for the "right" case to come before the judiciary, and for them to opt to take it, when the branch of the government charged with lawmaking can create a more certain solution now? Even if such a case was reviewed, there is no guarantee that the court would adopt an approach that would lessen *Kalway*'s bite.

The proposed statutory remedy strikes a balance between individual property interests and the competing interests of their community and serves Arizona's previous policy choices regarding STRs. The combination of the supermajority requirement and amortization period honors Arizona's commitment to protecting individual property owners' rights (as evidenced

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182. *Kalway*'s lot was approximately twenty-three acres while all other lots were between three to six acres. Thus, he was disproportionately affected by the new restrictions and amendments, and the amendments were made by the other members in secret without his knowledge. *Kalway v. Calabria Ranch HOA, LLC*, 506 P.3d 18, 22 (2022). In *PPF Dorsey*, it appears that Dorsey strategically purchased 90 units (94% of votes) in order to meet the termination vote threshold to convert the properties and force the sale of the individuals. *Cao v. PPF Dorsey Invs., LLC*, 516 P.3d 1, 3 (Ariz. Ct. App. 2022). Additionally, PPF promptly recorded after the ratification of the agreement, "changed the locks," and "disposed of the Xias' . . . personal property." *Id.* at 4. It could be said that the courts were inclined to protect the minority owner because of equitable concerns under the unique circumstances of these cases.

183. 506 P.3d at 24.

by its legislative history and *Kalway*) while also honoring communities' abilities to self-regulate and create individualized solutions to STRs. By creating a way for private communities to bypass *Kalway*'s high standard to pass STR-related amendments, the recently closed "statutory door" to private STR regulation would reopen. Enabling private communities to effectively self-regulate and prohibit STRs within their communities allows homeowners to take the charge to create restrictions that address their community's unique needs, and to circumvent the need to rely on the ineffective public regulations a municipality may put in place. The added supermajority and amortization requirements act as a compromise to protect the interests and investments of the STR owners in the community.

## V. CONCLUSION

Arizona faces a growing STR problem requiring an effective solution. Arizona's public regulations are difficult to enforce and are often ineffective.<sup>184</sup> Although private communities may technically prohibit or restrict short-term rentals under current law, their practical ability to do so is severely hindered by *Kalway*. A promising solution lies with the Arizona legislature. Arizona's STR problem and the potential implications of *Kalway* are best addressed by a new statutory requirement; the Arizona legislature should require any private covenant amendment that adds affirmative restrictions on, or that otherwise targets, STRs, to be enacted by a supermajority of the association and to be amortized over five years. This combination will help to protect individual STR owners' rights and expectations while recognizing the interests of the majority of owners in a community who are affected by the short-term rentals.

Importantly, just as the short-term rental problem emerged in recent years, other property use conflicts will inevitably arise and stir these same policy considerations and debates. *Kalway*'s strict notice requirement, which aims to protect the reasonable expectations of owners, does not simply apply in the STR context. The decision will shape all private covenant amendments and additions of affirmative restrictions on real property moving forward. Whether or not the Arizona legislature ultimately chooses to endorse this remedy (or a variation of it), it must weigh the competing policy interests of individuals and the rest of their communities. Where the legislature decides the policy balance lies in the short-term rental context may influence their

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184. See *supra* Section I.A.4.

policy decisions regarding other areas of property use and is thus deserving of our attention.