

1                                   **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2  
3 In the Matter of

**No. 23F-H060-REL**

4 Ryan McMahon,  
5 PETITIONER,

**ADMINISTRATIVE LAW JUDGE  
DECISION**

6 vs.

7  
8 Alhambra Terrace Condominium  
9 Association,  
10 RESPONDENT.

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11 **HEARING:** July 19, 2023 at 9:00 AM.

12 **APPEARANCES:** Ryan McMahon ("Petitioner") appeared on his own behalf. Mike  
13 Yohler, Esq. appeared on behalf of Alhambra Terrace Condominium Association  
14 ("Respondent" and "Association") with Kit Gorseth as a witness. Christina Samaras  
15 observed.

16 **ADMINISTRATIVE LAW JUDGE:** Jenna Clark.

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17           After review of the hearing record in this matter, the undersigned Administrative  
18 Law Judge makes the following Findings of Fact and Conclusions of Law, and issues this  
19 ORDER to the Commissioner of the Arizona Department of Real Estate ("Department").

20                                   **FINDINGS OF FACT**

21                                   **BACKGROUND AND PROCEDURE**

22           1.       The Department is authorized by statute to receive and to decide petitions  
23 for hearings from members of homeowners' associations and from homeowners'  
24 associations in Arizona.

25           2.       On or about May 01, 2023, Petitioner filed a single-issue petition with the  
26 Department which alleged a violation of Arizona Revised Statute ("ARIZ. REV. STAT") § 33-  
27 1221.<sup>1</sup> Specifically, Petitioner argued, "My request for interior modification was denied  
28 despite no violations in our communities CC&R's and or state/city building codes. All  
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30 <sup>1</sup> See Department's electronic file at 6\_adre dispute.pdf.

plans were verified by licensed bonded and insured companies however all denials were not supported by any laws, logic or facts of any nature.”<sup>2</sup> Regarding the request for relief, Petitioner indicated that he desired an Order for Respondent to abide by the referenced statute.

a. On May 04, 2023, Petitioner tendered a \$500.00 filing fee to the Department for the underlying petition.<sup>3</sup>

3. On May 04, 2023, the Department issued notice of the underlying petition to Respondent.<sup>4</sup>

4. On or about May 20, 2023, Respondent returned its ANSWER to the Department whereby it denied the merits of Petitioner’s allegation(s).<sup>5</sup>

5. Per the NOTICE OF HEARING, the Department referred this matter to the Office of Administrative Hearings (“OAH”), an independent state agency, for an evidentiary hearing on July 19, 2023, to determine whether Respondent violated ARIZ. REV. STAT. § 33-1221.<sup>6</sup>

#### **THE PARTIES AND GOVERNING DOCUMENTS**

6. Respondent is a condominium community association whose members own properties in the Alhambra Terrace Condominium residential real estate development located in Scottsdale, Arizona.<sup>7</sup> Membership for the Association is comprised of Alhambra Terrace Condominium owners.

7. Petitioner is an Alhambra Terrace Condominium owner and a member of the Association.

8. The Association is governed by its Covenants, Conditions, and Restrictions (“CC&Rs”), Bylaws, Articles of Incorporation, and Rules and Regulations.<sup>8</sup> It is overseen by a Board of Directors (“the Board”). The CC&Rs empower the Association to control certain aspects of property use within the development. When a party buys a residential

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<sup>2</sup> *Id.* (All errors in original).

<sup>3</sup> See Department’s electronic file at Receipt.pdf.

<sup>4</sup> See Department’s electronic file at Notice of Petition.pdf.

<sup>5</sup> See Department’s electronic file at Respondents Response.PDF.

<sup>6</sup> See Department’s electronic file at Notice of Hearing.pdf.

<sup>7</sup> See Department’s electronic file at Arizona Corporations Commission.pdf.

<sup>8</sup> See Department’s electronic file at 3\_ATC CC&Rs (Amended & Restated+Amendment)pdf (1).pdf.

1 unit in the two-story development, the party receives copies of the CC&Rs and Bylaws  
2 and agrees to be bound by their terms. Thus, the CC&Rs form an enforceable contract  
3 between the Association and each property owner, and the Bylaws outline how the  
4 Association is permitted to operate.

5 9. The Association is managed by AMCOR Property Professionals, Inc.  
6 ("AMCOR").

#### 7 **HEARING EVIDENCE**

8 10. Petitioner testified on his own behalf and submitted Exhibits 1 and 2.  
9 Respondent called Kit Groseth as a witness. The Department's electronic file, including  
10 the NOTICE OF HEARING, was also admitted into the evidentiary record. The substantive  
11 evidence of record is as follows:

- 12 a. Petitioner and Ms. Samaras are engaged to be married. The couple has 3  
13 young children. Petitioner owns Unit B8 in Alhambra Terrace, directly above  
14 Unit B4 which is owned by Ms. Samaras. Each Unit is approximately 998 sq.  
15 ft. with two bedrooms and 1 bathroom.
- 16 b. In or around January 2022, Petitioner submitted a request to the Board to  
17 modify Units B4 and B8, by removing the floor separating the units to  
18 combine the residences, and add 2 bathrooms – 1 in each former unit.  
19 Petitioner was advised to resubmit his request with architectural plans.
- 20 c. In February 2022, without Petitioner's knowledge or consent, tradesmen cut  
21 into Unit B8's subfloor to verify the location of pipes. Petitioner immediately  
22 notified the Association and received verbal authorization to commence  
23 with demolition and authorized the removal of debris shortly thereafter.
- 24 d. In March 2022, the Association formed its Architectural Committee ("ARC").
- 25 e. On or about March 06, 2022, Petitioner submitted design plans and  
26 corresponding scope of work to the Association.<sup>9</sup>
  - 27 i. Under GENERAL CONDITIONS the plans list, in pertinent part, as  
28 follows:

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29 <sup>9</sup> See Department's electronic file at 4\_COMBINED SET FOR HOA REVIEW.pdf.

DESIGNSBYSEVOL LLC IS A PROFESSIONAL PLANNING AND  
DRAWING SERVICE, NOT A LICENSED ARCHITECTURAL FIRM. .  
. . . DESIGNSBYSEVOL LLC ASSUMES THE INFORMATION  
PROVIDED BY THE OWNER/BUILDER FOR THE DESIGN OF  
THE STRUCTURE IS CORRECT . . . IT SHALL BE THE  
RESPONSIBILITY OF THE LOCAL BUILDING JURISDICTION TO  
DETERMINE IF STRUCTURAL DETAILS, SITE CONDITIONS,  
AND COMPLEX ROOF DESIGNS AND/OR SIMILAR  
CONSTRUCTION DATE MAY REQUIRE THE SERVICES OF A  
LICENSED STRUCTURAL ENGINEER PRIOR TO ISSUING A  
BUILDING PERMIT.<sup>10</sup>

- f. On or about April 19, 2022, AMCOR informed Petitioner that the Association was having an engineer review his documents so that it could make an informed decision regarding his request(s).
- g. On May 06, 2022, AMCOR issued an ARCHITECTURAL DENIAL LETTER to Petitioner, which noted in pertinent part, that the denial was based on, "ARC's decision that the same will interfere with the integrity of the building and pipe system."<sup>11</sup>
- h. On May 23, 2022, engineer Robert A. Young issued the following correspondence to the Association on behalf of Petitioner:

As a registered Engineer in the state of Arizona I have reviewed my reports dated March 7<sup>th</sup>. And February 17<sup>th</sup>., 2022 and find no structural reason for not being able to install a 2<sup>nd</sup>. Bathroom The upper unit and its slab is already being supported by the walls of the lower unit. What my client propose is no different and poses no danger to upper and lower units.<sup>12</sup>
- i. On May 26, 2022, at a scheduled Board meeting, Petitioner and Ms. Samaras resubmitted the underlying project request.
- j. On June 09, 2022, AMCOR issued a PRELIMINARY ARCHITECTURAL APPROVAL LETTER<sup>13</sup> to Petitioner, which noted, in pertinent parts, as follows:

<sup>10</sup> *Id.* (All errors in original).

<sup>11</sup> See Department's electronic file at 1\_1<sup>st</sup> ARC denial May 6<sup>th</sup> 2022.pdf.

<sup>12</sup> See Department's electronic file at 11\_structural engineer additional cert.pdf (All errors in original); see also Petitioner Exhibit 1.

<sup>13</sup> See Department's electronic file at 9\_Letter 06-13-2022 Conditional approval- 2<sup>nd</sup> denial.pdf.

3. It is necessary that owners utilize only licensed, insured and bonded contractors. The Association, its Directors and Management are indemnified and held harmless from any liability;

4. Construction debris, if any, is to be removed daily, along with any equipment used;

5. Building permits/plans are the responsibility of the owner to be obtained through the City, County and/or State. All documents must be submitted to the ARC. These documents should detail all aspects of the desired work;

6. **The engineer must sign off on the community plumbing concerns regarding the integrity of the current pipes. The report must address the following concerns: determining the proper size, as well as the current size and condition, of the building's main sewer line, ensure the pipes can accommodate six (6) bathrooms, four (4) kitchens and four (4) laundry units, the pipe's ability to handle the additional volume;**

7. **The plans for venting the sewer pipes, bathroom exhaust fans and laundry dryer must be submitted to the ARC for review.** Please avoid venting these on both the north and west sides of the building;

8. **All documents must be for each individual unit.** This includes all plans, letters, reports, etc. Any documents that do not specify the individual unit will not be accepted by the ARC.

Please be aware that this preliminary approval is not approval to begin this project. Once all of the concerns noted above are addressed and proper documentation is collected, another ARC request is to be submitted for each individual unit, along with the documentation and paperwork, for the ARC to review. Obtaining the requested documents and information does not guarantee final approval. Should any aspect of the project begin before full approval is granted, the homeowner is subject to immediate monetary penalties.<sup>14</sup>

k. On June 14, 2022, AMCOR informed Petitioner of its intent to have its attorney review Petitioner's project request.

l. On or about June 15, 2022, designer Gary Devol issued the following correspondence to the Association on behalf of Petitioner:

AS THE DESIGN FIRM THAT CREATED THESE PLANS, IT IS OUR OPINION THERE IS NOT A SIGNIFICANT LOAD ON THE SEWER SYSTEM BY ADDITIONAL BATHROOMS. THE CITY OF SCOTTSDALE DID NOT RAISE ANY ISSUES CONCERNING THE SIZE OF THE SEWER

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<sup>14</sup> *Id.* (emphasis added).

PIPE. IN ALL THE YEARS OF DOING THIS KIND OF WORK, I HAVE NEVER HEARD OF ANY ISSUED WITH THIS.<sup>15</sup>

m. On June 29, 2022, AMCOR issued another ARCHITECTURAL DENIAL LETTER to Petitioner, which noted in pertinent part, that the denial was because “the information requested in the preliminary approval letter has not been obtained. The information received is not sufficient for the board to ensure that impact to the Association is negligible.”<sup>16</sup>

n. On July 01, 2022, Petitioner and Ms. Samaras asked to meet with the ARC to review the status of the project and clarify the basis for the Association’s denial(s). The request was denied.

o. On July 06, 2022, Petitioner emailed AMCOR regarding the Association’s denials and received the following response, in pertinent part, from the Vice President:

[The] Board Members are not engineers or contractors. They do, however, have the right to higher [sic] an independent engineer, architect, [sic] consultant to review the plans and charge you that fee. However, it appears as if they are trying to move forward without either party having to incur more expenses with an engineer, etc.<sup>17</sup>

p. On or about August 26, 2022, Paradise Valley Plumbing Company, Inc. (ROC License No. 102911) issued correspondence to the Association on behalf of Petitioner which provided that it was the plumber for the underlying project, in consultation with Designs by Devol, LLC. The company noted, in pertinent parts, as follows:

Page P101 of the Plans includes a Residential Water Meter Worksheet detailing the addition of fixtures to each Unit under the Plans and verifying that the resulting base water pressure after the remodel will be no less than 80 psi, which meets universally accepted guidelines of plumbing design for a project of this type.

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<sup>15</sup> See Department’s electronic file at 7\_GLENROSA SEWER ISSUE LETTER.pdf (all errors and emphasis in original).

<sup>16</sup> See Department’s electronic file at 2\_3<sup>rd</sup> ARC denial June 28<sup>th</sup> 2022.pdf.

<sup>17</sup> See Department’s electronic file at 12\_Time line of events.pdf (All errors in original).

1 All proposed changes to the Units in the Plans are within proper protocol  
2 and based on universally accepted guidelines. All piping and drainage are of  
3 standard measurements and meet generally accepted design guidelines  
4 and building code specifications. The additional fixtures to be added [sic] the  
5 Units per the Plans will not decrease or negatively impact the existing water  
6 supply or water pressure and will not affect the drainage capacity of the  
7 plumbing systems of the Units or the building in which they are located.

8 [Plans] were submitted and reviewed by the City of Scottsdale's  
9 development services division, who reviewed the plans for code conformity  
10 and potential negative impacts to the sanitary drainage system. Plans are in  
11 conformity with applicable design guidelines and building code  
12 specifications. The City has requested HOA approval for permits to be  
13 issued.

14 To be clear . . . if all of the existing and newly proposed fixtures in the  
15 building were all simultaneously turned on, the existing plumbing  
16 infrastructure would be able to both supply water to each fixture without a  
17 significant drop in pressure and would also be able to drain all water  
18 supplied at a rate sufficient to support the load.<sup>18</sup>

- 19 i. Attached to the correspondence were handwritten calculations and  
20 design guideline excerpts from section 710, Drainage System Sizing,  
21 of the 2018 International Plumbing Code to the Association that the  
22 Qualifying Party for Paradise Valley Plumbing Company, Inc.  
23 purportedly used and relied on to make the aforementioned  
24 conclusions.<sup>19</sup>
- 25 q. On October 06, 2022, Petitioner met with the Board to review plans and  
26 project-related documentation.
- 27 r. On or about October 18, 2022, AMCOR's attorney issued a denial of  
28 Petitioner's project request.<sup>20</sup> At that time, Petitioner was advised that the  
29 denial was based on the fact that the Association's pipes were from the  
30 1960s and the Board did not want to assume that they would hold simply  
because they had not yet failed to date. Petitioner was further advised that

<sup>18</sup> See Department's electronic file at 10\_Plumbing engineer verification.pdf.

<sup>19</sup> See Department's electronic file at 5\_Devol – Plumbing Calculations 8-12-22.pdf.

<sup>20</sup> See Department's electronic file at 12\_Time line of events.pdf.

1 his project request was further denied because, if granted, it would “be an  
2 open door invitation” for other Members to add bathrooms to their units.

- 3 s. On January 05, 2023, the Association issued a FINAL ARCHITECTURAL  
4 DENIAL LETTER to Petitioner.<sup>21</sup>
- 5 t. On May 01, 2023, Counsel for Petitioner submitted an appeal to the  
6 Association regarding their second denial letter.<sup>22</sup> In the letter, Counsel  
7 acknowledged that Petitioner’s project request included “rerouting of piping  
8 between the Units,” and argued that the work to be performed in each Unit  
9 was “necessarily integrated.” Counsel denied the need for Petitioner, or Ms.  
10 Samaras, to submit two (2) requests because the project was singular.  
11 Counsel opined that the Association’s CC&Rs failed to provide direction for  
12 the submission and approval of unit modifications, save section 22 which  
13 provided that “without the written permission of the Management Committee  
14 first had and obtained, the owner shall not make or permit to be made any  
15 structural alteration, improvement or addition in or to the unit.” Counsel  
16 argued that the Association’s denial of Petitioner’s project request was  
17 “arbitrary” and “in bad faith” because the Association failed to provide  
18 evidence controverting to Petitioner’s submissions, particularly in light of the  
19 fact that Petitioner’s project passed the City of Scottsdale’s preliminary  
20 review. Per Counsel, the Association’s denial violated its duty to act  
21 reasonably in the exercise of its discretionary power and authority.

#### 22 **ADDITIONAL EVIDENCE**

- 23 u. On an unknown date, Petitioner accessed City of Scottsdale plumbing  
24 records and discovered that the Association’s water line was increased in  
25 1991, and all of the common element piping was updated in the early 2000s.
- 26 i. Cast iron pipes have an approximate 60 year lifespan.
- 27 ii. Each building within the Association has independent drainage from  
28 the others.

29 <sup>21</sup> See Petitioner Exhibit 2.

30 <sup>22</sup> See Department’s electronic file at 8\_Lawyer Demand Letter.pdf.



1                   iii. Prior permits have been issued by the City of Scottsdale for units  
2                   within the Association that affect common elements.

3                   v. On an unknown date, Petitioner issued a final appeal to the Association  
4                   whereby he asked the Board for an opportunity to request a permit from the  
5                   City of Scottsdale.<sup>23</sup>

6                   **CLOSING ARGUMENTS**

7                   11. In closing, Petitioner argued that the only thing holding up his project was  
8                   the Association's sign-off, which had been unfairly withheld. Petitioner argued that he had  
9                   satisfied all of the Association's preliminary terms and had not been told with specificity  
10                  what, if anything, still needed to be provided to gain approval from the Board. Per  
11                  Petitioner, the Association was "nitpicking" and illegitimately precluding him from seeing if  
12                  the City of Scottsdale would issue a permit for his project. Ultimately, Petitioner asked for  
13                  an Order compelling the Association to grant his request.

14                12. In closing, Respondent argued that its denial of Petitioner's project was over  
15                concerns regarding structural integrity, as Petitioner never complied with the terms of its  
16                preliminary approval and thus left Respondent with a lack of information. Respondent also  
17                argued that the documentation that was provided was insufficient, noting that plumbers  
18                and designers were neither architects nor engineers. Thus, what little information  
19                Petitioner provided was vague, incomplete, and unreliable. Respondent opined that  
20                because Petitioner failed to sustain his burden of proof, that his appeal should be  
21                dismissed.

22                   **CONCLUSIONS OF LAW**

23                1. This matter lies within the Department's jurisdiction pursuant to ARIZ. REV.  
24                STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a  
25                condominium and/or planned community association. The owner or association may  
26                petition the department for a hearing concerning violations of community documents or  
27                violations of the statutes that regulate condominium communities as long as the petitioner  
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29                   

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30                   <sup>23</sup> See Department's electronic file at 12\_Time line of events.pdf.

has filed a petition with the department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

2. Condominium associations are regulated by ARIZ. REV. STAT. Title 33, Chapter 9, Article 3.

3. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D), 32-2199.02, and 41-1092 et seq., OAH has the authority to hear and decide the contested case at bar. OAH has the authority to interpret the contract between the parties.<sup>24</sup>

4. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1243.<sup>25</sup>

5. “A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not.”<sup>26</sup> A preponderance of the evidence is “[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”<sup>27</sup>

6. ARIZ. REV. STAT. § 33-1221 provides that, subject to the provisions of the declaration, a unit owner:

(1) May make any improvements or alterations to his unit that do not impair the structural integrity or mechanical systems or lessen the support of any portion of the condominium.

(2) Shall not change the appearance of the common elements, or the exterior appearance of a unit or any other portion of the condominium, without written permission of the association.

(3) After acquiring an adjoining unit or, if the declaration expressly permits, an adjoining part of an adjoining unit, may remove or alter any intervening partition or create apertures in intervening partitions, even if the partition in whole or in part is a common element, if those acts do not impair the structural integrity or

<sup>24</sup> See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

<sup>25</sup> See ARIZ. ADMIN. CODE R2-19-119.

<sup>26</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

<sup>27</sup> BLACK'S LAW DICTIONARY 1220 (8<sup>th</sup> ed. 1999).

mechanical systems or lessen the support of any portion of the condominium. Removal of partitions or creation of apertures under this paragraph is not an alteration of boundaries.

7. The crux of Petitioner's inquiry is this: Did the Association violate ARIZ. REV. STAT. § 33-1221 by refusing to grant his Unit B8/B4 modification request?

8. Here, the record clearly establishes that Petitioner did not fully comply with itemized sub-requirements 6, 7, and/or 8 of the Association's PRELIMINARY ARCHITECTURAL APPROVAL LETTER. Paradise Valley Plumbing Company, Inc. is not a licensed structural engineering firm, so unfortunately the attestation of its Qualifying Party cannot be afforded much weight, if any. While Mr. Young is undoubtedly a licensed structural engineer, neither report listed in his attestation was offered for consideration and thus it is unclear if he made determinations regarding the integrity of the Association's pipes, fans, and vents as required by sub-requirements 6-8 of the Association's PRELIMINARY ARCHITECTURAL APPROVAL LETTER.

9. Therefore, based on the relevant and credible evidence of record, the undersigned Administrative Law Judge concludes that, because Petitioner did not sustain his burden of proof by a preponderance of the evidence that the Association violated ARIZ. REV. STAT. §§ 33-1221, his petition must be denied.

#### **ORDER**

Based on the foregoing,

**IT IS ORDERED** that Petitioner's petition be denied.

#### **NOTICE**

**Pursuant to ARIZ. REV. STAT. §32-2199.02(B), this ORDER is binding on the parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. § 32-2199.04. Pursuant to ARIZ. REV. STAT. § 41-1092.09, a request for rehearing in this matter must be filed with the Commissioner of the Arizona Department of Real Estate within 30 days of the service of this ORDER upon the parties.**

Done this day, August 07, 2023.

**Office of Administrative Hearings**

/s/ Jenna Clark  
Administrative Law Judge

Transmitted electronically to:

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