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No. 24F-H001-REL

ADMINISTRATIVE LAW JUDGE DECISION

The Villages at Rancho El Dorado
Homeowners Association,
Respondent.

APPEARANCES: Kristeen Herron (“Petitioner”) appeared on her own behalf with Ellis as a witness. Lydia Linsmeier, Esq. and Eden Cohen, Esq. of Carpenter wood Delgado & Bolen appeared on behalf of The Villages at Rancho El Dorado owners Association (“Respondent”) with April Lord and Christiano Monteiro as witnesses. LouAnne Schmidt observed.

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

BACKGROUND AND PROCEDURE

2. On or about July 05, 2023, Petitioner filed a single-issue petition with the Department which alleged that the Association violated Covenants, Conditions, and Restrictions (“CC&Rs”), Article IV section 4 by “turning off the community lap pool heater on April 14, 2023, before the outside temperature could consistently keep the water at or

1 above 78°F.”¹ Petitioner requested an ORDER from the Department that required the
2 Association to abide by Article 4.4 of the CC&Rs.²

3 a. On July 07, 2023, tendered \$500.00 to the Department as a filing fee for the
4 petition at issue.³

5 3. On July 10, 2023, the Department issued an HOA NOTICE OF PETITION to the
6 Association.⁴

7 4. On July 28, 2023, Respondent returned its ANSWER to the Department
8 whereby it denied all complaint items in the petition.⁵

9 5. Per the NOTICE OF HEARING, the Department referred this matter to the
10 Office of Administrative Hearings (“OAH”), an independent state agency, for an
11 evidentiary hearing on September 25, 2023, regarding the following issue:

12 **Whether The Villages at Rancho El Dorado Homeowners Association**
13 **(Respondent) is in violation of CC&Rs Article 4.4 for “turning off the**
14 **lap pool heater ... [f]or approximately one month” which Petitioner**
15 **further alleges constitutes discrimination against senior residents.**⁶

16 THE PARTIES AND GOVERNING DOCUMENTS

17 6. Respondent is a nonprofit homeowners’ association⁷ whose members own
18 properties in a residential real estate development located in Maricopa, Arizona.
19 Membership for the Association is comprised of The Villages at Rancho El Dorado
20 subdivision.

21 7. Petitioners are Villages at Rancho El Dorado subdivision property owners
22 and members of the Association.

23 8. The Association is governed by its CC&Rs and overseen by a Board of
24 Directors (“the Board”). The CC&Rs empower the Association to control certain aspects of
25 property use within the development. When a party buys a residential unit in the

26 ¹ See Department’s electronic file at Petition.pdf.

27 ² *Id.*

28 ³ See Department’s electronic file at Filing Fee Receipt.pdf.

29 ⁴ See Department’s electronic file at Notice of Petition.pdf.

30 ⁵ See Department’s electronic file at Association’s Response to ADRE (Herron v. Villages at Rancho El Dorado) (1).pdf.

⁶ See Department’s electronic file at Notice of Hearing.pdf.

⁷ See Department’s electronic file at Arizona Corporate Commission.pdf.

development, the party receives a copy of the CC&Rs and agrees to be bound by their terms. Thus, the CC&Rs form an enforceable contract between the Association and each property owner.

9. On or about October 29, 2003, the Association's CC&Rs were recorded with the Pinal County Recorder's Office.⁸

10. The Villages at Rancho El Dorado CC&Rs provide, in pertinent parts, as follows:

RECITALS B. Declarant desires that a nonprofit corporation, The Villages at Rancho El Dorado Homeowners Association, be formed for the purpose of the efficient preservation of the values and amenities of the Property and to which will be delegated certain powers of administering and maintaining the Common Area, enforcing this Declaration, and collecting and disbursing the assessments created herein.

* * *

4.4 Rules. By action of the Board, the Association may, from time to time and subject to the provisions of this Declaration, adopt, amend, and repeal rules and regulations to be known as the "Rules." The Rules may restrict and govern the use of the Property; provided, however, the Rules may not discriminate among Owners and shall not be inconsistent with this Declaration, the Articles or Bylaws. A copy of the Rules, as they may from time to time be adopted, amended or repealed, shall be mailed or otherwise delivered to each Owner. The Rules shall have the same force and effect as if they were set forth herein and were part of the Declaration and may be recorded.⁹

* * *

8.2(c)(12) Maintenance by Association. The Association has the right and may, at any time, as to any Common Area tracts conveyed, leased, or transferred to it, or otherwise placed under its jurisdiction, in the discretion of the Board, without approval of the Owners being required the Board shall be the sole judge as to the appropriate maintenance within the Common Area.

11. The Villages at Rancho El Dorado RULES & REGULATIONS for the Recreation Center Complex & Common Areas,¹⁰ last revised August 01, 2015, Article 3 Recreation Center Complex Rules, provides in pertinent part, as follows:

⁸ See Respondent Exhibit 1.

⁹ *Id.*

¹⁰ See Respondent Exhibit 5.

3.5.7 Lap Pool. The lap pool is reserved for exercise, lap swimming, and water walking with the exception of established "open swim" as approved by the Board. Persons must share the lap pool for the various forms of exercise.

- a. It is recommended that all persons use the on-site shower prior to entering the pool.
- b. Water walking will be permitted only during non-peak hours.
- c. If a lap swimmer requests a lane during non-peak hours and all lanes are occupied, water walkers shall share one lane.
- d. Lanes may be used for periods not to exceed thirty (30) minutes unless no other persons are waiting.
- e. When the community pool is closed for the winter season, the water shall be heated and maintained at a temperature as established by the Arizona Department of Health, which shall be between 78°F and 82°F.

HEARING EVIDENCE

12. Petitioner testified on her own behalf and called Karen Ellis as a witness. Respondent called April Lord and Christiano Monteiro as witnesses and submitted Exhibits 1-6 into the record. The Department's electronic file was also admitted into the record. The substantive evidence of record is as follows:

- a. The Villages at Rancho El Dorado subdivision, which contains 1,938 single-family residences, is not an age-restricted community, though a number of homeowners are senior citizens.
 - i. Winter Season for the pool runs from late-October through April of the following year.
- b. Petitioner owns residential property located at 43451 W. Palmen Dr. Maricopa, Arizona 85138, within The Villages at Rancho El Dorado subdivision.¹¹ The residence is equipped with a private pool and Jacuzzi hot tub in the backyard. Petitioner is a self-proclaimed "snowbird" who resides at the property October to May, annually.
- c. On or about May 17, 2023, the Association turned on the heater in the lap pool.
 - i. The lap pool is not medicinal, nor was it ever intended for that purpose.

¹¹ See Respondent Exhibits 2 and 6.

- 1 d. Though the petition alleges that temperatures in the lap pool between mid-
2 April 2023 and mid-May 2023 “were not consistently safe” for use, Petitioner
3 conceded that she did not know what the exact temperature(s) were, and
4 offered that they were merely not to her liking as she chose not to use the
5 lap pool during that time because it was “too cold” for her.

6 **ADDITIONAL EVIDENCE**

- 7 e. At a Board meeting on March 29, 2023, the following resolution was
8 adopted via unanimous vote:

9 **RESOLVED** to not open the large pool until the water temperature
10 reaches eighty-two (82) degrees and to shut off the heater in the lap
11 pool at the same time.¹²
12 (*Emphasis in original.*)

13 It was also determined that the Director of Maintenance, John Deck, would
14 take the temperature of the water in the large pool daily and keep the Board
15 apprised of his findings.¹³

- 16 f. In April 2023, Petitioner and Ms. Ellis petitioned the Board to amend Rule
17 3.5.7(e) to read: The lap pool shall be heated as needed and as long as
18 necessary in order to maintain the water temperature at a minimum of 84
19 degrees Fahrenheit all year long. To support their proposed amendment,
20 statistics from the American Red Cross, Mayo Clinic, YMCA, and US
21 Masters Swimming; essentially recommending pool temperatures between
22 83°F and 88°F, were included. Letters of support from fellow senior
23 homeowners were also attached.

- 24 i. At a Board meeting on May 17, 2023, the amendment request was
25 denied.

26 **CLOSING ARGUMENTS**

27 13. In closing, Respondent denied that the lap pool Rules were not
28 discriminatory, and argued that Petitioner had failed to sustain her burden of proof. Per

29 ¹² See Respondent Exhibit 4.

30 ¹³ *Id.*

Respondent, the Association was permitted to regulate the pool temperature, which it had reasonably done.

14. In closing, Petitioner argued that Respondent's refusal to heat the lap pool between April and May 2023 forced her to avoid the common area for health use(s), which was a discriminatory act on the Association's part.

CONCLUSIONS OF LAW

1. This matter lies within the Department's jurisdiction pursuant to ARIZ. REV. STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a planned community association. The owner or association may petition the department for a hearing concerning violations of community documents or violations of the statutes that regulate planned communities as long as the petitioner has filed a petition with the department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

2. 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.¹⁴

3. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated a community document.¹⁵

4. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."¹⁶ 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."¹⁷

5. Based upon a review of the credible and relevant evidence in the record, Petitioner failed sustained her burden of proof.

¹⁴ See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

¹⁵ See ARIZ. ADMIN. CODE R2-19-119.

¹⁶ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

¹⁷ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

1 6. Here, the material facts are clear. According to Recreation Center Complex
2 Rule 3.5.7(e), the Association is obligated to heat the pool between 78°F and 82°F during
3 the winter season. There is no evidence in the record that would support the contention
4 that the Association failed to do so through April 2023. Additionally, there is nothing in the
5 record that would reasonably establish that the lap pool did not maintain a temperature at
6 or above 78°F May 01-16, 2023. Moreover, CC&Rs Article 4.4 authorizes the Association
7 to govern the use of common areas. Petitioner's argument that she was unable to use the
8 lap pool because the temperature was outside of her preference does not amount to age-
9 based discrimination.

10 7. Therefore, the undersigned Administrative Law Judge must conclude that
11 because Petitioner did not establish a violation of Article 4.4 of the CC&Rs, her petition
12 must be denied.

13 **ORDER**

14 Based on the foregoing,

15 **IT IS ORDERED** that Petitioners' petition is dismissed.

16 **NOTICE**

17 **This ADMINISTRATIVE LAW JUDGE ORDER, having been issued as a result of a**
18 **rehearing, is binding on the parties. ARIZ. REV. STAT. § 32-2199.02(B). A party**
19 **wishing to appeal this order must seek judicial review as prescribed by ARIZ. REV.**
20 **STAT. § 41-1092.08(H) and title 12, chapter 7, article 6. Any such appeal must be**
21 **filed with the superior court within thirty-five days from the date when a copy of this**
22 **order was served upon the parties. ARIZ. REV. STAT. § 12-904(A).**

23 Done this day, October 16, 2023.

24
25 Office of Administrative Hearings

26 /s/ Jenna Clark
27 Administrative Law Judge
28
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30

Transmitted electronically to:

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By: OAH Staff