

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of

No. 24F-H019-REL

4 Schafer, Kevin W. & Lawton, Patricia A.

**ADMINISTRATIVE LAW JUDGE
DECISION**

5 Petitioners

6 v

7 Sycamore Springs Homeowners
8 Association, INC.

9 Respondent
10

11 **HEARING:** December 7, 2023 and December 12, 2023

12 **APPEARANCES:**

13 **ADMINISTRATIVE LAW JUDGE:** Brian Del Vecchio

14 **EXHIBITS ADMITTED INTO EVIDENCE:** Hearing File submitted by the Arizona
15 Department of Real Estate, Complainant's exhibits A through P, and Respondent's
16 exhibits 1 through 6.

17 **FINDINGS OF FACT**

18 **THE PARTIES AND GOVERNING DOCUMENTS**

19 1. Sycamore Springs Homeowners Association, INC. (Respondent or
20 Association) is a Planned Community Association whose members own properties in the
21 Association located in Tucson, Arizona. Membership in the association is comprised of
22 Association homeowners. Kevin Shafer and Patricia Lawton (collectively Petitioners), a
23 married couple, are property owners of the same home and are members of the
24 Association.

25 2. The Association is governed by its Covenants, Conditions, and Restrictions
26 (CC&Rs), and overseen by a Board of Directors (the Board). The Association is also
27 regulated by Title 33, Chapter 16, Article 1 of the ARIZ. REV. STAT.

28
29 **BACKGROUND AND PROCEDURE**

3. The Arizona Department of Real Estate (Department) is authorized by statute to receive petitions for hearings from members of homeowners' associations and from homeowners' associations in Arizona.

4. On September 8, 2023, Petitioners filed a two issue petition with the Department. The first issue alleged Respondent's conditional approval of a portable flagpole violated the CC&Rs Design Guidelines Section II(O) and Arizona Revised Statutes (ARIZ. REV. STAT.) § 33-1808(B). The second issue alleged Respondent improperly sent Petitioners a Violation Notice for being out of compliance with regard to the Petitioner's building envelope. The Violation Notice alleged a violation of the CC&Rs Design Guidelines Section III(A) and the 4th Amended Design Guidelines.¹

5. On October 13, 2023, Respondent returned its ANSWER to the Department whereby it denied Petitioners' claims.² The Department referred this matter to the Office of Administrative Hearings (OAH), an independent state agency, for an evidentiary hearing on December 7, 2023 and December 12, 2023, to determine whether violations of the CC&Rs and ARIZ. REV. STAT. § 33-1808(B) occurred.

HEARING EVIDENCE

6. On June 9, 2023, Petitioners submitted a written Design Modification Request (DMR) for approval of a portable flagpole to Respondent.³ On July 18, 2023, Respondent conditionally approved Petitioners DMR. Respondent placed the following conditions upon Petitioners: (1) limit the maximum height stated in the Design Guidelines (DG), (2) limit placement of the flag to "**the side** of the house"⁴, and (3) the flag may not be moved to different locations.⁵

7. On August 22, 2023, a Notice of Violation letter was sent to Petitioners' attorney alleging a violation of the CC&Rs and DG § III(A). DG § III(A) defined building envelopes as "the maximum [square footage] on a Dwelling Unit within which all clearing,

¹ See Department's electronic file at 24F-H019-REL "HOA Dispute Process Petition 9.8.23_000266.pdf" and "OAH HEARING PETITION – PACKET 9.8.23_000265.pdf"

² See Department's electronic file at 24F-H019-REL "2023.10.13 Final Response to Petitioners' ADRE Complaint.pdf."

³ See Petitioners' exhibit B.

⁴ Emphasis in original.

⁵ See Department's electronic file 24F-H019-REL "OAH HEARING PETITION – PACKET 9.8.23_000265.pdf", see also Petitioners' exhibit B.

grading, improvements, or any other alteration to the natural desert will be allowed.”⁶ The maximum building envelope square footage per lot is 22,000 square feet. The letter informed Petitioners that Respondent hired a land surveyor to conduct an analysis of Petitioners’ lot. Respondent concluded Petitioners’ building envelope was approximately 38,000 square feet in violation of DG § III(A).⁷

8. At hearing, Patricia Lawton and Stephen McLain, a licensed land surveyor, testified on behalf of Petitioners. Kristen Rawlette, President of Respondent, and J.O. Teague, a licensed land surveyor and a reviewer for the enforcement advisory committee at the Board of Technical Registration, testified on behalf of Respondent.

9. Mr. McLain conducted a survey of Petitioners’ lot to determine the building envelope. Mr. McLain has been a licensed land surveyor for 27 years and is a board member of the Arizona Board of Technical Registration. Mr. McLain reviewed the DG § III(A) and the 4th Amendment to the DG effective September 15, 2008, prior to conducting his in-person land survey. Following Mr. McLain’s review of the relevant documents, he determined the building envelope consists of two parts, the living area and the transition zone. The transition zone is the area of the lot which was disturbed as a result of construction.

10. Mr. McLain certified Petitioner’s building envelope was 17,451 square feet. On September 3, 2020, an aerial image was taken of Petitioners’ lot. Mr. McLain walked Petitioner’s lot, reviewed the areal imagery, and analyzed the relevant HOA documents. Mr. McLain then plotted an outline of Petitioners’ building envelope on the areal image. Mr. McLain determined Petitioner’s building envelope was 17,451 square feet.⁸

11. Ms. Lawton testified she personally maintains the property exterior. No improvements or construction occurred on the lot east of the home. Ms. Lawton maintained the property in compliance with the CC&Rs when she cleared excessive weeds, reduced overgrowth, removed dead and diseased plants and trees, and removed numerous pack rat nests.

⁶ See Respondent’s exhibit 2 at 10.

⁷ See Respondent’s exhibit 5, *see also* Petitioners’ exhibit F.

⁸ See Petitioners’ exhibit K.

12. Ms. Lawton testified she believed the building envelope Violation Letter was retaliation for a lawsuit she filed against Respondent earlier in the year.

13. Kristen Rawlette admitted the approval letter of Petitioners' June 9, 2023, DMR set conditions which were not in compliance with the CC&Rs or Arizona law. The conditional approval letter was sent by the Management Company hired by Respondent without Respondent's input or approval. Ms. Rawlette testified she would not have approved the language the Management Company used in the approval email. Ms. Rawlette admitted the flag pole height and mobility restriction condition was outside the authority granted to Respondent by the CC&Rs. Ms. Rawlette also admitted the side yard restriction violated Arizona statutes.

14. Ms. Rawlette testified Respondent hired a land surveyor because of Petitioners' lawsuit filed in Arizona Superior Court; however, Respondent was not targeting Petitioners. Respondent was acquiring data pursuant to their defense not as a method of retaliation.

15. J.O. Teague was hired by Respondent to conduct an analysis to determine whether Petitioners' lot exceeded the building envelope restriction set forth in DG § III(A). Mr. Teague conducted an assessment of Petitioners' lot; he utilized aerial images of the lot from 2022, the CC&Rs, a map and plat of the lot, the 4th Amendment to the DG § III(A), and Mr. McLain's survey report to make his assessment.

16. On August 4, 2022, Mr. Teague sent the results of his assessment to Respondent's attorney. The letter stated he was hired "to determine whether the 22,000 square foot building envelope has been exceeded." At hearing, Mr. Teague testified he was hired only to establish the area of Petitioners' lot and not to establish the building envelope despite what his August 4, 2022 letter stated. Mr. Teague admitted he did not make a determination as to whether the building envelope had been exceeded. Mr. Teague testified he believed the Petitioners' building envelope was 16,265 square feet. Mr. Teague testified the most accurate information for a land survey comes from a "boots on the ground" assessment. An aerial imagery analysis is inferior to an in-person survey.

CONCLUSIONS OF LAW

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

7 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
8 32-2199.02, and 41-1092 et seq.; OAH has the authority to hear and decide the contested
9 case at bar. OAH has the authority to interpret the contract between the parties.⁹

10 3. In this proceeding, Petitioner bears the burden of proving by a
11 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1805.¹⁰
12 Respondent bears the burden of establishing any affirmative defenses by the same
13 evidentiary burden.¹¹

14 4. A preponderance of the evidence is "[t]he greater weight of the evidence, not
15 necessarily established by the greater number of witnesses testifying to a fact but by
16 evidence that has the most convincing force."¹²

17 5. In Arizona, when construing statutes, we look first to a statute's language as
18 the best and most reliable index of its meaning. If the statute's language is clear and
19 unambiguous, we give effect to that language and apply it without using other means of
20 statutory construction, unless applying the literal language would lead to an absurd result.
21 Words should be given "their natural, obvious, and ordinary meaning."¹³

22 6. Statutes should be interpreted to provide a fair and sensible result.¹⁴

23 7. When the legislature uses a word or words in one section of a statute, but
24 not another, the tribunal may not read those words into the section where the legislature
25

26 ⁹ See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

27 ¹⁰ See Arizona Administrative Code ("ARIZ. ADMIN. CODE") R2-19-119.

28 ¹¹ *Id.*

29 ¹² BLACK'S LAW DICTIONARY (11th ed. 2019).

30 ¹³ *Arpaio v. Steinle*, 201 Ariz. 353, 355 ¶ 5, 35 P.3d 114, 116 (App. 2001) (footnotes and citations omitted).

¹⁴ *Gutierrez v. Industrial Commission of Arizona*; see also *State v. McFall*, 103 Ariz. 234, 238, 439 P.2d 805, 809 (1968) ("Courts will not place an absurd and unreasonable construction on statutes.").

1 did not include them.¹⁵ Unless defined by the legislature, words in statutes are given their
2 ordinary meaning.¹⁶

3 8. Each word, phrase, clause, and sentence of a statute or rule must be given
4 meaning so that no part will be void, inert, redundant, or trivial.¹⁷

5 9. ARIZ. REV. STAT. § 33-1808 provides, in relevant part, as follows:

6 A. Notwithstanding any provision in the community documents, an
7 association shall not prohibit the outdoor front yard or backyard display
8 of . . . [t]he American flag.

9 10. Based upon a review of the credible and relevant evidence in the record,
10 Petitioner sustained its burden of proof regarding the flag pole issue. Petitioners' DMR
11 request was to display the American flag. Ms. Rawlette admitted the Management
12 Company who created the conditional approval to Petitioner's DMR erred. Ms. Rawlette
13 admitted Respondent did not have authority to restrict Petitioners' flag approval. Ms.
14 Rawlette admitted the flag pole height and mobility restrictions were inappropriate
15 because the CC&Rs do not grant Respondent authority to restrict flag poles in this
16 manner. Ms. Rawlette admitted the restriction preventing placement of the American flag
17 in the front and back yards violated ARIZ. REV. STAT. § 33-1808. Thus, the evidence
18 established Respondent violated the CC&Rs and ARIZ. REV. STAT. § 33-1808.

19 11. Based upon a review of the credible and relevant evidence in the record,
20 Petitioner sustained its burden of proof regarding the building envelope issue. Both
21 parties' expert witnesses agreed, Petitioners' building envelope was below the 22,000
22 square foot maximum. Mr. McLain and Mr. Teague agreed Mr. McLain's "boots on the
23 ground" survey is superior to an aerial only survey. Mr. McLain established Petitioners'
24 building envelope was 17,451 square feet, well below the 22,000 square foot maximum.
25 Thus, the evidence established Petitioners' building envelope did not violate the CC&Rs
26 maximum limit.

27
28 ¹⁵ See *U.S. Parking v. City of Phoenix*, 160 Ariz. 210, 772 P.2d 33 (App. 1989).

29 ¹⁶ *Id.*

30 ¹⁷ See *Deer Valley v. Houser*, 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007).

12. . "The administrative law judge may order any party to abide by the statute, condominium documents, community documents or contract provision at issue and may levy a civil penalty on the basis of each violation. . . . If the petitioner prevails, the administrative law judge shall order the respondent to pay to the petitioner the filing fee required by section 32-2199.01."¹⁸

13. Petitioner failed to provide sufficient evidence that Respondent's actions warranted the issuance of civil penalties. The flag pole issue was not an ongoing repetitive harassment campaign, rather, it was miscommunication between the Management Company and Respondent. The building envelope violation letter was sent to Petitioner because of their Superior Court lawsuit. The information was acquired for the purpose of forming a defense and not retaliation as Petitioners alleged. Thus, civil penalties ought to be denied.

ORDER

IT IS ORDERED that Petitioners' petition in this matter be affirmed.

IT IS FURTHER ORDERED that Petitioners' request to levy a civil penalty against Respondent is denied.

IT IS FURTHER ORDERED Respondent shall reimburse Petitioners' filing fee of \$1,000.00 pursuant to ARIZ. REV. STAT. § 32-2199.02(A).

NOTICE

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

Done this day, January 1, 2024.

/s/ Brian Del Vecchio

¹⁸ ARIZ. REV. STAT. § 32-2199.02(A).

Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile January 1, 2024 to:

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