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**No. 24F-H015-REL**

## ADMINISTRATIVE LAW JUDGE DECISION

**V.**

Sierra Tortuga Homeowner's Association

Respondent

**HEARING:** November 22, 2023 and December 20, 2023.

**APPEARANCES:** Petitioner was represented by Jeffrey Brie, Esq. who appeared via Google Meet. Respondent was represented by Phillip Brown, Esq. and Kelly Oetinger, Esq. who appeared via Google Meet.

**ADMINISTRATIVE LAW JUDGE:** Adam D. Stone

**EXHIBITS ADMITTED INTO EVIDENCE:** Complainant Exhibits 1-21, 23, 25-31 were admitted into evidence. Respondent Exhibits 1-15 were admitted into evidence.

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").

## FINDINGS OF FACT

## BACKGROUND AND PROCEDURE

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

1           2.       On or about August 29, 2023, Petitioner filed a two-issue petition against the  
2 Association with the Department. Petitioner tendered \$1,000.00 to the Department with  
3 his petition.

4           3.       On or about September 25, 2023, the Sierra Tortuga Homeowner's  
5 Association ("Association") filed its ANSWER with the Department whereby it denied all  
6 complaint items in the petition.

7           4.       Per the NOTICE OF HEARING, the Department referred this matter to the  
8 Office of Administrative Hearings ("OAH"), an independent state agency, for an  
9 evidentiary hearing on November 22, 2023, regarding the following issues based on  
10 Petitioner's petition:

11                   1. Item 4 of the Respondent's First Declaration of Restrictions and  
12                   Item F of the Respondent's Second Declaration of Restrictions by  
13                   "not enforcing the 25ft setback provision"

14                   2. A.R.S § 33-1805 by failing "to provide documents"

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

16           5.       Respondent is a homeowners' association whose members own properties  
17 in a residential real estate development located in Tucson, Arizona.

18           6.       Petitioner is a property owner and a member of the Association.

19           7.       The Association is governed by its Covenants, Conditions, and Restrictions  
20 ("CC&Rs"), and overseen by a Board of Directors ("the Board"). The Association is also  
21 regulated by Title 33, Chapter 16, Article 1 of the Arizona Revised Statutes ("ARIZ. REV.  
22 STAT.")

#### 23                                   **HEARING EVIDENCE**

24           8.       Petitioner testified that she purchased a lot and built a home in the  
25 community in 2011. Petitioner testified generally as to her understanding on the First and  
26 Second Declarations of Restriction governing her community.

27           9.       Specifically, Petitioner testified as to what was contained in the Second  
28 Declaration of Restrictions Sierra Tortuga Sub Division (Declaration).<sup>1</sup> Petitioner testified

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29 <sup>1</sup> See Complainant's Exhibit 4.

1 that the Declaration created an Architectural Committee which was to be composed of not  
2 less than three persons nor more than five persons and had the right to approve or  
3 disapprove of any plans.<sup>2</sup>

4 10. Petitioner also testified that per paragraph F of the Declaration, all  
5 improvements shall be set back from the property lines of each parcel not less than 25 feet  
6 unless the Architectural Committee approved a lesser setback.<sup>3</sup>

7 11. Further, Petitioner testified that paragraph H gave to Architectural  
8 Committee the right to clear lots at the owner's expense should the lot owner fail to comply  
9 with the provisions of paragraph H.<sup>4</sup> Petitioner asserted that the Committee has the  
10 obligation to remedy the matter.

11 12. Petitioner testified that on or about June 13, 2020, she sent a certified letter  
12 to the Board informing the Board that her neighbors on Lot 9 were in violation of the 25  
13 foot setback rule as they had made improvements on their lot, specifically the addition of  
14 boulders, and the grading.<sup>5</sup>

15 13. Next, Petitioner testified that on June 19, 2020, the Board responded by  
16 requesting 90 days to complete an investigation into the matter.<sup>6</sup> On July 8, 2020,  
17 Petitioner submitted another letter to the Board informing them that 90 days was too long  
18 and a sixty day investigation would be more than enough time.<sup>7</sup>

19 14. Petitioner testified that on September 3, 2020, the Board produced a report  
20 regarding its findings. The investigation found that there were several lots which may  
21 have made improvements without approval, and that it may make remedying the situation  
22 difficult.<sup>9</sup> However, as to Lot 9, the Board concluded that improvements were neither  
23 submitted to, nor approved by the Architectural Committee, and stated that Lot 9 must halt  
24 work and submit improvement requests to the Architectural Committee within 30 days.<sup>10</sup>

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25 <sup>2</sup> See id.

26 <sup>3</sup> See id.

27 <sup>4</sup> See id.

28 <sup>5</sup> See Complainant's Exhibit 5.

29 <sup>6</sup> See Complainant's Exhibit 8.

30 <sup>7</sup> See Complainant's Exhibit 9.

<sup>8</sup> See Complainant's Exhibit 10.

<sup>9</sup> See id.

<sup>10</sup> See id.

Petitioner testified that to her knowledge, to date Lot 9 had not submitted its plans to the Architectural Committee, and has not returned the land to its natural state.

15. Petitioner also testified as to letter sent to Marcia Aguilar (one of the owners of Lot 9) on July 7, 2021, wherein her attorney demanding Ms. Aguilar return the parking area encroaching on the 25-foot setback area to its natural state.<sup>11</sup>

16. As to the documents issue, Petitioner testified that on April 27, 2023, she sent a letter through her attorney requesting any and all documents (including but not limited to plans, specifications, emails and correspondence, or any other document authored by the Board) involving the improvements on Lot 9.<sup>12</sup>

17. Petitioner testified that on May 8, 2023, Robert Lewin responded requesting 90 days to review the matter and respond accordingly.<sup>13</sup> Petitioner testified that her attorney tried twice to follow up on the documents as Mr. Lewin failed to produce the same.<sup>14</sup>

18. Petitioner also offered the testimony of Tracy Bogardus who testified as to his report about the erosion on Lots 8 and 9.<sup>15</sup> Mr. Bogardus was a civil engineer who was hired by Complainant after Ms. Aguilar had made a claim that Petitioner had altered her property to change the flow of rainwater to her property.

19. Mr. Bogardus testified that after investigation, he concluded that Lot 8 did not contribute to the drainage issues on Lot 9, as those issues could have been because Lot 9 was not built according to plan.

20. Respondent offered the testimony of Robert Lewin and Marcella Aguilar.

21. Mr. Lewin was the current President of the Board and moved into the development in February 2022.

22. Mr. Lewin testified that there were numerous lots with setback issues and various other possible issues which were incongruent with the Declarations. Because of this, Mr. Lewin testified, that the Board has tried to find a way to “reset” the issues to

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<sup>11</sup> See Exhibit 15.

<sup>12</sup> See Complainant's Exhibit 17.

<sup>13</sup> See Complainant's Exhibit 18.

<sup>14</sup> See Complainant's Exhibits 19 and 20.

<sup>15</sup> See Complainant's Exhibit 13.

essentially start over, and have the lot owners and Board follow the rules as listed in the Declaration. To that end, the Architectural Committee approved a Board request to allow the berm built on Petitioner's lot and approved the driveway turnaround on Lot 9.<sup>16</sup>

23. As to the disclosure of documents issue, Mr. Lewin testified that in July 2023, he notified Petitioner that there were no documents to provide. However, Mr. Lewin testified that he did not provide the meeting minutes from the investigation report. Mr. Lewin also testified that he has complied with Petitioner's most recent request for financial records in July 2023.

24. Marcella Aguilar was the owner of Lot 9. She testified that the turnaround was on her lot when she purchased the house, but she had to dig out a utility trench. Ms. Aguilar testified that in 2021 she added the boulders and plants to her property and since she added the boulders, there has been no major runoff.

### **CONCLUSIONS OF LAW**

1. This matter lies within the Department's jurisdiction. Pursuant to ARIZ. REV. STAT. §§ 32-2102 and 32-2199 et al., 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(D), 32-2199.02, and 41-1092, OAH has the authority to hear and decide the contested case at bar.

3. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated the item F of the Declarations and ARIZ. REV. STAT. § 33-1805.<sup>17</sup>

4. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."<sup>18</sup> A preponderance of the evidence is "[t]he greater weight of the evidence, not necessarily established by the greater number of

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<sup>16</sup> See Respondent's Exhibit 15.

<sup>17</sup> See ARIZ. ADMIN. CODE R2-19-119.

<sup>18</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 witnesses testifying to a fact but by evidence that has the most convincing force; superior  
2 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable  
3 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than  
4 the other.”<sup>19</sup>

5 5. Section F of the Declaration states as follows:

6 All improvements of every kinds, excepts fences and entry gates, shall be  
7 set back from the property lines of each parcel not less than twenty-five (25)  
8 feet. Unless the Architectural Committee approves a lesser setback or a  
9 different location by reason of lot configuration or flood prone area, Hilltop  
10 ordinance, vegetation corridor, wildlife corridor, when visible from the street  
11 or an adjacent lot, shall be painted an earth-tone color and/or appropriately  
12 screened with native vegetation. Nor shall the developed portion of any  
13 parcel exceed twenty-five (25) percent of the gross area of the parcel. The  
term “developed portion” shall mean the entire area inside any private  
fences or walls, all area occupied by structures or other improvements, and  
all area within which any native growth is removed or the surface of the land  
is visibly altered in any way.

14 6. ARIZ. REV. STAT. § 33-1805 provides, in relevant part, as follows:

15 A. Except as provided in subsection B of this section, all financial and other  
16 records of the association shall be made reasonably available for  
17 examination by any member or any person designated by the member in  
18 writing as the member's representative. The association shall not charge a  
19 member or any person designated by the member in writing for making  
20 material available for review. The association shall have ten business days  
21 to fulfill a request for examination. On request for purchase of copies of  
22 records by any member or any person designated by the member in writing  
as the member's representative, the association shall have ten business  
days to provide copies of the requested records. An association may  
charge a fee for making copies of not more than fifteen cents per page.

23 B. Books and records kept by or on behalf of the association and the board  
24 may be withheld from disclosure to the extent that the portion withheld  
relates to any of the following:

25 1. Privileged communication between an attorney for the association  
26 and the association.

27 2. Pending litigation.  
28

29 <sup>19</sup> BLACK'S LAW DICTIONARY 1220 (8<sup>th</sup> ed. 1999).

1 3. Meeting minutes or other records of a session of a board meeting  
2 that is not required to be open to all members pursuant to section 33-  
3 1804.

4 4. Personal, health or financial records of an individual member of the  
5 association, an individual employee of the association or an  
6 individual employee of a contractor for the association, including  
7 records of the association directly related to the personal, health or  
8 financial information about an individual member of the association,  
9 an individual employee of the association or an individual employee  
10 of a contractor for the association.

11 5. Records relating to the job performance of, compensation of,  
12 health records of or specific complaints against an individual  
13 employee of the association or an individual employee of a contractor  
14 of the association who works under the direction of the association.

15 C. The association shall not be required to disclose financial and other  
16 records of the association if disclosure would violate any state or federal  
17 law.

18 7. Article 11.3 of the Association Bylaws states,

19 Every Director shall have the absolute right at any reasonable time to  
20 inspect all books, records, and documents of the Association and the  
21 physical properties owned or controlled by the Association. The right  
22 of inspection by a Director includes the right to make extra copies of  
23 documents at the reasonable expense of the Association.

24 8. The material facts in this matter are not in dispute.

25 9. It was clear that Lot 9 never submitted a request for the improvements on its  
26 lot and the improvements failed to comply with the setback requirement. It was also clear  
27 that the Board requested that the owners of Lot 9 submit its request to the Architectural  
28 Committee and/or remedy the matter. Lot 9 has failed to do so. However, the tribunal  
29 disagrees with Petitioner that Respondent *must* clear the lot. Section H of the Declaration  
30 merely states that the Architectural Committee "shall have the right to clear such lot".  
Thus, it is still within the Architectural Committee's discretion to act on that right.

10. As to the document request, Petitioner made a proper request for  
documents on April 27, 2023. From the evidence presented, and Mr. Lewin admitted, that

Respondent failed to produce a copy of the meeting minutes discussing the investigative report. It was clear that there were no other documents as Lot 9 never submitted any request to the Architectural Committee to make the improvements.

11. Petitioner has met the burden of proof in demonstrating that the Board was in violation of Section F of the Declaration and ARIZ. REV. STAT. § 33-1805.

**ORDER**

**IT IS ORDERED** that Petitioner's petition in this matter be granted.

**IT IS FURTHER ORDERED** pursuant to ARIZ. REV. STAT. § 32-2199.02(A), Respondent shall reimburse Petitioner's filing fee of \$1,000.00 as required by ARIZ. REV. STAT. § 32-2199.01.

**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 3, 2024.

/s/ Adam D. Stone  
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile January 3, 2024 to:

Susan Nicolson

Commissioner  
Arizona Department of Real Estate  
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