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No. 24F-H023-REL

ADMINISTRATIVE LAW JUDGE DECISION

V.

Respondent.

APPEARANCES: Petitioners Robert P. Fink and Brittany L. Oleson appeared on their own behalf. David Onuschak, Esq. represented Respondent Casas Arroyo Association, Inc.

ADMINISTRATIVE LAW JUDGE: Sondra J. Vanella

EXHIBITS ADMITTED INTO EVIDENCE: Petitioners' Exhibits 2, 12, 16, 17, 23, 24, 25, 26, 28, and the new affidavits submitted on April 17, 2024, marked as Exhibits 31 and 32. Administrative Notice was taken of the Agency record which contained all of Petitioners' originally filed Exhibits.

1. On or about October 16, 2023, Robert P. Fink and Brittany L. Oleson (“Petitioners”) filed a Homeowners Association (HOA) Dispute Process Petition (“Petition”) with the Arizona Department of Real Estate (“Department”) alleging a violation of the CC&Rs by Casas Arroyo Association, Inc. (“Respondent”). Petitioners indicated a single issue would be presented, paid the appropriate \$500.00 filing fee, and asserted a violation of the CC&Rs “Article II Section 1(c).”

2. On or about December 1, 3023, the Department issued a Notice of Hearing in which it set forth the issue for hearing as follows:

Petitioner[s] alleged Respondent of violating [sic] Article II Section 1(c) of the CC&Rs by passing a ballot measure, "with the agreement of members representing only sixty-nine percent of the eligible votes."

3. At hearing, Petitioners testified on their own behalf and presented the testimony of Juanita Havill. Respondent presented the testimony of Erik Powell, a Board member.

REFERENCED CC&Rs

4. Article II Section 1(c) of the 2006 recorded CC&Rs provides in relevant part as follows:

SECTION 1. MEMBERS' EASEMENTS OF ENJOYMENT. Every owner shall have a right and easement of enjoyment in and to the Common Area and such easement shall be appurtenant to and shall pass with the title to each and every Lot. The common elements shall remain undivided, and shall at all times be owned by the Association or its successors, it being agreed that this restriction is necessary in order to preserve the rights of the owners with respect to the operation and management of the common elements. It is expressly acknowledged and agreed by all parties concerned that this paragraph is for the mutual benefit of owners in Casa Arroyo and it is necessary for the protection of said owners. Such right and easement of enjoyment shall be subject to the following provisions:

. . . .
(c) The right of the Association to dedicate or transfer all or any part of the Common Area to any public agency, authority or utility for such purposes and subject to such conditions as may be agreed to by the members, as hereinafter defined. No such dedication or transfer shall be effective unless an instrument signed by members representing three quarters (3/4) of the eligible vote of the Association agreeing to such dedication or transfer and approved by the Board of Directors of Tunnel Springs Ranch Corporation, Inc., has been recorded. Likewise, no improvements shall be placed upon the common area and no act or action shall be taken which would increase the density of residences on the Properties except by agreement of members representing not less than three quarters (3/4) of the eligible votes of the Association and the approval of the Board of Directors of Tunnel Springs Ranch Corporation, Inc.

5. Article IV Section 2 of the 2006 recorded CC&Rs provides in relevant part as follows:

SECTION 2. PURPOSE OF ASSESSMENTS. The assessments levied by the Association shall be used exclusively to promote the recreation, health, safety and welfare of the residents in the properties and for the improvement and maintenance of the Common Area, and of the homes situated upon the Properties.

HEARING EVIDENCE

6. The community is located approximately 30 miles north of the Mexico border. Respondent installed a security gate due to an uptick in crime including human trafficking, drug trafficking, and other criminal activities such as property damage and home invasions in the community. As far back as 2014, Border Patrol recommended that Respondent take security measures. Petitioners opposed the installation of a security gate and filed the instant Petition.

7. Mr. Fink spent a considerable amount of time at hearing testifying to and referencing exhibits regarding the following events:

a. On September 9, 2023, at a Board of Directors meeting, the Board approved a motion to conduct a vote of the members to approve the placement of a security gate on the common area at the sole point of access to the community. The Board indicated that existing funds would be used, and no special assessment would be imposed on the members. Mr. Fink testified that the Board indicated that the approval of the gate installation would require two thirds of eligible member votes. Mr. Fink contended that the applicable CC&Rs require a vote of three quarters of the eligible votes, which equates to thirty-nine (39). Mr. Fink testified that the minimum number of votes necessary to approve the installation of a security gate on the common area is thirty (30).¹

¹ See Petitioners' Exhibits 23, 24, and 25.

1 b. In a September 14, 2023 email to the members of the community, Board
2 Secretary Erik Powell stated that the voting process for the security gate
3 was ongoing as of that date with ballots due on September 25, 2023. The
4 email included a cover letter from President Tom Hardesty and a ballot.
5 The cover letter reiterated that the standard for approval of the gate was
6 two thirds of those who voted.²
7

8 c. In a September 26, 2023 email to all community members, the Board
9 advised that it passed the ballot measure to place a security gate at the
10 Highway 82 community entrance.³ The email stated that there were
11 twenty-seven (27) votes in favor of installing a gate and ten (10) votes
12 against installing a gate.
13

14 8. The parties spent time at hearing addressing whether the gate was
15 a capital improvement, and whether CC&R provisions regarding such or the provision
16 regarding special assessments applied to the instant matter. The parties further
17 referenced letters written by two attorneys upon which Respondent's Board relied when
18 deciding to install the gate.⁴
19

20 9. Mr. Fink acknowledged at hearing that he served on the Water and
21 Roads Committee for Respondent in 2021 and 2022, and due to water erosion, had
22 suggested that a water curb be installed at a cost of \$3,500.00. A special assessment
23 was not implemented and there was no vote concerning the water curb installation.
24

25 10. Juanita Havill testified on behalf of Petitioners. Ms. Havill has
26 resided in the community since 2000, and has served on the Board in various capacities
27 from 2003 through 2021. Ms. Havill testified that since 2014, the Board has been
28 discussing the security issues within the community and ways in which to improve
29 security. Initially, when the proposal for a gate was discussed, the cost was thought to be
30

² See Petitioners' Exhibit 28.

³ See Petitioners' Exhibit 29.

⁴ See Petitioners' Exhibits 16 and 17.

1 approximately \$25,000.00, which would have required a special assessment. Ms. Havill
2 testified regarding her understanding of the voting requirements which would have
3 required three quarters of the members' approval and two thirds of member approval for
4 the special assessment. However, Ms. Havill testified that the cost of the gate was
5 approximately \$3,000.00 and that at special assessment was not needed, as it was
6 funded out of the general fund.

7 11. Erik Powell, a Board member, testified on behalf of Respondent.
8 Mr. Powell testified that the Association had enough funds in its budget to pay for the gate,
9 and therefore, a special assessment was not necessary. Mr. Powell testified that a vote
10 regarding the gate installation was not necessary.

11 12. Mr. Powell testified that at the end of 2021, one of the roads in the
12 community washed out and created dangerous conditions. Mr. Fink was a member of the
13 Roads Committee and recommended the installation of a check dam concrete curb. This
14 was not put to a vote of the community and the cost was comparable to the security gate.

15 **CONCLUSIONS OF LAW**

16 1. Arizona statute permits an owner or a planned community organization to
17 file a petition with the Department for a hearing concerning violations of planned
18 community documents or violations of statutes that regulate planned communities.⁵ That
19 statute provides that such petitions will be heard before the Office of Administrative
20 Hearings.

21 2. Petitioners bear the burden of proof to establish that Respondent committed
22 the alleged violation by a preponderance of the evidence.⁶ Respondent bears the burden to
23 establish affirmative defenses by the same evidentiary standard.⁷

24 3. "A preponderance of the evidence is such proof as convinces the trier of fact
25 that the contention is more probably true than not."⁸ A preponderance of the evidence is
26 "[t]he greater weight of the evidence, not necessarily established by the greater number of

27 ⁵ See A.R.S. § 32-2199.

28 ⁶ See A.R.S. section 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazzano v. Superior Court*, 74 Ariz.
369, 372, 249 P.2d 837 (1952).

29 ⁷ See A.A.C. R2-19-119(B)(2).

30 ⁸ 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.”⁹

5 4. Petitioners allege a violation of Article II Section 1(c) of the 2006 recorded
6 CC&Rs. One cannot read Section 1(c) of Article II without taking into consideration the
7 context of the entire provision:

8 (c) The right of the Association to dedicate or transfer all or any part of the
9 Common Area to any public agency, authority or utility for such purposes
10 and subject to such conditions as may be agreed to by the members, as
11 hereinafter defined. No such dedication or transfer shall be effective unless
12 an instrument signed by members representing three quarters (3/4) of the
13 eligible vote of the Association agreeing to such dedication or transfer and
14 approved by the Board of Directors of Tunnel Springs Ranch Corporation,
15 Inc., has been recorded. Likewise, no improvements shall be placed upon
16 the common area and no act or action shall be taken which would increase
17 the density of residences on the Properties except by agreement of
18 members representing not less than three quarters (3/4) of the eligible votes
19 of the Association and the approval of the Board of Directors of Tunnel
20 Springs Ranch Corporation, Inc.

21 5. This provision governs the dedication or transfer of all or any part of the
22 common area to any public agency, authority or utility. A three quarters vote of the eligible
23 voting members is required to transfer or dedicate all or any part of the Common Area to
24 any public agency, authority or utility. Further, the provision indicates that no
25 improvements shall be placed upon the common area ***and*** no act or action shall be taken
26 *which would increase the density of residences on the Properties* except by agreement of
27 members representing not less than three quarters of the eligible votes of the Association.
28 This sentence is written in the conjunctive. The word “and” is used to connect the two
29 clauses. It is not written in the disjunctive, as the word “or” is not part of the sentence. The
30 installation of a security gate does not dedicate or transfer all or any part of the common
area to any public agency, authority or utility. Therefore, a three quarters vote is not
required. Further, the installation of a security gate is not an improvement that increases

⁹ BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

1 the density of the residences. Therefore, a three quarters vote is not required. The
2 Administrative Law Judge concludes that the provision of the CC&Rs cited by Petitioners
3 is inapplicable to the instant matter.

4 6. Moreover, Article IV Section 2 of the 2006 recorded CC&Rs grant authority
5 to Respondent to use the general assessment monies to "promote the recreation, health,
6 safety and welfare of the residents."

7 7. Based on a review of the credible and relevant evidence of record, it is held
8 that Petitioners failed to establish by a preponderance of the evidence that Respondent
9 violated the provisions of Article II Section 1(c) of the CC&Rs.

10 **ORDER**

11 **IT IS ORDERED** that no action is required of Respondent in this matter and that
12 Petitioners' Petition is dismissed.

13 **NOTICE**

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

19 Done this day, May 16, 2024.

20 /s/ Sondra J. Vanella
21 Administrative Law Judge
22

23 Transmitted by either mail, e-mail, or facsimile May 16, 2024 to:

24 Susan Nicolson, Commissioner
25 Arizona Department of Real Estate
26 SNicolson@azre.gov
27 vnunez@azre.gov
28 djones@azre.gov
29 labril@azre.gov
30 mneat@azre.gov
lrecchia@azre.gov

1 gosborn@azre.gov

2
3 Tom Hardesty
4 board@casasarroyo.org

5 David Onuschak, Esq.
6 donuschak@jshfirm.com

7 Robert P. Fink & Brittany L. Oleson
8 45robertf@gmail.com

9
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11 By: OAH Staff
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