

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:

No. 24F-H036-REL

Aaron Solen & Anh Jung

ADMINISTRATIVE LAW JUDGE DECISION

Petitioners

VS

Power Ranch Community Association

Respondent

HEARING: June 19, 2024

APPEARANCES: Petitioner Anh Jung appeared on her own behalf. Respondent Power Ranch Community Association was represented by Charles H. Oldham.

ADMINISTRATIVE LAW JUDGE: Adam D. Stone

EXHIBITS ADMITTED INTO EVIDENCE: Petitioner's Exhibits A-S, and Respondent's Exhibits 1-6 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.

2. On or about December 30, 2023, Petitioners filed a single-issue petition against the Association with the Department. Petitioners tendered \$500.00 to the Department with his petition.

1 3. On or about March 6, 2024, the Power Ranch Community Association
2 ("Association") filed its ANSWER with the Department whereby it denied all complaint items
3 in the petition.

4 4. Per the NOTICE OF HEARING, the Department referred this matter to the
5 Office of Administrative Hearings ("OAH"), an independent state agency, for an
6 evidentiary hearing on May 2, 2024, regarding the following issues based on Petitioner's
7 petition:

8 Petitioner was issued fines as a result of a Design Review Committee
9 decision and petitioner was not provided an opportunity to appeal to or be
10 heard by the board of directors as required by A.R.S. §33-1803(B) and
11 Article 5, specifically Article 5.2.4 of the Association's by-laws.

12 **THE PARTIES AND GOVERNING DOCUMENTS**

13 5. Respondent is a homeowners' association whose members own properties
14 in a residential real estate development located in Gilbert, Arizona.

15 6. Petitioners are members of the Association.

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

20 **HEARING EVIDENCE**

21 8. Petitioner, Anh Jung testified on her own behalf. Respondent called
22 Jennifer Partridge as a witness. The Agency Record from the Department and NOTICE OF
23 HEARING were also admitted into the evidentiary record.

24 *Anh Jung's testimony*

25 9. Ms. Jung testified that she purchased the house with her husband on or
26 about October 20, 2022. On July 20, 2023, Petitioners conveyed the property to ACRE
27 Holdings, LLC, an LLC owned and operated by Petitioners¹.

28
29 ¹ See Respondent's Exhibit 1. A corrective deed was later recorded on January 25, 2024 to reflect the
30 actual Grantee as A.CRE Holdings, LLC. *Id.*

1 10. Ms. Jung testified that on or about March 9, 2023, she received a Courtesy
2 Notice from the Association as to an unapproved modification.² The Notice indicated in
3 pertinent part:

4 **...It appears that a modification has been made to your lot that has not**
5 **been approved by the Design Review Committee. Please submit a**
6 **Design Modification Application, along with all necessary details, for**
7 **review by the Design Review Committee...**³

8 11. Ms. Jung testified that on March 21, 2023, she completed the Design
9 Review Committee (“DRC”) Application,⁴ which was subsequently denied on April 10,
10 2023.⁵

11 12. Further, Ms. Jung testified that she sent an e-mail to the management
12 company on April 10, 2023, requesting to speak with Board and inquired as to the process
13 to achieve the same.⁶ Further, Ms. Jung testified that she sent another e-mail on April 11,
14 2023, informing that there would be no changes to the Application without discussing the
15 matter to the Board.⁷

16 13. Ms. Jung testified that on May 20, 2023, she cut down the height of the
17 planter.

18 14. Next, Ms. Jung testified that while she and her husband attended the May
19 22, 2023 Board Meeting, their appeal was not addressed.⁸

20 15. Ms. Jung testified that on May 30, 2023, she e-mailed Nick Ferre and copied
21 Jennifer Campbell⁹ from the management company, attached new pictures of the
22 modified planter, and requested that the issue be heard at the June 2023 Board
23 Meeting.¹⁰

24
25 ² See Petitioners’ Exhibit A.

26 ³ Id.

27 ⁴ See Petitioners’ Exhibit B.

28 ⁵ See Petitioners’ Exhibit D.

29 ⁶ See Petitioners’ Exhibit E.

30 ⁷ See Petitioners’ Exhibit F.

⁸ See Petitioners’ Exhibit G.

⁹ During the pendency of this action, Ms. Campbell became married and now goes by Jennifer Partridge.

¹⁰ See Petitioners’ Exhibit H.

1 16. Further, Ms. Jung testified that while she received an e-mail on June 5, 2023
2 inviting her to an executive session of the Board set for June 26, 2023,¹¹ Petitioners did
3 not attend because it was her belief that executive sessions were not open to the public,
4 nor that this was to discuss her appeal.

5 17. Ms. Jung testified that on October 2, 2023, October 19, 2023, November 7,
6 2023 and November 28, 2023, Petitioners received Notices of Fines in the amount of
7 \$100.00 for having an unapproved modification on their property.¹²

8 18. Also, Ms. Jung testified that Petitioners had not supplied a Modification
9 Application to the DRC, and did not plan to do so.

10 19. In closing arguments, Ms. Jung requested that the Association provide clear
11 procedures for these types of disputes regarding appeals and modification of design
12 requests; requested that the Board provide written approval of the planted without the
13 need for additional forms; requested that the Board be given the information supplied on
14 May 30, 2023 regarding her modifications to make a decision; that the penalties of
15 \$400.00 be removed; reimbursement of Petitioner's filing fee paid in the matter; and lastly,
16 that the tribunal impose a civil penalty.

17 Jennifer Partridge's testimony

18 20. Ms. Partridge was employed by CCMC, and was the Executive Director for
19 the Association.

20 21. Ms. Partridge testified that per the CC&R's, all modifications to the
21 landscape must be approved by the DRC after an Application was filed.¹³

22 22. Further, Ms. Partridge testified generally that the Board was proactive in
23 assisting Petitioners with their issue and tried to avoid a final hearing to give Petitioners
24 the opportunity to submit a DRC Modification Application. Too, Ms. Partridge testified that
25 on June 2, 2023, she e-mailed Petitioners a link to the Application, and how to properly
26 submit the photographs which were previously submitted on May 30, 2023.¹⁴

27
28 ¹¹ See Respondent's Exhibit 2.

29 ¹² See Petitioners Exhibits K-N.

30 ¹³ See Respondent's Exhibit 6.

¹⁴ See Petitioners Exhibit I.

1 23. Ms. Partridge testified that the issue was not placed on the agenda for the
2 May 22, 2023 Board meeting, as no new information, including a modification application
3 had been submitted. Thus the Board thought that the best course of action would be for
4 Ms. Partridge to continue to work with Petitioners, because had a final decision been
5 made, Petitioners would have had no further recourse.

6 24. Ms. Partridge testified that she invited Petitioners to the June 23, 2023
7 executive session which was intended to be the hearing. Also, Ms. Partridge testified that
8 Petitioners attended that meeting and asked questions concerning the Application.¹⁵ Ms.
9 Partridge testified that ultimately the Board took no action on the appeal and requested
10 that Petitioners re-apply.

11 25. Finally, Ms. Partridge testified that because there was no further application
12 submitted, the Association commenced fines in October 2023, however stopped after
13 November 2023 as this action was pending.

14 26. In closing, Respondent's attorney argues that the action should be
15 dismissed as Petitioners were not the owners of the property, and that this was actually a
16 two-issue Petition as both a statutory violation and a Bylaw violation were marked.
17 Further, the Board waited nearly seven months before actually issuing fines.

18 CONCLUSIONS OF LAW

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

25 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(D), 32-2199.02,
26 and 41-1092, OAH has the authority to hear and decide the contested case at bar.

27 3. In this proceeding, Petitioner bears the burden of proving by a
28 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1803.¹⁶

29 ¹⁵ See Respondent's Exhibit 4.

30 ¹⁶ See ARIZ. ADMIN. CODE R2-19-119.

1 4. "A preponderance of the evidence is such proof as convinces the trier of fact
2 that the contention is more probably true than not."¹⁷ A preponderance of the evidence is
3 "[t]he greater weight of the evidence, not necessarily established by the greater number of
4 witnesses testifying to a fact but by evidence that has the most convincing force; superior
5 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
6 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
7 the other."¹⁸

8 5. ARIZ. REV. STAT. § 33-1803(B) provides, in relevant part, as follows:

9 B. After notice and an opportunity to be heard, the board of directors may
10 impose reasonable monetary penalties on members for violations of the
11 declaration, bylaws and rules of the association. Notwithstanding any
12 provision in the community documents, the board of directors shall not
13 impose a charge for a late payment of a penalty that exceeds the greater of
14 fifteen dollars or ten percent of the amount of the unpaid penalty. A payment
15 is deemed late if it is unpaid fifteen or more days after its due date, unless
16 the declaration, bylaws or rules of the association provide for a longer
17 period. Any monies paid by a member for an unpaid penalty shall be
18 applied first to the principal amount unpaid and then to the interest
19 accrued. Notice pursuant to this subsection shall include information
20 pertaining to the manner in which the penalty shall be enforced.

21 6. Article 5.2.3 of the CC&R's state:

22 The Owner shall pay the fine set forth in the Notice of Violation to the
23 Association within ten (10) days after the Notice of Violation is served on the
24 Owner unless prior to that time the Owner requests a hearing on the
25 violation pursuant to Section 5.2.4 of the Bylaws.¹⁹

26 7. At the outset, the tribunal finds that Petitioners are the proper parties to the
27 action. They are the members of the Association, and all mail went directly to Petitioners
28 individually, and not as a member/manager of the LLC. Perhaps the analysis would be
29 different if there were other members of the LLC who actually was residing at the property,
30 however, that is not the case at bar.

¹⁷ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

¹⁸ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

¹⁹ See Petitioners' Exhibit S.

1 8. Likewise, the tribunal does not find this to be a two-issue Petition as it is only
2 one issue for which two statutes/CC&R's are referenced.

3 9. As to the lack of hearing, the tribunal finds Petitioners have met their burden
4 that the opportunity to have a hearing on the issue was not granted by the Association.
5 The first opportunity for a hearing after Petitioners requested the same was at the May
6 2023 meeting. By Ms. Partridge's own testimony the matter/hearing was not on the
7 agenda as the Board wanted to give the Petitioners additional time to cure or modify their
8 application so as to not face a "final decision". While this was a noble gesture intended to
9 help the Petitioners, it was clear that Petitioners right to a hearing was not granted.

10 10. Further, at the June 2023, Executive Session, while this was noticed,
11 Petitioners failed to appear as they believed it was a closed session. The tribunal doubts
12 that Petitioner would have purposely failed to appear on this issue as they had been in
13 discussion for months about the planter. Thus, the tribunal finds that the June 2023
14 Executive Session was not a "hearing" for purposes of the CC&R's, and it was not an
15 opportunity to be heard based upon the confusion the Executive Session terminology
16 caused.

17 11. Therefore, although the Board was most generous in delaying the "hearing"
18 to avoid a final decision, the matter should have been addressed in May and June at the
19 monthly meetings and it was not. Thus, Petitioners have met their burden that the
20 Association has violated ARIZ. REV. STAT. § 33-1803(B) and the CC&R's section 5.2.3.,
21 and as such Petitioners prevail on their Petition.

22 12. However, the tribunal has no statutory authority to erase the fines imposed
23 nor force the Association to rewrite its CC&R's, nor can it force the Association to accept
24 the planters as is without Petitioners going through the property DRC processes.

25 **ORDER**

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

27 **IT IS FURTHER ORDERED** pursuant to ARIZ. REV. STAT. § 32-2199.02(A),
28 Respondent shall reimburse Petitioner's filing fee as required by ARIZ. REV. STAT. § 32-
29 2199.01.
30

IT IS FURTHER ORDERED denying Petitioners' request for the imposition of a civil penalty, reimbursement for the fines incurred, approval of the planters, and re-writing of the CC&R's.

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, July 5, 2024.

/s/ Adam D. Stone
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile July 5, 2024 to:

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