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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Justin R. Sheakley,
Petitioner,
v.
Arizona Hillcrest Community Association,
Respondent.

No. 24F-H056-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARING: Convened and concluded on September 30, 2024.

APPEARANCES:

For Petitioner: Justin R. Sheakley.

For Respondent: Attorney Quinten Cupps.

ADMINISTRATIVE LAW JUDGE: Samuel Fox

EXHIBITS ADMITTED INTO EVIDENCE: Notice of Hearing File, provided by the Department of Real Estate. Petitioners' Exhibits A through F. Respondent's Exhibits 1 through 7.

FINDINGS OF FACT

1. Arizona Hillcrest Community Association (Respondent) is a planned community association in Phoenix, Arizona.
2. Justin R. Sheakley (Petitioner) owns a home located at 3234 W. Bajada Dr. and is a member of Respondent.
3. On or about June 12, 2024, Petitioner filed a Petition with the Arizona Department of Real Estate (Department) alleging that Respondent had violated the Association's Declaration of Covenants, Conditions, Restrictions and Easements (CC&Rs), Article 11, Section 11.2. The alleged violation is as follows:

On May 29, 2024 I the homeowner received notice I am responsible for paying for half the repair of the common wall and in Article 11 - Section 11.2 States If a wall is located on the boundary line between Common Areas and a Lot, then the association shall be responsible for the painting and maintenance and repair of the surface on the side thereof that faces the Common Areas and the top of such wall, and the Owner or Owners owning

the opposite side of the wall shall be responsible for the maintenance, repair, painting and replacement of such opposite side.¹

4. Respondent, through its Attorney, Quinten Cupps, filed a written answer to the Petition, denying that it had violated its CC&Rs.

5. The Department referred the Petition to the Office of Administrative Hearings, an independent state agency, for an evidentiary hearing.

6. A hearing was held on September 30, 2024. Administrative Notice was taken of the agency record. Petitioner testified on his own behalf. Melanie Veach, Community Manager, and Peter Alesi, owner of Elite Construction and Painting, testified for Respondent.

7. The CC&Rs provides, in part, as follows:

"Common Areas" means . . . (e) any other areas with respect to which the Association has assumed in writing administrative or maintenance responsibilities.

11.1.1 Areas of Association Responsibility. The Association, or its duly designated representative, shall maintain manage and control the Common Areas and shall keep the Common Areas in good, clean, attractive and sanitary condition, order and repair, pursuant to the terms and conditions hereof. . . .

11.1.2 Delegation of Responsibilities. The Board shall have the sole discretion to determine whether the Association or an individual Owner should be responsible for maintenance of certain Common Areas or public rights-of-way considering cost, uniformity of appearance, location and other relevant factors.

11.1.3 Standard of Care; Disclaimer of Liability. The Association shall use a reasonably high standard of care in providing for the repair, management and maintenance of the Common Areas so that the Project will reflect a high degree of pride of ownership. The Board, however, shall be the sole judge as to the appropriate level of maintenance of all Common Areas by the Association.

11.2 Walls and Fences Between Lots and Common Areas. If a wall is located on the boundary line between Common Areas and a Lot, then the Association shall be responsible for the painting and maintenance and repair of the surface on the side thereof that faces the Common Areas and the top of such wall, and the Owner or Owners owning the opposite side of

¹ Not. of Hr'g, Homeowners Association (HOA) Dispute Process Petition, at 2 (all errors included in original).

1 the wall shall be responsible for the maintenance, repair, painting and
2 replacement of such opposite side. In the case of destruction of both sides
3 of such wall or structural damage, the Owner(s) owning Lots adjacent to the
4 wall shall be responsible for one half of the cost of replacement or repair of
5 the wall and the Association shall be responsible for the other one-half.
6 Unless originally constructed by or for Declarant or otherwise approved in
7 writing by the Board or Committee, a wall may not be located on the
8 Common Areas unless it is part of the Common Areas.²

9 8. On or around June 25, 2020, Criterium-Kessler Engineers evaluated the
10 walls in the community “to determine the condition of the walls and to provide
11 recommendations on how to proceed. . . .”³ They issued a Report dated August 11, 2020,
12 which identified numerous issues with the walls, including water damage, cracking,
13 exposed footings, corrosion, leaning segments of wall, offset expansion joints, and
14 discontinuous expansion joints. The Report concluded that, while the walls were in
15 relatively good condition compared to walls of similar age and construction, “there [were]
16 several areas with structural deficiencies. . . .”⁴

17 9. In or around September 2020, Respondent wanted to replace five walls.
18 The project was postponed due to the pandemic.

19 10. In 2022, Respondent had the walls inspected again.⁵

20 11. On January 30, 2024, Respondent sent Complainant a notice that one of his
21 walls had been designated for repair in addition to six others. Respondent sent another
22 notice on February 28, 2024, informing Complainant that it had received three bids to
23 repair the wall and it would likely be going with the least expensive option. Respondent
24 sent further notice on May 29, 2024, confirming that Complainant’s wall was to be
25 repaired; it stated in part: “[a]fter reviewing the proposals, both past and the three most

26 ² Resp. Exh. 1.

27 ³ Comp. Exh. D.

⁴ *Id.*

⁵ Resp. Exh. 3.

1 recent, listening to the homeowners suggestions, discussing with the Association's
2 Attorney, the Board has decided to move forward with the repairs. . . ."⁶

3 12. Respondent signed a contract with Elite Construction and Painting for the
4 repairs on May 21, 2024.⁷

5 13. Complainant testified that he believed the wall was not structurally damaged
6 and he believed that Respondent and Elite Construction were engaged in some untoward
7 activity. Complainant hired Bringham Engineering Consultants to evaluate his wall, and
8 their Report, dated July 27, 2024, stated as follows:

9 It is our opinion that flaking paint and discoloration of the paint has not
10 affected the structural integrity of the wall. There is no structural reason for
the wall to be replace.⁸

11 14. Notably, the Bringham Report did not address the visible cracking in
12 photographs provided of the wall. It focused on the paint and discoloration.

13 15. Ms. Veach testified that the Board members looked at the walls after
14 receiving repair recommendations and the Board voted to make the repairs.

15 16. Mr. Alesi testified that the walls had structural issues and needed to be
16 repaired.

17 **CONCLUSIONS OF LAW**

18 1. A.R.S. § 32-2199 authorizes the administrative law judge to "adjudicate
19 complaints regarding and ensure compliance with . . . [t]itle 33, chapter 16 and planned
20 community documents."

21 2. A.R.S. § 32-2199.01 permits a member of a planned community to file a
22 petition with the Department for a hearing concerning the planned community
23 association's alleged violations as set forth in Title 33, Chapter 16. This matter lies within
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25 ⁶ Resp. Exh. 5.

26 ⁷ Resp. Exh. 4.

27 ⁸ Comp. Exh. B.

1 the Department's jurisdiction. That statute provides that such petitions will be heard
2 before the Office of Administrative Hearings.

3 3. A.R.S. § 32-2199.02 authorizes the administrative law judge to "order any
4 party to abide by the statute, condominium documents, community documents or contract
5 provision at issue and may levy a civil penalty on the basis of each violation." This
6 Tribunal is not authorized to order other remediation or order civil penalties for other
7 conduct.

8 4. Petitioner bears the burden of proof to establish that Respondent violated
9 applicable statutes, CC&Rs, and/or Bylaws by a preponderance of the evidence.⁹
10 Respondent bears the burden to establish affirmative defenses by the same evidentiary
11 standard.¹⁰

12 5. "A preponderance of the evidence is such proof as convinces the trier of fact
13 that the contention is more probably true than not."¹¹ A preponderance of the evidence is
14 "[t]he greater weight of the evidence, not necessarily established by the greater number of
15 witnesses testifying to a fact but by evidence that has the most convincing force; superior
16 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
17 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
18 the other."¹²

19 6. Based on the record, maintenance, repair, and structural damage are not
20 defined terms. Accordingly, the Tribunal assigns those terms their ordinary meaning.

21 7. Respondent believed that the wall at issue had structural damage, and
22 Petitioner disagreed with that assessment. Structural damage means damage to the
23 integrity of a structure that is more serious than mere cosmetic damage. This is supported
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25 ⁹ See 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).

26 ¹⁰ See A.A.C. R2-19-119(B)(2).

27 ¹¹ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

¹² BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

1 by CC&R 11.2, which distinguishes between the “painting and maintenance and repair of
2 the surface” and in the case of destruction or structural damage “replacement and repair
3 of the wall.” Structural damage does not mean that the structure is fatally flawed; it means
4 that the structure is damaged beyond the surface.
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6 8. The Community Documents in the record do not require a specific severity
7 of structural damage for the purpose of repairs or replacement. Instead, they grant the
8 Board significant discretion and authority over walls and other areas that Respondent is
9 responsible for maintaining.

10 9. Petitioner did not demonstrate by a preponderance of the evidence that
11 Respondent did not have the authority to order maintenance, repairs, or replacement of
12 the wall at issue or that Respondent did not have the authority to require payment from
13 homeowners.
14

15 10. Petitioner did not demonstrate by a preponderance of the evidence that the
16 Board was unreasonable when determining the wall at issue was structurally damaged.

17 11. Accordingly, the preponderance of the evidence established that Petitioner
18 failed to meet his burden that Respondent failed to abide by its Community Documents.
19

20 ORDER

21 **IT IS ORDERED** that Respondent be deemed the prevailing party in this matter.

22 *In the event of certification of the Administrative Law Judge Decision by the*
23 *Director of the Office of Administrative Hearings, the effective date of the Order will be forty*
24 *(40) days from the date of that certification.*

25 Done this day, October 21, 2024.

26 /s/ Samuel Fox
27 Administrative Law Judge

28 Transmitted by either mail, e-mail, or facsimile to:

29 Susan Nicolson, Commissioner
30 Arizona Department of Real Estate
31

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6 By: OAH Staff