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2
3 In the Matter of
4 Keystone Owners Association
5 Petitioner,
6 vs.
7 Bernadette M. Bennett
8 Respondent.
9

No. 24F-H031-REL
**ADMINISTRATIVE LAW JUDGE
DECISION**

10 **HEARING:** November 19, 2024

11 **APPEARANCES:** Erica Mortenson, Esq. appeared on behalf of Keystone Owners
12 Association (Petitioner). Thomas Walcott, Esq. appeared on behalf of Bernadette
13 M. Bennett (Respondent).

14 **ADMINISTRATIVE LAW JUDGE:** Velva Moses-Thompson

15 **EXHIBITS ADMITTED INTO EVIDENCE:** Petitioner's Exhibits A through M.
16 Respondent's Exhibit 1.
17

18 **FINDINGS OF FACT**

19 1. The Department is authorized by statute to receive and to decide Petitions for
20 Hearings from members of homeowners' associations (HOAs) and from HOAs in
21 Arizona.

22 2. Petitioner is an Arizona non-profit Corporation and subassociation located
23 within the Mountain Park Ranch Homeowners Association master association, an
24 Arizona non-profit Corporation (Mountain Park Association). Petitioner and Mountain
25 Park Association are Arizona Planned Communities per A.R.S. §33-1801 et. seq.

26 3. The members of the Mountain Park Association own single-family houses on
27 lots in Mountain Park Ranch in Phoenix, Arizona.

28 4. Respondent owns a house in Mountain Park Ranch and is a member of
29 Petitioner and the Mountain Park Association.
30

1 5. On or about December 12, 2023, Petitioner filed a petition with the
2 Department alleging that Respondent had violated Article IV, Section 2 of the Mountain
3 Park Association Covenants, Conditions, and Restrictions (CC&Rs) and Article V,
4 Section 5.19 of Petitioner's CC&Rs, by installing a driveway extension that exceeds 35
5 percent of the total yard frontage area.

6 6. Respondent denied the allegations through its written answer.

7 7. The Department referred the petition to the Office of Administrative Hearings
8 (OAH), an independent state agency, for an evidentiary hearing.

9 8. A hearing was held November 19, 2024.

10 9. At hearing, Petitioner presented the testimony of Harry Whitesell, a member
11 of Petitioner's Board. Respondent did not present witness testimony.

12 10. The parties are governed by (1) Mountain Park Ranch's CC&Rs, (2)
13 Mountain Park's Articles of Incorporation, (3) Mountain Park's Bylaws, (4) Mountain
14 Park's Rules, (5) Petitioner's CC&Rs, (6) Petitioner's Articles of Incorporation, (7)
15 Petitioner's Bylaws, and (8) Petitioner's Rules (collectively referred to herein as
16 "Governing Documents"). See Exhibits B through E.

17 11. The Governing Documents authorize Petitioner to enforce the Governing
18 Documents, as further memorialized by an executed Assignment Agreement by and
19 between Mountain Park Association and Keystone Owners Association signed on
20 August 16, 2023. See Exhibit J.

21 12. Article IV, Section 2 of the Mountain Park Association CC&Rs requires
22 Respondent to obtain prior written approval before making any addition, alteration,
23 repair, change or other work which in any way alters the exterior appearance. See
24 Exhibit B.

25 13. Article 5, Section 5.19 of the Keystone CC&Rs requires Respondent to
26 obtain prior written approval before making any addition, alteration, repair, change or
27 other work which in any way alters the exterior appearance. See Exhibit C.

28 14. Petitioner's Rules and the Mountain Park Association Rules collectively
29 provide that driveways may not be altered in any way without the prior written approval
30 of the Architectural Review Committee and that driveways can be widened to a

1 maximum of 27 feet. See Exhibit D and E. Moreover, (1) driveway surfaces exceeding
2 27 feet in width are prohibited in all cases unless as a part of the original design by the
3 developer, and (2) the parking surface shall not exceed 35 percent of the total yard
4 frontage area. The Rules also provide that granite or turf areas used to access rear
5 yards may not be used for vehicle parking or show visual evidence of being used as a
6 driveway. See Exhibit E.

7 15. In 2022, it came to the attention of the Association that Respondent removed
8 the previously installed artificial turf in the front yard and replaced it with new turf.
9 Furthermore, Respondent, without obtaining the mandatory written approval from the
10 Association, erected a cement driveway extension that exceeds 35 percent of the total
11 yard frontage area and initiated parking on this unauthorized expansion.

12 16. In December 2022, as a result of the aforementioned unauthorized
13 modifications, the Association dispatched a violation notice to Respondent. See Exhibit
14 I, KEYSTONE0195. The notice emphasized Respondent's omission in submitting
15 architectural requests for the landscaping and driveway alterations and stipulated a 21-
16 day deadline for Respondent to submit an application, consistent with the Association's
17 policies.

18 17. On February 16, 2023 and May 30, 2023, the Association sent fine letters
19 addressing the aforementioned violations to Respondent. See Exhibit I,
20 KEYSTONE0196-0197.

21 18. At hearing, Petitioner presented evidence of architectural landscaping
22 requests submitted by Respondent to Petitioner from 2015 to 2017. See Exhibits F
23 through H. However, there was no testimonial or written evidence presented to establish
24 that Respondent was granted approval to install a driveway that exceeded 35% of the
25 total yard frontage area.

26 19. Respondent has contended that Petitioner is barred by the doctrine of
27 laches from filing the petition.

28 **CONCLUSIONS OF LAW**

29 20. A.R.S. § 32-2199(B) permits an owner or a planned community organization
30 to file a petition with the Department for a hearing concerning violations of planned

community documents under the authority Title 33, Chapter 16.¹ Such petitions will be heard before the Office of Administrative Hearings, an independent state agency.

21. Petitioner bears the burden of proof to establish that Respondent violated CC&R § 7.9 by a preponderance of the evidence.² Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.³

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

23. “A cardinal rule of statutory interpretation is to give full effect to each statutory word or phrase so that no part is rendered void, superfluous, contradictory or insignificant.”⁶ Similarly, if a restrictive covenant is unambiguous, it is enforced to give effect to the intent of the parties.⁷ “Restrictive covenants must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein.”⁸

24. A.R.S. § 32-2199.02, provides, in pertinent part, as follows:

A. 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.

¹ See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce the development's CC&Rs.

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

³ See A.A.C. R2-19-119(B)(2).

⁴ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁵ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

⁶ *Westburne Supply, Inc. v. Diversified Design and Construction, Inc.*, 170 Ariz. 598, 600, 826 P.2d 1224, 1226 (Ct. App. 1992).

⁷ See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

⁸ *Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. App. 1993) (quoted in *Powell*, 211 Ariz. at 557 ¶ 16, 125 P.3d at 377).

25. The preponderance of the evidence shows that Respondent erected a cement driveway extension that exceeds 35 percent of the total yard frontage area, without obtaining prior approval from the Architectural Committee, as required under Governing Documents.

26. Laches is an affirmative defense, and Respondent bears the burden of establishing the defense by a preponderance of the evidence. A.C.C. R2-19-119B)(2). Respondent has not established by a preponderance of the evidence that there was unreasonable delay that has resulted in prejudice to Respondent sufficient to deny the relief Petitioner seeks, and consequently has not met its burden. *See Flynn v. Rogers*, 172 Ariz. 62 (1992).

RECOMMENDED ORDER

IT IS ORDERED that Petitioner be deemed the prevailing party in this matter.

IT IS FURTHER ORDERED that Respondent pay Petitioner its filing fee of \$1,500.00, to be paid directly to Petitioner within thirty (30) days of this Order.

IT IS FURTHER ORDERED that Respondent shall henceforth comply with the provisions of the Governing Documents.

No Civil Penalty is found to be appropriate in this matter. All other requested relief is denied.

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, December 9, 2024.

/s/ Velva Moses-Thompson
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile December 9, 2024 to:

Susan Nicolson

Commissioner
Arizona Department of Real Estate

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By: OAH Staff