

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of
4 Cross Creek Ranch Community
5 Association

No. 25F-H005-REL

6 **Petitioner,**
7 vs.
8 Turquoise Textures, LLC

**ADMINISTRATIVE LAW JUDGE
DECISION**

9 **Respondent.**

10 **HEARING:** November 26, 2024 at 9:00AM

11 **APPEARANCES:** On behalf of Petitioner: John Kalinich, Greg Chambers, Daniel
12 Donahue, Steve Jermaine, Jeffrey Penchina, Tim Smith; William Durham, Principal of
13 Turquoise Textures, LLC, Respondent

14 **ADMINISTRATIVE LAW JUDGE:** Nicole Robinson

15 **EXHIBITS ADMITTED INTO EVIDENCE:** Arizona Department of Real Estate
16 Hearing Packet (Packet), Petitioner Exhibits 1-7

17 **FINDINGS OF FACT**

18 **BACKGROUND AND PROCEDURE**

19
20 1. The Arizona Department of Real Estate (Department) is authorized by
21 statute to receive and to decide petitions for hearings from members of homeowners'
22 associations and from homeowners' associations in Arizona.

23 2. On or about July 16, 2024, Petitioner filed a one issue petition with the
24 Department which alleged that William D. Durham, aka Turquoise Textures LLC
25 (Respondent) violated its Covenants, Conditions, and Restrictions (CC&Rs) Article 3,
26 Section 3.1.3; Article 7, Section 7.5.¹

27 3. The relief requested by Petitioner, other than ordering Respondent to pay
28 to Petitioner the filing fee required by ARIZ. REV. STAT. § 32-2199.01 if Petitioner

29
30 ¹ See Petitioner Exhibits, Exhibit #3-Petition pdf pages 1-4.

1 prevailed, was the following— *Order a party to abide by the section(s) of the*
2 *condominium/planned community document(s) specified.*²

3 4. On August 21, 2024, the Department sent a Homeowner's Association
4 (HOA) Notice of Petition to Respondent which informed Respondent of the petition
5 initiated against him. In addition, the petition informed Respondent to send a timely
6 response to the Department and to Petitioner no later than September 25, 2024.³

7 5. On September 23, 2024, Respondent returned its ANSWER in two parts to
8 the Department whereby he stated in part one, "*As previously discussed with the HOA,*
9 *I have arranged for a landscaper experienced with work in the neighborhood to*
10 *satisfactory remediate plants. Bobs will be providing an acceptable plan to them during*
11 *the week of September 23 to get their support and feedback. Once accepted, the plan*
12 *will be implemented in short order.*"⁴ Respondent checked in part two – All of the
13 complaint items in the Petition are denied. Mr. Durham wrote, "*An acceptable*
14 *experienced landscaper will help this week to remediate plants as originally discussed*
15 *this will be communicated with ARC to assure compliance this week.*"⁵

16 6. On or about October 23, 2024, the Department referred this matter to the
17 Office of Administrative Hearings (OAH), an independent state agency, for an
18 evidentiary hearing to address the issues set forth as follows:

19 The Petitioner's allegation within the petition states, "*Commencing with*
20 *the start of the home build in September of 2023, respondent clear cut*
21 *building lot of old growth trees and vegetation in clear violation of plans*
22 *approved by the association and its Architectural Review Committee*" "" in
23 violation of CC&Rs Article 3, Section 3.1.3; Article 7, Section 7.5..⁶

24 Pursuant to Article 3, Section 3.1.3 of the Associations Declaration
25 regarding Architectural approval and control of projects and pursuant to
26 the Associations Declaration and Design Guidelines Mr. Durham at the
27 start of his construction in September of 2023 cleared his lot of 20-30 old
28 growth trees (Junipers and Pinions) as well as many native shrubs and
29 vegetation in violation of his approved plans. Architectural Review

30 ² *Id.* (One issue claimed in Petition cost Petitioner a \$500 filing fee).

³ See Packet, Notice of Petition pdf pages 1-3.

⁴ See Packet, MC – Durham Response pdf page 1.

⁵ See Packet, Respondent's Response.

⁶ See Footnote 1.

1 Committee approval of plans was contingent on those plantings remaining
2 in place. Respondent clear cut trees for a better view out his rear
3 elevation. This has detrimentally affected the community and lot values as
4 the community is prized and valued for its vegetation and scenic views.

5 Pursuant to Article 7, Section 7.5 of the Associations Declaration relating
6 to improper maintenance and use of lots, page 44 of the Declaration, this
7 clear cutting of trees and vegetation does not comply with the
8 maintenance standard and presents a public and private nuisance.

9 The allegation within the petition further states, *"It is the Associations
10 belief that the removal and clear cutting of old growth trees shrubs and
11 vegetation was not only in violation of approved plans but ultimately
12 affects the appearance and value of the community. Cross Creek Ranch
13 is a community with meadows, old growth cottonwood trees, old growth
14 conifers and other lush vegetation. The diversity of the land is what
15 attracts potential owners as well as its proximity to Oak Creek."*

16 **THE PARTIES AND GOVERNING DOCUMENTS**

17 7. Petitioner is a Condominium/Community Association whose members own
18 properties in the Cross Creek Ranch residential real estate development located in
19 Sedona, Arizona. Most lots in the development are between 2.5 and 3 acres.

20 8. Respondent is a Cross Creek Ranch property owner and a member of the
21 Association.

22 9. The governing documents include Cross Creek Ranch CC&Rs and the
23 Cross Creek Design Guidelines.

24 The **Cross Creek Ranch CC&Rs** provides, in pertinent part, these
25 sections⁷:

26 Article 3, Section 3.1.3 – In reviewing plans and specifications for any
27 construction, installation, addition, alteration, repair, change or other work
28 which must be approved by the Architectural Review Committee, the
29 Architectural Review Committee, among other things, may consider the
30 quality of workmanship and design, harmony of external design with
existing structures and location in relation to surrounding structures,
topography and finish grade elevation. The Architectural Review
Committee may disapprove plans and specifications for any construction,
installation, addition, alteration, repair, change or other work which must

⁷ See Packet, Notice of Petition pdf pages 6-7.

1 be approved by the Architectural Review Committee pursuant to this
2 Section 3.1 if the Architectural Review Committee determines, in its sole
3 and absolute discretion, that: (i) the proposed construction, installation,
4 addition, alteration, repair, change or other work would violate any
5 provision of this Declaration; (ii) the proposed construction, installation,
6 addition, alteration, repair, change or other work does not comply with any
7 Design Guideline; (iii) the proposed construction, installation, addition,
8 alteration, repair, change or other work is not in harmony with existing
9 Improvements in the Project or with Improvements previously approved by
10 the Architectural Review Committee but not yet constructed; (iv) the
11 proposed construction, installation, addition, alteration, repair, change or
12 other work is not aesthetically acceptable; (v) the proposed construction,
13 installation, addition, alteration, repair, change or other work would be
14 detrimental to or adversely affect another Owner or the appearance of the
15 Project; of (vi) the proposed construction, installation, addition, alteration,
16 repair, change or other work is otherwise not in accord with the general
17 plan of development for the Project.

18 Article 7.5 – Improper Maintenance and Use of Lots. In the event any
19 portion of any Lot is so maintained as to not comply with the Maintenance
20 Standard, or as to present a public or private nuisance, or as to
21 substantially detract from the appearance or quality of the surrounding
22 Lots or other areas of the Project which are substantially affected thereby
23 or related thereto, or in the event any portion of a Lot is being used in a
24 manner which violates this Declaration; or in the event the Owner of any
25 Lot is failing to perform any of his obligations under the Project
26 Documents, the Board may make a finding to such effect, specifying the
27 particular condition or conditions which exist, and pursuant thereto give
28 notice thereof to the offending Owner that unless corrective action is taken
29 within fourteen (14) days, the Board may cause such action to be taken at
30 said Owner's cost. If at the expiration of said fourteen-day period of time
the requisite corrective action has not been taken, the Board shall be
authorized and empowered to cause such action to be taken and the cost
thereof shall be paid by such Owner to the Association upon demand and
payment of such amounts shall be secured by the Assessment Lien.

The **Cross Creek Ranch Design Guidelines** in pertinent part these
sections⁸:

Landscaping Design – All landscaping installed for a new Residential Unit
shall be installed within ninety (90) days of either the issuance of
Certificate of Occupancy or conveyance of a Lot from the Declarant to the
Owner. It is required that any landscaping plans take the Fire Mitigation
requirements identified in Appendix B into account.

⁸ See Petitioner Exhibits, Exhibit #2.

When reviewing landscaping submittals, the objective of the Cross Creek Ranch ARC will be to integrate the built environment with the natural environment, and to generally enhance the natural environment; to screen, accent, improve and/or restore the visual character of the Project. All plant material proposed by owners for landscaping non-private areas shall be drought resistant, water conserving and generally compatible with the indigenous plant materials of the existing area. Existing natural features such as unique vegetative groupings, rock outcroppings and washes shall be preserved wherever possible. The majority of plant materials approved by the ARC for private areas will be indigenous Species, which will ensure minimal water usage and compatibility with the natural environments. An aggressive re-vegetation program shall be required in all areas impacted by construction to ensure uninterrupted sense of "fit" between the community and its physical environment.

All Lots are comprised of three (3) landscape zones: Natural Area, Transition Area and Private Area.

....
Note: Careful attention to preserving view corridors in all site design and site layout is an important factor for approval and will be strongly considered during review by the ARC.

HEARING EVIDENCE

10. In April 2021, prior to Respondent purchasing Lot 62, Respondent met with Architectural Review Committee (ARC) Member, Steve Jermaine and they spoke about Cross Creek, CC&Rs, and Design Guidelines whereby property owners could not remove trees solely for the purpose of preserving or improving views. On April 18, 2021, Mr. Jermaine followed up this discussion with an email to Respondent reiterating, "The ARC does not approve the removal of trees (especially large trees) solely for the purpose of preserving or improving a view."⁹

11. On June 14, 2021, Respondent recorded on Lot 62 under his name William D. Durham.

12. On July 7, 2022, Respondent called Mr. Jermaine and asked for permission to clear dead trees inside and outside of the building envelope. They met at the lot, Mr. Jermaine explained to Respondent that until his house plan was approved by the ARC, he would only receive permission to cut dead trees. As such, the two

⁹ See Petitioner Exhibits, Exhibit #2.

1 walked the property and Mr. Jermaine gave Respondent permission to remove four
2 trees that were tagged. Later on, Mr. Jermaine followed up the meeting with an email
3 from ARC regarding the removal of the four dead trees.¹⁰

4 13. On July 9, 2022, Mr. Jermaine drove by Respondent's lot where he saw
5 not only the four dead trees being removed but also viable trees that were not approved
6 for removal. Mr. Jermaine informed Respondent to stop removing viable trees, which
7 Respondent seemed to heed. Later on that day, Mr. Jermaine followed up the
8 conversation with a letter from the ARC regarding the unauthorized removal of trees
9 from Lot 62.¹¹

10 14. In June 2023, Respondent's submitted residential and landscape plans
11 were approved by the ARC. On August 29, 2023, a pre-construction meeting took place
12 with Respondent; Tim Smith with Smith & Sons Construction, Respondent's general
13 contractor; and ARC. Approximately 28 trees and shrubs were to be cut within the
14 private and transition areas per the approved plans.

15 15. In September 2023, Mr. Smith, the general contractor, cleared Lot 64 of
16 approximately 30 plus trees and shrubs that were not included in the approved plans
17 per Respondent's instruction. Respondent told Mr. Smith the trees were disturbing his
18 views and he did not care. It took Mr. Smith's company about three full days of clearing
19 the lot, removing trees and shrubs, and chipping the wood. In addition, Respondent
20 was on the lot and was aware of everything that happened on the Lot.

21 16. Respondent testified on his own behalf, rebutting the testimony of Mr.
22 Smith. Respondent admitted that his lot was cleared of 30 plus old growth trees and
23 shrubs that were to remain on the lot per his approved lot plans through the ARC.
24 Respondent blamed the clearance of his lot on Mr. Smith and that Mr. Smith, on his own
25 and without permission, cleared his lot of way more trees and shrubs than he was
26 permitted to clear.

27 17. On February 9, 2024, Mr. Durham transferred the property and recorded
28 Lot 64 under Turquoise Textures, LLC.

29 ¹⁰ *Id.*

30 ¹¹ *Id.*

ARGUMENTS

Petitioner's argument

18. Petitioner argued that Respondent violated the approved plans by clearing his lot of 30 plus old growth trees and shrubs and that he needed to rectify the damage by replanting the Lot.

Respondent's argument

19. Respondent admitted that his Lot was cleared of trees that were not permitted to be removed. Respondent agreed to develop a remediation plan with Cross Creek HOA.

CONCLUSIONS OF LAW

1. This matter lies within the Department's jurisdiction pursuant to ARIZ. REV. STAT. §§ 32-2102 and 32-2199 *et seq.*, regarding a dispute between an owner and a condominium/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(A), 32-2199.01(D), 32-2199.02, and 41-1092 *et seq.*, OAH has the authority to hear and decide the contested case at bar. OAH has the authority to interpret the contract between the parties.¹²

3. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated the aforementioned Design Guidelines and CC&Rs.¹³

4. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."¹⁴ A preponderance of the evidence is "[t]he greater weight of the evidence, not necessarily established by the

¹² See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

¹³ See ARIZ. ADMIN. CODE R2-19-119.

¹⁴ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

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.”¹⁵

5. In this case, regardless of whether or not Respondent directed his general contractor to remove non-approved trees is not persuasive. A pattern developed over the year beginning back to Respondent’s meeting with Mr. Jermaine failing to heed the ARC’s directions in July 2022. In addition, Respondent admitted what happened to his Lot was not a part of the approved plan and, hence, was a violation of Petitioner’s CC&Rs and Design Guidelines.

6. Accordingly, Petitioner established that Respondent acted in violation of the Association’s governing documents.

7. The undersigned Administrative Law Judge concludes that, because Petitioner sustained its burden of proof that Respondent committed the alleged violation, its petition must be granted.

ORDER

Based on the foregoing,

IT IS ORDERED that Petitioner’s petition be granted.

IT IS FURTHER ORDERED that Respondent reimburse Petitioner’s filing fee of \$500.00 in certified funds.

IT IS FURTHER ORDERED that Respondent shall henceforth comply with the provisions of the governing documents.

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

¹⁵ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

1 **must be filed with the Commissioner of the Department of Real Estate**
2 **within 30 days of the service of this Order upon the parties.**

3
4 Done this day, December 16, 2024.

5
6 /s/ Nicole Robinson
7 Administrative Law Judge

8 Transmitted by either mail, e-mail, or facsimile December 16, 2024 to:

9 Susan Nicolson, Commissioner
10 Arizona Department of Real Estate
11 100 N. 15th Avenue, Suite 201
12 Phoenix, Arizona 85007

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By: OAH Staff