IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Jerry and Patricia Gravelle Petitioners, v. Village Parc Homeowners Assoc. of Havasu, Respondent.	**No. 17F-H1716008-REL** **ADMINISTRATIVE LAW JUDGE DECISION**

<u>HEARING</u>: November 10, 2016, at 8:30 a.m.; because the disputed issue was primarily an issue of law, the record was held open until December 21, 2016, to allow the parties to submit post-hearing legal memoranda.

<u>APPEARANCES</u>: Jerry and Patricia Gravelle (“Petitioners”) appeared on their own behalf; Village Parc Homeowners Assoc. of Havasu (“Respondent” or “the Association”) was represented by Kenneth E. Moyer, Esq., Law Office of Kenneth E. Moyer, PLLC.

<u>ADMINISTRATIVE LAW JUDGE</u>: Diane Mihalsky

<u>FINDINGS OF FACT</u>

PETITIONERS’ CLAIM

1. Respondent is a homeowners’ association whose members own condominiums in the Village Parc development in Lake Havasu City, Arizona.

2. Petitioners own Unit 14 in Village Parc and are members of Respondent.

3. On or about October 23, 2015, it was discovered that Petitioner’s Unit 14, as well as Units 15 and 16, had suffered damage from a sewer backup.

4. Although Petitioners had an insurance policy in effect for their unit, the policy did not provide coverage for damages caused by a sewer backup.

5. On or about December 15, 2010, Travelers Casualty Insurance Company (“Travelers”) had issued a commercial general liability and business owner’s property damage insurance policy to Respondent, which provided general liability coverage and property damage coverage (“the Policy”), which remained in effect during all relevant

times. The Policy contained an endorsement that covered certain risks, in relevant part as follows:

> Building, meaning the building or structure described in the Declarations, including:
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> (9) Any of the following types of property contained within a unit, regardless of ownership, ***if your Condominium Association Agreement requires you to insure it***:
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> (a) Fixtures, improvements and alterations that are part of the building or structure; and
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> (b) Appliances, such as those used for refrigerating, ventilating, cooking, dishwashing, laundering, security or housekeeping.[1]

The endorsement also provided that "[a] unit-owner may have other insurance covering the same property as this insurance. This insurance is intended to be primary, and not to contribute with such other insurance."[2]

6. Section 1 of the Covenants, Conditions, and Restrictions ("CC&Rs") for Village Parc defines the entire condominium project, individually owned units, and limited common elements, in relevant part as follows:

> 1.19 "Limited Common Elements" shall mean and refer to a portion of the Common Elements allocated by this Declaration or in accordance with the Arizona Condominium Act for the exclusive use and benefit of one or more but fewer than all of the Units.
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> . . . .
>
> 1.27 "Project" shall mean and refer to the entire Property . . . portions of which are designated for separate ownership and the remainder of which are designated for common ownership solely by the owners of the Units therein. The Project shall constitute a "Condominium" as defined in the Arizona Condominium Act.
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> . . . .

[1] Petitioners' Exhibit 20 at 1 (emphasis added).
[2] Petitioners' Exhibit 20 at 2.

> 1.32 “Unit” shall mean and refer to the elements of an individual unit . . ., which are not owned in common with the Owners of other Condominium Units in the Project.

7. Section 2 of the CC&Rs contains the following additional descriptions that distinguish between individual units and limited common elements that may serve the units:

> 2.2.1 <u>Units</u>
>
> Each of the Units as separately shown, numbered and designated on the Condominium Plan is bounded by and contained within the interior finished surfaces of the perimeter walls, floors and ceilings of each Unit. . . .
>
> . . . .
>
> 2.2.3 <u>Limited Common Elements</u>
>
> Any chute, flue, duct, wire, conduit, bearing wall, bearing column, or other fixture which lies partially within and partially outside the Unit boundaries shall be Limited Common Elements to the extent the same serve only that Unit . . . .

8. Section 11.7.3 of the CC&Rs requires Respondent to maintain an insurance policy that provides coverage of certain elements of the condominium development, in relevant part as follows:

> [T]he Association shall obtain and continue in effect a master or blanket policy of multi-peril insurance on the Project . . . , said coverage to be obtained on a replacement cost basis in an amount not less than one hundred percent (100%) of the insurable value (based on replacement cost) of all improvements in the Project. . . . Such policy of insurance shall not be required to insure the personal property within any individual Unit, which insurance shall be the responsibility and risk of the Unit Owners.

9. Section 11.7.5 of the CC&Rs provides that Respondent shall not be liable for damages to an owner’s uninsured or underinsured individually owned unit, in relevant part as follows:

> Neither . . . the Association nor any officer or director thereof shall be liable to any Owner or other party if any risk or hazard is not covered by insurance or the amount is inadequate. Each Owner is responsible for ascertaining the Association's coverage and for procuring such additional coverage as such owner deems necessary. . . .

10. Section 11.7.6 of the CC&Rs provides that if insured improvements in the project are damaged, in most cases, insurance proceeds must be used to rebuild or repair the damage, in relevant part as follows:

> [I]f any of the Project improvements are damaged by fire or other casualty, insurance proceeds payable to the Association shall be used to rebuild or repair such damage . . . . In the event the proceeds of the Association's insurance policy are insufficient to rebuild or repair the damaged Project improvements . . ., then the Association may use funds from its general account or, if necessary, from levying a special Assessment on all Unit Owners to restore or rebuild said improvements. . . .

11. Respondent submitted a claim for the damages caused by the sewer backup to Travelers.[3] Travelers concluded that there was coverage under the Policy for damage done to certain common elements and issued a check to Petitioners in the amount of $338.64 for the damages to the common elements associated with their unit.[4]

12. Travelers concluded that there was no coverage under the Policy for damage to the interior of Petitioners' unit because the CC&Rs provide that the unit owner is responsible for damages within a unit and the Policy only provided coverage for the common elements and structural damage to the units, not for the finished surfaces and personal property within the unit.[5]

13. The Arizona Department of Real Estate ("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. On or about August 31, 2016, Petitioners filed a petition with the Department that alleged that Respondent had violated the CC&Rs Article 11, Section 11.7.3, and Article 11, Section 11.7.6 by failing

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[3] *See* Petitioners' Exhibit 29; Gary Himango's Affidavit submitted with Respondent's December 14, 2016 Responsive Memorandum ("Himango Affidavit") at paragraph 6.

[4] *See* Petitioners' Exhibit 72; Himango Affidavit at paragraph 6.

[5] *See* Exhibit 1 attached to Respondent's December 14, 2016 Responsive Memorandum.

to provide insurance coverage for all the damages to Petitioners' unit caused by the sewer backup. Petitioners requested that Respondent pay $6,697.70 to reimburse them for the loss that Travelers refused to cover under the Policy.

14. Respondent's president filed an answer to the Petition, denying any violation of the CC&Rs or applicable statutes.

RESPONDENT'S AND TRAVELERS' PAST PRACTICES

15. Petitioners contacted Travelers to point out that in 2014, Travelers' adjuster initially determined that the Policy provided coverage for damage done to a unit, not just the limited common elements.[6] Travelers responded by stating that the adjuster erred in the initial determination and that Travelers did not pay any claim for damage to the unit.[7]

16. Petitioners allege that in 2011, a broken shower drain damaged Units 3 and 5. Petitioners submitted evidence that in June 2011, Respondent authorized expenditures in the amounts of $153.74, $75.00, and $296.11 to repair the damage to Units 3 and 5.[8]

17. Petitioners allege that in 2012, the kitchen cabinets in Unit 6 were damaged by a broken roof vent. Petitioners submitted evidence that in January 2012, Respondent authorized an expenditure in the amount of $449.45 to repair the damage to Unit 6.[9]

18. In November 2015, Petitioner Mr. Gravelle served as secretary/treasurer on Respondent's Board of Directors. At the November 2015 board meeting, the Board determined that sections 11.7.1 and 11.7.3 of the CC&Rs required Respondent to provide insurance coverage for all the damages to Unit 14 caused by the sewer backup, not just the limited common elements.[10] Nonetheless, as noted above, Travelers'

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[6] *See* Petitioners' Exhibit 22.

[7] *See* Exhibit 1 attached to Respondent's December 14, 2016 Responsive Memorandum; Petitioners' Exhibit 94; Himango Affidavit at paragraph 10.

[8] *See* Petitioners Exhibits 104 and 105. Apparently, Respondent did not submit a claim to Travelers for the damages to Units 3 and 5 that it paid to repair.

[9] *See* Petitioners' Exhibits 106 and 107. Apparently, Respondent did not submit a claim to Travelers for the damages to Unit 6 that it paid to repair.

[10] *See* Petitioners' Exhibits 93, 45, and 42.

adjuster denied the claim for damages to anything but the limited common elements in the unit.[11]

CONCLUSIONS OF LAW

1. A.R.S. § 32-2199.01 permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of planned community documents or violations of statutes that regulate planned communities. That statute provides that such petitions will be heard before the Office of Administrative Hearings.

2. Petitioners bear the burden of proof to establish that Respondent violated applicable statutes or CC&Rs by a preponderance of the evidence.[12] Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.[13]

3. "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 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]

4. Section 1.27 of the CC&Rs provides that the Project is a condominium as defined in the Arizona Condominium Act. Section 2.2.1 provides that each unit is bounded by and contained within the interior finished surfaces of the perimeter walls, floors, and ceilings.

5. Under the Arizona Condominium Act, "[i]f walls, floors or ceilings are designated as boundaries of a unit, all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring and any other materials constituting any part of the finished surfaces are a part of the unit, and all other portions of the walls,

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[11] *See* Petitioners' Exhibit 94.
[12] *See* 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).
[13] *See* A.A.C. R2-19-119(B)(2).
[14] MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).
[15] BLACK'S LAW DICTIONARY at page 1220 (8^{th} ed. 1999).

floors or ceilings are a part of the common elements."[16] "Except to the extent provided by the [CC&Rs] . . ., the association is responsible for maintenance, repair and replacement of the common elements and each unit owner is responsible for maintenance, repair and replacement of the unit."[17]

6. Section 11.7.3 of the CC&Rs expressly provides that Respondent is not required to provide insurance coverage for damages to personal property within any individual unit, which is the responsibility of the owners. Section 11.7.5 provides that Respondent is not liable to any owner for uninsured damages to his or her unit. Section 11.7.6 only applies to Respondent's use of insurance proceeds, but does not define the property that Respondent is required to insure. Nothing in the CC&Rs requires Respondent to provide insurance to cover damages to Petitioners' unit caused by a sewer backup, except to the extent that the backup damages any limited common elements.

7. The insurance contract between Respondent and Travelers only required that Travelers provide insurance coverage for specific risks and areas of the condominium project as required by the CC&Rs. Petitioners did not establish that Travelers has ever provided insurance coverage or actually paid for damages to an individual unit caused by a limited common element. The adjuster's initial error in the 2014 claim does not estop[18] Travelers from denying the claim for damages to Petitioners' unit that the sewer backup caused in 2015.

8. Respondent's Board's erroneous opinion that Sections 11.7.3 and 11.7.6 required it to provide insurance coverage for damages to an individually owned unit and the Board's actual payments of small amounts for damages to individually owned units do not amend the plain language of the CC&Rs that does not require such insurance or

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[16] A.R.S. § 33-1212(1).
[17] A.R.S. § 33-1247(A).
[18] "Estop" means "[t]o stop, bar, or impede; to prevent; to preclude." BLACK'S LAW DICTIONARY, *supra,* at 551. "'Estoppel' means that a party is prevented by his own acts from claiming a right to detriment of other party who was entitled to rely on such conduct and has acted accordingly. *Id.* (citing *Graham v. Asbury,* 112 Ariz. 184, 186, 540 P.2d 656, 658 (1975)). The plain language of the CC&Rs prevents Petitioners from claiming that they reasonably relied on the Board's or Travelers' past practices in deciding not to purchase insurance to cover the risk that a sewer backup would damage their individually owned unit.

amend the plain language of the Travelers Policy to actually provide coverage for such damages.

9. The CC&Rs put Petitioners on notice that Respondent was not required to provide insurance coverage for damages to their individual unit.[19] Petitioners therefore did not establish that the Arizona Condominium Act, the CC&Rs, Respondent's past practices, or any of the other circumstances of this case make Respondent responsible for the damages to Petitioners' individual unit caused by the sewer backup.

RECOMMENDED ORDER

In view of the foregoing, it is ORDERED that no action is required of Respondent in this matter and that the petition is dismissed.

In the event of certification of the Administrative Law Judge Decision by the Director of the Office of Administrative Hearings, the effective date of the Order will be five days from the date of that certification.

Done this day, December 22, 2016.

/s/ Diane Mihalsky
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate

[19] Everyone is presumed to know the law. *See Conway v. State Consolidated Publishing Co.*, 57 Ariz. 162, 171, 112 P.2d 218 (1941). "As a matter of public policy, all persons are charged with knowledge of law pertaining to their transactions . . . ." *Turner v. State Employees Retirement System,* 485 So. 2d 765 (Ala. App. 1986). Because everyone is presumed to know the law's requirements, a mistake as to such requirements does not excuse failure to meet them. *See Newman v. Fidelity Savings and Loan Ass'n*, 14 Ariz. 354, 359, 128 P. 53 (1912).