

BEFORE THE DEPARTMENT OF REAL ESTATE
OFFICE OF ADMINISTRATION
IN AND FOR THE STATE OF ARIZONA

Jerry and Patricia Gravelle,

Petitioner,

vs.

Village Parc Homeowners Assoc. of Havasu,

Respondent.

CASE NO. HO 17-16/008

DOCKET NO. 17F-H1716008-REL

FINAL ORDER

Pursuant to Arizona Revised Statutes ("A.R.S.") § 41-1092.08, the attached Administrative Law Judge ("ALJ") Decision is adopted by the Commissioner of the Department of Real Estate ("Commissioner") and is accepted as follows:

ORDER

The Commissioner accepts the ALJ Recommendation that the petition be dismissed.

Pursuant to A.R.S. § 41-1092.09, a party may file a motion for rehearing or review within thirty (30) days after the service of this final Order. A written request for rehearing should be addressed to Abby Hansen, 2910 N. 44th Street, Suite 100, Phoenix, Arizona, 85018.

This Order is a final administrative action and is effective immediately from the date service is complete. A party may appeal this final administrative decision by filing a complaint for judicial review pursuant to title 12, chapter 7, article 6. The Order will not be stayed unless a stay is obtained from the court in conjunction with the judicial review action.

1 DATED this 3rd day of January, 2017.

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4 
5 Judy Lowe, Commissioner
6 DEPARTMENT OF REAL ESTATE

7 The foregoing mailed this 3rd day of January, 2017,
8 via certified mail receipt number 7015 1520 0000 8792 5354 to:

9 Jerry and Patricia Gravelle
10 2095 Mesquite Ave #14
11 Lake Havasu City AZ 86403-6749

12 Copy sent via certified mail receipt no. 7015 1520 0000 8792 5347 to:

13 Kenneth E. Moyer, Esq.
14 Law Offices of Kenneth E. Moyer
15 1845 Mcculloch Blvd. Suite A-10
16 Lake Havasu City AZ 86403

17 COPY electronically transmitted to:

18 The Office of Administrative Hearings
19 1400 W Washington St, Suite 101
20 Phoenix, AZ 85007

21 By:

22 
23 Abby Hansen
24 HOA Coordinator
25
26
27
28

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Jerry and Patricia Gravelle

No. 17F-H1716008-REL

4 Petitioners,

5 v.

ADMINISTRATIVE LAW JUDGE

6 Village Parc Homeowners Assoc. of
7 Havasü,

DECISION

8 Respondent.

9
10 **HEARING:** November 10, 2016, at 8:30 a.m.; because the disputed issue was
11 primarily an issue of law, the record was held open until December 21, 2016, to allow
12 the parties to submit post-hearing legal memoranda.

13 **APPEARANCES:** Jerry and Patricia Gravelle ("Petitioners") appeared on their
14 own behalf; Village Parc Homeowners Assoc. of Havasu ("Respondent" or "the
15 Association") was represented by Kenneth E. Moyer, Esq., Law Office of Kenneth E.
16 Moyer, PLLC.

17 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky
18

19 **FINDINGS OF FACT**

20 **PETITIONERS' CLAIM**

- 21 1. Respondent is a homeowners' association whose members own
22 condominiums in the Village Parc development in Lake Havasu City, Arizona.
- 23 2. Petitioners own Unit 14 in Village Parc and are members of Respondent.
- 24 3. On or about October 23, 2015, it was discovered that Petitioner's Unit 14, as
25 well as Units 15 and 16, had suffered damage from a sewer backup.
- 26 4. Although Petitioners had an insurance policy in effect for their unit, the policy
27 did not provide coverage for damages caused by a sewer backup.
- 28 5. On or about December 15, 2010, Travelers Casualty Insurance Company
29 ("Travelers") had issued a commercial general liability and business owner's property
30 damage insurance policy to Respondent, which provided general liability coverage and
 property damage coverage ("the Policy"), which remained in effect during all relevant

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

3 Building, meaning the building or structure described in the
4 Declarations, including:

5 (9) Any of the following types of property contained within a
6 unit, regardless of ownership, ***if your Condominium
Association Agreement requires you to insure it:***

7 (a) Fixtures, improvements and alterations that are part of
8 the building or structure; and

9 (b) Appliances, such as those used for refrigerating,
10 ventilating, cooking, dishwashing, laundering, security or
11 housekeeping.¹

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

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

18 1.19 "Limited Common Elements" shall mean and
19 refer to a portion of the Common Elements allocated by this
20 Declaration or in accordance with the Arizona Condominium
21 Act for the exclusive use and benefit of one or more but
22 fewer than all of the Units.

23

24 1.27 "Project" shall mean and refer to the entire
25 Property . . . portions of which are designated for separate
26 ownership and the remainder of which are designated for
27 common ownership solely by the owners of the Units therein.
28 The Project shall constitute a "Condominium" as defined in
29 the Arizona Condominium Act.

30

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 Units

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 Limited Common Elements

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

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.

1 violated the CC&Rs Article 11, Section 11.7.3, and Article 11, Section 11.7.6 by failing
2 to provide insurance coverage for all the damages to Petitioners' unit caused by the
3 sewer backup. Petitioners requested that Respondent pay \$6,697.70 to reimburse
4 them for the loss that Travelers refused to cover under the Policy.

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

7 **RESPONDENT'S AND TRAVELERS' PAST PRACTICES**

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

13 16. Petitioners allege that in 2011, a broken shower drain damaged Units 3 and
14 5. Petitioners submitted evidence that in June 2011, Respondent authorized
15 expenditures in the amounts of \$153.74, \$75.00, and \$296.11 to repair the damage to
16 Units 3 and 5.⁸

17 17. Petitioners allege that in 2012, the kitchen cabinets in Unit 6 were damaged
18 by a broken roof vent. Petitioners submitted evidence that in January 2012,
19 Respondent authorized an expenditure in the amount of \$449.45 to repair the damage
20 to Unit 6.⁹

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

26 ⁶ See Petitioners' Exhibit 22.

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

29 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.

30 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.

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

3 CONCLUSIONS OF LAW

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

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

12 3. "A preponderance of the evidence is such proof as convinces the trier of fact
13 that the contention is more probably true than not."¹⁴ 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
18 than the other."¹⁵

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

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

27
28 ¹¹ See Petitioners' Exhibit 94.

29 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
30 837 (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 (8th ed. 1999).

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

5 6. Section 11.7.3 of the CC&Rs expressly provides that Respondent is not
6 required to provide insurance coverage for damages to personal property within any
7 individual unit, which is the responsibility of the owners. Section 11.7.5 provides that
8 Respondent is not liable to any owner for uninsured damages to his or her unit. Section
9 11.7.6 only applies to Respondent’s use of insurance proceeds, but does not define the
10 property that Respondent is required to insure. Nothing in the CC&Rs requires
11 Respondent to provide insurance to cover damages to Petitioners’ unit caused by a
12 sewer backup, except to the extent that the backup damages any limited common
13 elements.

14 7. The insurance contract between Respondent and Travelers only required that
15 Travelers provide insurance coverage for specific risks and areas of the condominium
16 project as required by the CC&Rs. Petitioners did not establish that Travelers has ever
17 provided insurance coverage or actually paid for damages to an individual unit caused
18 by a limited common element. The adjuster’s initial error in the 2014 claim does not
19 estop¹⁸ Travelers from denying the claim for damages to Petitioners’ unit that the sewer
20 backup caused in 2015.

21 8. Respondent’s Board’s erroneous opinion that Sections 11.7.3 and 11.7.6
22 required it to provide insurance coverage for damages to an individually owned unit and
23 the Board’s actual payments of small amounts for damages to individually owned units
24 do not amend the plain language of the CC&Rs that does not require such insurance or
25

26 ¹⁶ A.R.S. § 33-1212(1).

27 ¹⁷ A.R.S. § 33-1247(A).

28 ¹⁸ “Estop” means “[t]o stop, bar, or impede; to prevent; to preclude.” BLACK’S LAW DICTIONARY, *supra*, at
29 551. “‘Estoppel’ means that a party is prevented by his own acts from claiming a right to detriment of
30 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.

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

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

8 **RECOMMENDED ORDER**

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

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

14 Done this day, December 22, 2016.

15 /s/ Diane Mihalsky
16 Administrative Law Judge

17 Transmitted electronically to:

18 Judy Lowe, Commissioner
19 Arizona Department of Real Estate
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21
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23
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27
28 ¹⁹ Everyone is presumed to know the law. See *Conway v. State Consolidated Publishing Co.*, 57 Ariz.
29 162, 171, 112 P.2d 218 (1941). "As a matter of public policy, all persons are charged with knowledge of
30 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).