IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Jay Janicek Petitioner, vs. Sycamore Vista No. 8 HOA Respondent.	**No. 17F-H1717033-REL** **ADMINISTRATIVE LAW JUDGE DECISION**

<u>HEARING</u>: July 12, 2017

<u>APPEARANCES</u>: Jay Janicek, Petitioner; Evan Thompson, Attorney for Respondent' Steve Russo, Respondent's representative; John Shields, Margery and Mathew Janicek, observers

<u>ADMINISTRATIVE LAW JUDGE</u>: Dorinda M. Lang

After filing a petition against Respondent in this matter, Petitioner did not establish a violation. Therefore, it is recommended that the petition be denied.

<u>FINDINGS OF FACT</u>

1. Petitioner filed the petition in this matter alleging that Respondent is in violation of its Covenants, Conditions, and Restrictions ("CC&Rs"). Where Petitioner lives, the general housing development's master association, Sycamore Vista Master Home Owner's Association ("Master HOA"), governs expenses concerning the entire development. The overall development also has various first level associations governing expenses relating to those individual areas and the common areas. The first level association that Petitioner belongs to is Respondent. It pays into the Master HOA for a loan that was used to pay for expenses relating to a roadway within the master development.
2. Petitioner argues that some of the expenses being paid for by the master association, most egregiously, for the loan, do not benefit the whole development equally and, therefore, they are not appropriate expenses for all of the homeowners in the development to be paying. Petitioner argued that this is in

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violation of Article 11. Section 11.5 of the Respondent's CC&Rs,[1] which provides as follows:

> Costs of Improvements. The cost of improving Unimproved Lots and Commons Areas and/or Areas of Association Responsibility shall be borne by the Owners of the Lots located in within either Phase 3 or Phase 4. Lots within Phase 3 shall bear the costs of improving only Unimproved Lots and Commons Ares and/or Arizona of Association Responsibility located in Phase 3. Lots within Phase 4 shall bear the costs of improving only Unimproved Lost and Commons area and/or Areas of Responsibility located in Phase 4. The costs of improving Unimproved Lots and Commons area and/or Arizona of Association Responsibility shall be paid by the imposition of Unimproved Lot Assessments, as particularly described in Section 6.13.

3. According to Article 1, Section 1.6 of the same document, Common Areas concern areas that are shown on a plat that was noted to be attached as "Exhibit B" to the document. Unfortunately, there was no plat attached to the document that was offered into evidence and it was not to be found among the other exhibits. Therefore, Petitioner was unable to establish that Respondent's fees pay for anything that is not provided for in the CC&Rs.
4. Respondent argued that the Master HOA fees pay for the common areas. Petitioner did not dispute this but argued that his association does not get the same benefit as the rest of the development. He added that one of the other first level associations doesn't pay into the Master HOA even though it receives more of a benefit from the common areas. While this statement was not disputed, Petitioner offered no legal authority that requires that all first level associations must pay the same into a master association or that all homeowners must receive the same benefit from or contribute the same amount (or even a proportionate share) to the common areas.
5. The record was held open to allow the submission of additional documentation. Petitioner submitted some financial documentation and emails and an argument that there is a rule against perpetuities argument at stake. Respondent

[1] The document was entitled "New Tucson Unit No. 8" but the attached documents show that the name was changed to the current name.

submitted a Notice of Lien and attachments and argued that Petitioner's argument regarding the rule against perpetuities went beyond the Order Holding Record Open.

6. Petitioner's post-hearing submissions shall be admitted as Exhibit 6. Respondent's post-hearing submission of the lien is admitted as Exhibit H.
7. Respondent's Exhibit H shows that, to the extent that there is a lien regarding water services for properties not part of Respondent, Respondent's homeowners are not responsible for it.

CONCLUSIONS OF LAW

1. Petitioner filed his petition against Respondent with the Department pursuant to A.R.S. § 32-2199 *et seq*.
2. The Department referred this matter to the Office of Administrative Hearings for hearing and the issuance of an Order, pursuant to A.R.S. §§ 32-2199.01(D) and 32-2199.02.
3. Pursuant to A.A.C. R2-19-119(B), Petitioner has the burden of proof in this matter. The standard of proof is preponderance of the evidence. A.A.C. R2-19-119(A).
4. In this case, Petitioner has not established that Respondent is in violation of its CC&Rs. Petitioner's argument that association fees are disproportionately heavy on the existing homeowners was not established to be a violation of the CC&Rs. Petitioner has offered no legal authority or provision of the CC&Rs that requires the association fees to be even-handed or equally beneficial to all homeowners. Payment for Common Areas comports with the CC&Rs and Petitioner did not dispute that the roads paid for in the master HOA are Common Areas. There being insufficient evidence to find a violation, the petition in this matter should be denied.
5. Although Petitioner brought forth a new argument concerning the rule against perpetuities that was not in the petition, the Administrative Law Judge will comment on it in the hopes that it may lay a concern to rest. The rule against perpetuities states that property ownership must vest within a time frame of an existing lifetime plus 21 years. It evolved as estates were bequeathed to a series

of descendants or heirs and does not generally apply to the sale of property where the sale involves the transfer of all rights at once. Ownership of the undeveloped lots of any association have already vested in the developer and when they are sold, they normally vest in the new owner at that time. Therefore, the rule against perpetuities does not apply to a homeowner's association and it clearly does not apply in this matter.

ORDER

IT IS ORDERED that Petitioner's petition in this matter is denied.

Pursuant to A.R.S. § 32-2199.02(A), the Respondent shall not pay to the Petitioner the filing fee required by section 32-2199.01.

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 based on a petition setting forth the reasons for the request for rehearing, in which case the order issued at the conclusion of the rehearing is binding on the parties.

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, August 14, 2017.

/s/ Dorinda M. Lang
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate