BEFORE THE DEPARTMENT OF REAL ESTATE

OFFICE OF ADMINISTRATION

IN AND FOR THE STATE OF ARIZONA

Jay Janicek, **Petitioner,** **vs.** **Sycamore Vista No. 8 HOA** **Respondent.**	**CASE NO. HO 17-17/033** **DOCKET NO. 17F-H1717033-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 decision that Petitioner's petition in this matter is denied.

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 within thirty (30) days after the service of this final Order. Per R4-28-1310 a rehearing or review of the decision may be granted for any one of the following causes that materially affect the moving party's rights:

1. Irregularity in the proceedings or any order or abuse of discretion by the administrative law judge that deprived a party of a fair hearing.
2. Misconduct by the Department, ALJ or the prevailing party.
3. Accident or surprise that could not have been prevented by ordinary prudence.
4. Newly discovered material evidence that could not with reasonable diligence have been discovered and produced at the original hearing.

5. Excessive or insufficient penalties.
6. Error in the admission or rejection of evidence or other errors of law occurring during the proceeding.
7. That the findings of fact or decision is arbitrary, capricious, or an abuse of discretion.
8. That the findings of fact or decision is not supported by the evidence or is contrary to law.

A written request for rehearing should be addressed to Dan Gardner, 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.

DATED this 21st day of August 2017.

Judy Lowe

Judy Lowe, Commissioner
DEPARTMENT OF REAL ESTATE

The foregoing mailed this 21st day of August 2017,
via certified mail receipt number 91 7199 9991 7037 6594 5394 to:

Jay Janicek
1098 S. Chatfield Place
Corona de Tucson, AZ 85641

Copy sent via certified mail receipt no. 91 7199 9991 7037 6594 5400 to:

Sycamore Vista No. 8 HOA
c/o Thompson Krone PLC
4601 E Ft. Lowell Road, Suite 109
Tucson, AZ 85712

COPY electronically transmitted to:

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

By: ______________________
Dan Gardner
HOA Coordinator

RECEIVED
AUG 16 2017
AZ Dept. of Real Estate

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Jay Janicek

Petitioner,

vs.

Sycamore Vista No. 8 HOA

Respondent.

No. 17F-H1717033-REL

ADMINISTRATIVE LAW JUDGE DECISION

HEARING: July 12, 2017

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

ADMINISTRATIVE LAW JUDGE: 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.

FINDINGS OF FACT

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

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

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

that there is a rule against perpetuities argument at stake. Respondent 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