

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

Richard Long,

Petitioner,

vs.

Pebble Creek Resort Community,

Respondent.

CASE NO. HO 17-17/037

DOCKET NO. 17F-H1717037-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, in which case the order issued at the conclusion of the rehearing is binding on the parties.

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 person aggrieved by a decision of the administrative law judge may apply for a rehearing by filing with the commissioner a petition for rehearing or review within thirty (30) days after the service of this Final Order pursuant to A.R.S. § 41-1092.09. A written request for rehearing should be addressed to Dan Gardner, 2910 N. 44th St. Suite 100, Phoenix, Arizona 85018. 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 14th day of September 2017.


Judy Lowe, Commissioner
DEPARTMENT OF REAL ESTATE

The foregoing mailed this 14th day of September 2017,

Copy mailed via certified mail receipt number 91 7199 9991 7037 6682 8139 to:

Richard Long
3548 N 162nd Ave.
Goodyear, AZ 85395

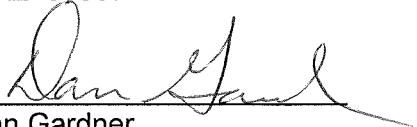
Copy sent via certified mail receipt no. 91 7199 9991 7037 6682 8146 to:

1 Pebble Creek Resort Community
2 3645 Clubhouse Dr.
3 Goodyear, AZ 85395

4 COPY electronically transmitted to:

5 The Office of Administrative Hearings
6 1400 W Washington St, Suite 101
7 Phoenix, AZ 85007

8 By:


9 Dan Gardner
10 HOA Coordinator
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AZ Dept. of Real Estate

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Richard Long,

No. 17F-H1717037-REL

Petitioner,

v

ADMINISTRATIVE LAW JUDGE

Pebble Creek Resort Community,

DECISION

Respondent.

HEARING: August 30, 2017, at 9:00 a.m.

APPEARANCES: Richard Long ("Petitioner") appeared on his own behalf; Pebble Creek Resort Community ("Respondent") appeared through Jack Sarsam, the Senior Vice President for Robson Communities.¹

ADMINISTRATIVE LAW JUDGE: Diane Mihalsky

FINDINGS OF FACT

BACKGROUND AND PROCEDURE

1. 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.

2. Respondent is a homeowners' association whose members own the condominiums in the Pebble Creek Resort Community development. At this time, Respondent is comprised of the owners of approximately 4,700 houses. When the development is fully built out, it will have approximately 6,000 houses.

3. Petitioner owns a home in and is a member of Respondent.

4. On or about June 14, 2017, Petitioner filed a single-issue petition with the Department that alleged that Respondent had violated its Covenants, Conditions and Restrictions ("CC&Rs") and Architectural Landscape Committee ("ALC") Guidelines by refusing to approve a 10' long, 6' high block wall to provide privacy to his property.

¹ Because the Pebble Creek Resort Community has not been fully built out, the developer has not yet ceded control of Respondent Homeowner's Association to residents who have purchased property in the development.

1 5. Respondent filed with the Department a written answer to the petition,
2 denying that it had violated any CC&Rs or ALC Guidelines. Respondent explained the
3 reasons that the CC&Rs and ALC Guidelines restricted the construction of block walls
4 near property lines, in relevant part as follows:

5 If not handled properly, walls between or near lot lines can
6 be a problem. Sometimes, two neighbors agree to split the
7 cost of a party wall along a lot line. This is optimal.
8 Sometimes, both neighbors want a wall along the lot line, but
9 only one of them is willing to pay for it. In those
10 circumstances, the owner willing to pay for the wall often
11 doesn't want the other owner to have the benefits of the wall,
12 in which case the owner willing to pay sometimes builds the
13 wall a short distance from the lot line and refuses to allow
14 the other owner to connect to that wall. It is not unusual for
15 the owner who didn't pay (or its successor as owner) to
16 eventually build a wall on his or her lot, such as if that owner
17 installs a pool or gets a pet, which results in two parallel
18 walls. This is not a good situation in that there often isn't
19 room between the walls to properly maintain either wall, and
20 the area in between the two walls becomes filled with refuse,
21 leaves, insects, nests and rodents.²

22 6. The Department referred the petition to the Office of Administrative Hearings,
23 an independent state agency, for an evidentiary hearing. A hearing was held on August
24 30, 2017. Petitioner submitted six exhibits, including an exhibit that was comprised of
25 numerous photographs of various walls in the development, and testified on his own
26 behalf. Respondent submitted one exhibit and presented the testimony of Jack
27 Sarsam, who oversees Respondent's operations.

28 **THE RECORD OF THE PARTIES' DISPUTE**

29 7. Petitioner proposed to build a 10' long, 6' high block wall between his patio
30 and his adjacent neighbor's ("the Rohnmans") patio for privacy that would be a foot or
so inside his side of the property line.³

8. Petitioner explained at the hearing that he did not want to build a return wall
or gate between the block wall and his house. If the Rohnmans eventually wanted to
have a return wall, for example, if his neighbor acquired a dog or built a pool, the

² Petitioner's Exhibit 3 at 2.

³ See Respondent's Exhibit 1.

1 Rohlms could build their own wall parallel to Petitioner's wall. Petitioner testified that
2 he would be reasonable in considering a future request by his neighbor to build his or
3 her own wall.

4 9. After the ALC denied Petitioner's request to build the wall and the parties
5 exchanged correspondence, on May 1, 2017, Respondent approved the requested
6 variance if Petitioner complied with several conditions, including the following:

7 The condition to allow the wall is that it will be on the
8 property line and both parties, [Petitioner and his wife] (Unit
9 39 Lot 12) and [the Rohlms] (Unit 39 lot 11) must agree in
10 writing that current or future owners may extend/complete
11 the wall and that each grants permission to do so. This
12 agreement must be disclosed upon sale of the house to the
13 new owners.⁴

14 10. Respondent attached a form ALC 48 – ALC Party Wall/Fence Agreement to
15 the May 1, 2017 letter, which provided in relevant part as follows:

16 I/We, the undersigned grant permission to the owner(s) of
17 Unit ____ Lot ____ to build a wall/view fence immediately
18 adjacent to our adjoining property lines. Permission is also
19 granted to the landscaping/contractor chosen by Unit ____
20 Lot ____ to access our property in order to build the said
21 wall/fence and to restore our property to its appearance prior
22 to the construction process.⁵

23 11. Mr. Sarsam testified that the executed agreement would be placed in the
24 ALC files for the affected lots and that Respondent would inform future owners of the
25 agreement and include in the packet of information provided to future owners upon their
26 purchase of the property.

27 12. Petitioner submitted an email from the Rohlms that provided in relevant
28 part as follows:

29 [We] declined to have a wall built on the property line
30 between our homes because it affects the current and future
value of our property – and yours. Furthermore, each of us
would have to grant the other an easement in perpetuity,
which is a legal document. The HOA cannot simply decree
that we have an easement on each other's property. This

⁴ The Department's electronic record at pdf page 49.

⁵ Petitioner's Exhibit 5.

1 would be a legal expense. Upon the sale of our home, we
2 would have to inform the purchaser of the easement, which
3 lowers the value of the property. In addition, since the wall
4 would be on the property line, either of us, or future owners,
5 would be able to lengthen the wall the full length of the
6 homes without the agreement of the other party. All of these
7 requirements are onerous.⁶

8
9 **POTENTIALLY APPLICABLE CC&RS AND ALC GUIDELINES**

10 13. Section 1(Hh) of the CC&Rs provides the following definition of a “party
11 wall”:

12 “Party Walls” shall mean a wall **constructed on or**
13 **immediately adjacent** to the common boundary of Lots,
14 Parcels, Common Areas or other areas in PebbleCreek Golf
15 Resort.⁷

16 14. Section 2(P)(i) of the CC&Rs concerns party walls and provides in relevant
17 part as follows:

18 Party Walls. Except as hereinafter provided, the rights and
19 duties of Owners of contiguous properties which have Party
20 Walls shall be as follows:

21 (i) Each Owner shall have the right to use the Party Wall,
22 provided that such use does not interfere with the other
23 Owner’s use and enjoyment thereof.⁸

24 None of the exceptions listed in CC&R § 2(P) applies to the block wall that Petitioner
25 proposes to build just inside his property line.

26 15. Section SS(1)(i) of the ALC Guidelines concerns “Walls and Fences General
27 Information” and provides in relevant part as follows:

28 If a party wall/view fence is to be installed, it is
29 recommended that a “Party Wall/Fence Agreement” be
30 signed by all Non-HOA bordering parties. This agreement
will serve to notify the neighbors that a party wall/view fence
is being installed and will grant the wall owner access to the
neighboring property for the construction of the wall/fence.

31 ⁶ Petitioner’s Exhibit 4.

32 ⁷ Respondent’s Exhibit A at 8 (emphasis added).

33 ⁸ Respondent’s Exhibit A at 22.

1 The "party Wall/Fence Agreement" form may be obtained at
2 the ALC office.⁹

3 16. Section SS(4)(a) of the ALC Guidelines concerns party walls and provides
4 as follows

5 Party walls when paid for by only one homeowner shall be
6 placed on the homeowner's property immediately adjacent to
7 the property line. An existing party wall along a joint
8 property line precludes any adjacent parallel party wall, i.e.
9 Two walls cannot be built side by side.¹⁰

10 17. Section JJ of the ALC Guidelines concerns privacy panel walls and provides
11 as follows:

12 An ALC permit and approval is required prior to installation.
13 The privacy panel wall is a free standing alumawood wall,
14 must be six (6) feet in height and no longer than sixteen (16)
15 feet in length. The privacy panel wall shall be located at
16 least three (3) feet from the property line. The primary
17 function shall be to shield the view of the originally built patio
18 area from the neighbor. . . .¹¹

19 Petitioner acknowledged that he could obtain the ALC's approval to build an aluminum
20 or lattice privacy wall 3' off his property line to shield his patio from the view of his
21 adjacent neighbors, presently the Rohlmans.¹² Because Petitioner felt a privacy wall
22 was unsightly and flimsy, he wanted to build a block party wall inside the property line to
23 which his neighbors could not attach. Petitioner argued that the CC&Rs and ALC
24 Guidelines did not prohibit his construction of this wall.

25 **CONCLUSIONS OF LAW**

26 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization
27 to file a petition with the Department for a hearing concerning violations of planned
28 community documents or violations of statutes that regulate planned communities. That
29 statute provides that such petitions will be heard before the Office of Administrative
30 Hearings.

⁹ Petitioner's Exhibit 6 at 42.

¹⁰ Petitioner's Exhibit 6 at 43.

¹¹ Petitioner's Exhibit 6 at 38.

¹² See Petitioner's Exhibit 6 at 38 ("Privacy Panel Wall").

2. Petitioner bears the burden of proof to establish that Respondent violated the CC&Rs and ALC Guidelines by refusing to approve his construction of a 6' high, 10' long, block wall a foot or so inside his property line by a preponderance of the evidence.¹³ Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.¹⁴

3. “A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not.”¹⁵ 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.”¹⁶

4. CC&R § 1(Hh) requires a party wall to be constructed on or immediately adjacent to a property line, not a foot inside the property line. CC&R § 2(P)(i) requires that both owners of contiguous properties shall have the right to use a party wall built on or immediately adjacent to the property line. ALC Guideline SS(4)(a) prohibits parallel party walls from being built on adjacent properties. These documents, which were available to Petitioner and to the Rohlmans when they purchased their properties, unequivocally prohibit Respondent from building a 6' high, 10' long block wall a foot from his property line that the Rohlmans are not permitted to use.¹⁷ Therefore, Petitioner's petition should be dismissed.

RECOMMENDED ORDER

In view of the foregoing, it is ORDERED 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

¹³ See A.R.S. § 41-1092.07(G)(2); 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).

¹⁴ See A.A.C. R2-19-119(B)(2).

¹⁵ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

¹⁶ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

¹⁷ The Administrative Law Judge does not address the merits of the various legal arguments raised in the Rohlmanns' email about how onerous the alleged legal consequences of compliance with the CC&Rs and ALC Guidelines are. Since Petitioner implicitly acknowledges that it is possible to comply with the requirements of the CC&Rs and ALC Guidelines, such analysis is beyond the jurisdiction of the Department and OAH.

1 a rehearing is granted pursuant to A.R.S. § 32-2199.04 based on a petition setting forth
2 the reasons for the request for rehearing, in which case the order issued at the
3 conclusion of the rehearing would be binding on the parties.

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

7 Done this day, September 6, 2017.

8 /s/ Diane Mihalsky
9 Administrative Law Judge

10 Transmitted electronically to:

11 Judy Lowe, Commissioner
12 Arizona Department of Real Estate
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