

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Charles Mandela

No. 18F-H1817006-REL

4 Petitioner,

5 Blue Ridge Estates Homeowner
6 Association

**ADMINISTRATIVE LAW JUDGE
DECISION**

7 Respondent.
8

9
10 **HEARING:** November 28, 2017, at 9:00 a.m.

11 **APPEARANCES:** Charles Mandela ("Petitioner") appeared on his own behalf;
12 Blue Ridge Estates Homeowner Association ("Respondent") was represented by Brian
13 C. Axt, Esq., Resnick & Louis, P.C.

14 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

15
16 **FINDINGS OF FACT**

17 **BACKGROUND AND PROCEDURE**

18 1. The Arizona Department of Real Estate ("the Department") is authorized by
19 statute to receive and to decide Petitions for Hearings from members of homeowners'
20 associations and from homeowners' associations in Arizona.

21 2. Respondent is a homeowners' association whose members own single-family
22 houses on lots in the Blue Ridge Estates development in Happy Jack, Arizona.

23 3. Petitioner owns a house in and is a member of Respondent.

24 4. On or about September 7, 2017, Petitioner filed a single-issue petition with
25 the Department that alleged that Respondent had violated Covenants, Conditions, and
26 Restrictions ("CC&Rs") § 3.1(a) and Architectural Committee Aligned Standard
27 ("Architectural Committee regulation") 3(D) by allowing members to build play
28 structures, swing sets, or treehouses on their properties, even though their properties
29 had another detached structure, such as a garage or shed.

30 5. Respondent filed a written answer to the petition, denying that it had violated
any CC&Rs or Architectural Committee regulation. The Department referred the

petition to the Office of Administrative Hearings, an independent state agency, for an evidentiary hearing.

6. A hearing was held on November 28, 2017. Petitioner submitted five exhibits and testified on his own behalf. Respondent submitted nine exhibits and presented the testimony of its Board's president, Joseph Hancock.

RELEVANT CC&RS AND ARCHITECTURAL COMMITTEE STANDARDS

7. Respondent's Declaration of CC&Rs was recorded at the Coconino County Recorder on June 17, 1998. Respondent is not an age-restricted community and was intended to be a "uniquely planned recreation property."¹

8. Section 1.17 of the CC&Rs defines "improvements" as "the buildings, garages, carports, roads, driveways, parking areas, fences, walls, utilities and service lines, decks, hedges, plantings, planted trees and shrubs, and all other structures or landscaping improvements of every type and kind."²

9. Article III of the CC&Rs is entitled "Land Use Classifications, Permitted Uses and Restrictions." Section 3.1 of the CC&Rs provides in relevant part as follows:

Permitted Uses and Restrictions – Single Family. The Property shall be used, improved and devoted exclusively to Single Family Residential Use. No business, commercial, manufacturing, industrial, mercantile, vending or similar activity of any kind whatsoever shall be conducted on any of the Property No building or structure shall be erected or maintained separate from the Single Family Residence located on any Lot, other than a garage in accordance with Coconino County zoning ordinances in existence at the time. . . . No garage or shed shall be built prior to the issuance of a Coconino County building permit for the construction of a Single Family Residence.³

Section 3.6 of the CC&Rs prohibits temporary structures from being placed, erected or maintained on any portion of the property.⁴ Section 3.7 of the CC&Rs prohibits trailers, mobile homes, or permanent tents from being placed on any property.⁵ Section 3.24 of the CC&Rs provides that "[n]o building, fence, wall, screen, residence or other structure

¹ Respondent's Exhibit A at 1.

² Respondent's Exhibit A at 3.

³ Respondent's Exhibit 1 at 5-6.

⁴ See *id.* at 6.

⁵ See *id.* at 6-7.

1 shall be commenced, erected, maintained, improved or altered in respect of any Lot
2 without the prior written approval of the . . . Architectural Committee.”⁶

3 10. Pursuant to the authority granted by CC&R § 10.2, the Architectural
4 Committee promulgated the following regulations to be aligned with Article III, Sections
5 1, 6, and 7:

6 ARTICLE III
7 LAND USE CLASSIFICATIONS, PERMITTED USES AND
8 RESTRICTIONS

9 Section 3.1 Permitted Uses and Restrictions

10

11 A. As per Article 3.7 No mobile homes or manufactured
12 homes of any kind shall be allowed on any portion of the
13 Property, this includes mobile homes, manufactured
14 homes or modular homes. All homes must be site built.

15

16 D. One detached structure may, with Architectural
17 Committee approval, be constructed on a property. The
18 residence must be constructed and completed before the
19 detached structure is built.

20

21 Section 3.6 Temporary Structures

22 A temporary structure or building is defined as one
23 without a cement or block foundation to which the
24 structure or building is permanently attached and may not
25 include any container, (vehicle, r.v., house trailer, hauling
26 trailer etc.) not harmonious with the residence and forest.

27 Section 3.7 Trailers and Motor Vehicles

28

29 D. If you can live/sleep in it, you cannot park it in Blue Ridge
30 Estates. However, if you can park it in your garage and
close the door, a Non-Compliance notice will not be
issued.⁷

⁶ *Id.* at 9-10. See also CC&R § 10.4(a) requiring Architectural Committee's prior written approval before construction of any improvements, modifications, alterations, additions, repairs, excavation, grading, landscaping or other work that alters the exterior appearance of any portion of the Property.

⁷ Respondent's Exhibit B at 1-2, 3, 3-4.

11. Section 4.2 of the CC&Rs provides that “[b]y a majority vote of the Board, the Association may, from time to time and subject to the provisions of this Declaration, adopt, amend and repeal rules and regulations to be known as the ‘Rules and Regulations.’”⁸

12. Section 12.2 of the CC&Rs provides in relevant part as follows:

Except as otherwise provided herein, this Declaration may be amended . . . by the affirmative vote (in person or by proxy) or written consent of Members owning at least seventy-five percent (75%) of all Lots. . . .⁹

HEARING EVIDENCE

13. Petitioner has lived in Respondent's subdivision for approximately 25% of each year since 2007. Petitioner testified that for the past 18 years, Respondent has interpreted § 3.1 of the CC&Rs to allow only one detached structure on a lot, regardless of whether the structure was a detached garage or shed or a play structure, swingset, or treehouse.

14. Petitioner testified that between 2002 and 2016, Respondent removed nine structures that were not compliant with CC&R § 3.1, including a gazebo, a play house, an observation deck, and a zipline structure. Petitioner testified that Respondent has only allowed one detached structure and that if a member has a detached garage or shed, the member cannot have a swingset, play structure, or tree house on his property.

15. To support his testimony, Petitioner submitted a letter dated February 7, 2006, from Carpenter Hazlewood, PLC, that opined that Respondent could enforce CC&R § 3.1 against “grandfathered” detached structures that had been built without the approval of the Architectural Committee, in relevant part as follows:

Were it not for the second sentence, [CC&R § 3.1] would clearly limit erecting a separate building or structure to a “garage”. However, the second sentence muddies the water by mentioning a “garage or shed” not being built prior to the Residence building permit being issued. How can these be reconciled? It still appears that only one structure (garage or shed) is permitted.

⁸ Respondent's Exhibit A at 10.

⁹ Respondent's Exhibit A at 29.

1 The document entitled "Alignment of CC&Rs Article III
2 with Architectural Committee Standards Article X" seems to
3 correctly clarify the issue. On page 2, it states in C that "one
4 detached structure may, with Architectural Committee
5 approval, be constructed on a property", and that the
6 Residence has to be completed before building the detached
7 structure" (slightly more strict than the CC&Rs but not
8 inconsistent). *Therefore, you may enforce the "one
9 detached structure" requirement going forward by giving
10 notice of your intention to strictly do so as of a certain date.*

11 We noticed a couple of interesting issues in reviewing
12 the Coconino county zoning code. . . . First, the Rural
13 Residential Zone rules define swimming pools, hot tubs and
14 spas as detached accessory structures. . . . You may want
15 to clarify the Association does NOT consider them structures
16 (if that is true) even if the County does. Second, the County
17 says accessory structures less than 120 square feet do not
18 require building permits, but they are subject to County
19 setback requirements. You may want to clarify whether
20 there is any minimum size "structure", such as a small metal
21 storage shed, that would not be considered a detached
22 structure by the Association.¹⁰

23 The February 7, 2006 letter did not mention swingsets, play structures, or tree houses.

24 16. Petitioner also submitted a Dismissal Notice dated September 9, 2015, from
25 the Office of the Arizona Attorney General Division of Civil Rights Section that
26 dismissed Mr. Hancock's claim of discrimination, that stated in relevant part as follows:

27 Based upon its investigation, the Division of Civil Rights
28 Section concludes that the information obtained is not
29 sufficient to establish violations of the statute(s) and further
30 investigation is unlikely to produce such evidence. This
does not certify that the Respondent is in compliance with
the Statute(s). No finding is made as to any other issues
that might be construed as having been raised by this
charge/complaint. . . .¹¹

31 Petitioner also submitted Carpenter Hazlewood's June 18, 2015 response to Mr.
32 Hancock's claim against Respondent for housing discrimination¹² and a letter dated

33 ¹⁰ Petitioner's Exhibit 1 at 2-3.

34 ¹¹ Petitioner's Exhibit 2.

35 ¹² See Petitioner's Exhibit 3.

1 January 14, 2016, containing an opinion on whether a letter sent by member John
2 Mariconda to certain of Respondent's members was defamatory.¹³ Neither of these
3 letters mentioned CC&R § 3.1 or whether it allowed swingsets, play structures, or tree
4 houses in addition to a detached garage or shed. Petitioner testified that both Mr.
5 Hancock's discrimination claim and Mr. Mariconda's letter involved swingsets, play
6 structures, or tree houses.

7 17. Petitioner submitted a Play Structure Approval Request from Respondent's
8 website regarding CC&R § 3.1 that he testified he had drafted when he was on the
9 board and the president of the Architectural Committee, in relevant part as follows:

10 In the Board of Directors meeting on Saturday, June
11 25, 2016 it was unanimously voted to adopt changes to the
12 CCR's [sic], which will allow play structures on your lot and
13 they will not be considered a second allowable structure, nor
14 a Temporary Structure. . . . You're allowed no more than two
15 (2) play structures¹⁴

16 Petitioner testified that because 75% of Respondent's members had not approved the
17 changes to the CC&Rs, the form could not be used.

18 18. Mr. Hancock has been Respondent's president for approximately two years.
19 He has lived in Respondent development for 11 years. He and his wife, Leonie, have
20 six children and 20 grandchildren. Mr. Hancock testified that he and his wife have a
21 swingset that his children, grandchildren, and the neighbor children use.

22 19. Mr. Hancock acknowledged that he removed a play structure from his
23 property.

24 20. Mr. Hancock testified that Respondent has 193 lots, 71 of which are
25 occupied by the owners. There are currently 16 swingsets or play structures in
26 Respondent development. Mr. Hancock testified that Respondent retained the firm of
27 Poli & Ball, PLC to render an opinion about whether Article III of the CC&Rs prohibited
28 swingsets and play structures, even if a detached garage or shed had already been
29 constructed on the property. Poli & Ball opined that the aligned regulations that the
30 Architectural Committee had promulgated "[could] be changed, as long as it is

¹³ See Petitioner's Exhibit 4.

¹⁴ Petitioner's Exhibit 5.

1 consistent with the CC&Rs” and since Respondent was intended to be a planned
2 recreation property for single family residential use, “[p]lay structures are perfectly
3 consistent with recreation and family use.”¹⁵

4 21. Respondent submitted an email from Jason Miller at Carpenter Hazlewood,
5 in which he generally agreed with Poli & Ball’s opinion that Respondent could amend
6 the Architectural Committee’s regulations to explicitly allow play structures consistently
7 with the CC&Rs.¹⁶

8 22. Mr. Hancock testified that the Play Structure Approval Request from
9 Respondent’s website that Petitioner had submitted contained a typographical error, in
10 that Respondent’s board had meant to amend the Architectural Committee’s
11 regulations, not the CC&Rs. Respondent submitted the minutes of the June 25, 2016
12 board meeting at which Poli & Ball’s opinion letter was read and the board passed a
13 motion to amend the CC&Rs.¹⁷ Respondent submitted the minutes of the December 3,
14 2016 board meeting, at which the play structure opinion from Carpenter Hazlewood was
15 discussed:

16 Joe Hancock explained the board had a review with
17 HOAMCO along with Carpenter [Hazlewood] and found the
18 Play Structure document on the BRE Website was incorrect.
19 The board had approved “Modifying the Rules and
20 Regulations,” however, the document posted on the website
21 stated changing the CC&R’s. The wording change was
22 mistakenly made by the then previous Chair of the
23 Architectural Committee and posted to the website. The
24 approved Play Structure Rule Change has been placed on
25 the website. This mistake has no doubt been the cause of
26 much misunderstanding with some of the members. With
27 the draft of a play structure guideline made by the previous
28 board in 2015 and the approved Play Structure Ruling from
29 the current board the Attorney from Carpenter [Hazlewood]
30 determined the current board acted within the bounds of the
BRE HOA Board of Directors jurisdiction to make the Play
Structure Ruling Change.¹⁸

¹⁵ Respondent’s Exhibit D at 2.

¹⁶ See Respondent’s Exhibit G at 2.

¹⁷ See Respondent’s Exhibit F at 2.

¹⁸ Respondent’s Exhibit H at 1-2.

23. Respondent submitted minutes from the October 7, 2017 board meeting, which provided in relevant part as follows:

Per Legal Counsel, a Clarification Vote of the Architectural Rule Change on Play Structures. This item was addressed by President Hancock. He stated that the topic of the play structures had been discussed in February of 2016 and then voted on in June of 2016. However at the time the fact that it was a rule change was [mis]-quoted as a change to the CC&R's. This was not identified as an error in how it was recorded until October 2016. It was then voted on in December of 2016. For clarification, the changes [were] stated again and the fact that it was a rule change and not a change to the CC&R's was clarified and voted on by the board. . . . The motion was carried.¹⁹

24. Respondent submitted the amended Play Structure Approval Request, which provided in relevant part as follows:

Per the modified Rules and Regulations dated April 6, 2016, this form must be submitted to Architectural Committee for approval of any Play Structure. A play structure is defined, but not limited to, Swing Sets, Jungle Gyms, Tree Houses, Tree Viewing Stands and Ground Placed Play Houses/Forts. You're allowed [to have] one (1) . . . one of each, but no more than (2) play structures. . . .²⁰

CONCLUSIONS OF LAW

1. A.R.S. § 32-2199(B) permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of planned

¹⁹ Respondent's Exhibit I at 1.

²⁰ Respondent's Exhibit E.

community documents under the authority Title 33, Chapter 16.²¹ Such petitions will be heard before the Office of Administrative Hearings, an independent state agency.

2. Petitioner bears the burden of proof to establish that Respondent violated CC&R § 3.1 by a preponderance of the evidence.²² Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.²³

3. “A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not.”²⁴ 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.”²⁵

4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give effect to the intent of the parties.²⁶ “Restrictive covenants must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein.”²⁷ CC&R § 3.1 is entitled “Permitted Uses and Restrictions – Single Family.” Titles of CC&Rs may be used to understand the parties’ intent.²⁸ The Architectural Committee’s promulgation of Regulation 3.1(A) to prohibit only mobile homes, manufactured homes, and modular homes, and 3.7(D) to provide the

²¹ See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce the development’s CC&Rs. Petitioner argued that Title 33 did not apply to Respondent because it is a non-profit organization, apparently based on the arguments mentioned by the law firm of Carpenter Hazlewood in Petitioner’s Exhibit 4. The Administrative Law Judge does not address this argument because she does not believe it has merit. She also does not believe that Petitioner contemplated the legal consequences of his argument because if Title 33 did not apply to this dispute, neither the Office of Administrative Hearings (“OAH”) nor the Department have jurisdiction to decide the merits of Petitioner’s claim. Although Petitioner argued that the Department must consider his petition because he has no other forum, as executive agencies, OAH and the Department can only enforce duly enacted statutes within the authority given by such statutes. The Department may consider this argument because lack of jurisdiction is may not be waived.

²² 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).

²³ See A.A.C. R2-19-119(B)(2).

²⁴ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

²⁵ BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

²⁶ See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

²⁷ *Lookout Mountain Paradise Hills Homeowners’ Ass’n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. App. 1993) (quoted in *Powell*, 211 Ariz. at 557 ¶ 16, 125 P.3d at 377).

²⁸ See *Bruce v. Chas Roberts Air Conditioning, Inc.*, 166 Ariz. 221, 225, 801 p.2d 456, 460 (App. 1990).

clarification that “[i]f you can live/sleep in it, you cannot park it” in Respondent’s development make clear that Article III is concerned with keeping Respondent single-family residential by prohibiting structures and vehicles that could be used as a second residential dwelling on a lot. Respondent was not required to amend the CC&Rs to permit play structures on properties that already had a detached garage or shed because a play structure cannot be easily converted into a second residence. Respondent could amend the Architectural Committee’s regulations to provide clarification on the status of play structures, swingsets, and tree houses because allowing a play structure is not inconsistent with CC&R § 3.1’s allowance of the construction of a second enclosed structure after the residence was completed.

5. Petitioner did not establish that Respondent uniformly has enforced CC&R § 3.1 to require members to remove play structures if they already had a detached garage or shed on their property. Instead, it appears that the status of play structures, swingsets, and tree houses has been unsettled and the subject of some contention, at least partially due to Petitioner’s advocacy of the interpretation of CC&R § 3.1 on which he based his petition. Respondent established that it properly resolved the issue of the status of play structures, swingsets, and tree houses under CC&R § 4.2 by amending the Architectural Committee’s Regulations to explicitly permit play structures. Therefore, Petitioner’s petition should be denied, all the play structures that the Architectural Committee has previously approved should be allowed to remain on members’ property, and the Architectural Committee may consider and, if appropriate, grant future Play Structure Approval Requests that are submitted to the Committee.

RECOMMENDED ORDER

IT IS ORDERED that Petitioners’ petition is denied because he has not established that CC&R § 3.1 prohibits play structures under any circumstances.

NOTICE

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. Pursuant to A.R.S. § 41-1092.09, a request for rehearing in this matter must be filed with the Commissioner of the Department of Real Estate within 30 days of the service of this Order upon the parties.

1 Done this day, December 6, 2017.

2 /s/ Diane Mihalsky
3 Administrative Law Judge

4 Transmitted electronically to:

5 Judy Lowe, Commissioner
6 Arizona Department of Real Estate

7 Charles Mandela
8 4769 Starlight Dr.
9 Happy Jack, AZ 86024

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