IN THE OFFICE OF ADMINISTRATIVE HEARINGS

James and Shawna Larson Petitioner, vs. Tempe Gardens Townhouse Corporation, Respondent.	**No. 17F-H1717038-REL-RHG** **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: November 20, 2017

APPEARANCES: Lisa M. Hanger, Esq. for Petitioners; Nathan Tennyson, Esq. for Respondent

ADMINISTRATIVE LAW JUDGE: Thomas Shedden

FINDINGS OF FACT

1. On September 1, 2017, the Arizona Department of Real Estate issued a Notice of Re-Hearing setting the above-captioned matter for hearing on October 19, 2017 at the Office of Administrative Hearings in Phoenix, Arizona. The matter was continued and the hearing was conducted on November 20, 2017.

2. The Notice of Hearing shows that Petitioners James and Shawna Larson alleged that Respondent Tempe Gardens Townhouse Corporation violated paragraph 10(a) of the Respondent's CC&Rs.

3. On June 15, 2017, Ms. Larson filed with the Department the petition that gave rise to this matter.

4. The association consists of 169 units in twenty-five two-story buildings. Petitioners' unit is one of fifty or eighty with a patio cover. These covers are independent common elements within the meaning of ARIZ. REV. STAT. section 33-1212(4). Petitioners' patio cover is made of wood.

5. Respondent has been making any necessary repairs to the buildings and then having them painted.

6. Respondent informed the homeowners with patio covers that they were required to remove their covers before the painting and repairs started (at the owner's

expense). Respondent also informed the homeowners that if they did not remove their patio covers, Respondent would do so and charge the homeowner.

7. Neither party is alleging that the other party has violated a statute or the CC&Rs, but rather they are in essence requesting an advisory opinion regarding their respective rights and obligations under the CC&Rs and governing statutes.

8. The basic issue is Petitioners' assertion that Respondent does not have the authority to mandate removal of their patio cover. At the hearing, Respondent took the position that it had the authority to require all owners, including Petitioner, to remove the patio covers to facilitate the painting project based on CC&R sections 9 and 9(b) and ARIZ. REV. STAT. sections 33-1212(4) and 33-1255.

9. CC&R section 9(b) provides that the Respondent is responsible to maintain the outsides of the buildings, and section 9 provides that "Any cooperative action necessary or appropriate to the proper maintenance and upkeep of the … [building] exteriors … shall be taken by the [Respondent]."

10. Respondent initially informed the homeowners of the painting project and the related need to remove their patio covers in a letter dated December 22, 2016. In that letter, Respondent also informed the homeowners that Chris Morga of Jacob and Co. would remove the covers for $150, but homeowners were not required to hire Mr. Morga. Additional evidence shows that the $150 cost was for aluminum covers, whereas the cost for Petitioners' wood cover would be $225, which was not necessarily a firm price.

11. In a letter to the homeowners dated January 23, 2017, Respondent informed homeowners that the patio covers for which the Architectural committee had previously given approval could be reinstalled after the painting, but those that had not been so approved would require approval before reinstallation. The evidence at hearing showed that wood patio covers would also require a permit from the City of Tempe.

12. The January 23rd letter also included information showing that exceptions could be granted if the painter's scaffolding could be used with the cover in place and that homeowners who wanted to explore that option should contact the Community Manager to schedule an inspection.[1]

[1] There was no evidence adduced to show that Petitioners had requested an inspection.

13. Respondent sent to the homeowners an undated letter regarding the patio-inspections that had taken place. Respondent explained that the Arizona Department of Occupational Safety and Health mandates a safe work environment, which meant that the painters required scaffolding to reach the second story of the buildings. The area required for this scaffolding was fourteen feet by eight feet, which meant that almost all of the patio covers would need to be removed, but depending on the structure supporting the roof, it was possible that in some cases only the roof would need to be removed.

14. In a letter to the homeowners dated May 3, 2017, Respondent again informed the owners of the need to remove the patio covers. Attached to that letter were letters sent to specific homeowners, including one to Petitioners showing that Petitioners were required to remove their patio cover.

15. In a letter to Respondent dated May 19, 2017, Petitioners, through counsel, informed Respondent that they were of the opinion that the request to remove the patio cover was not reasonable given the cost, which Petitioners asserted would be thousands of dollars, and the short time before the cover could be reinstalled. Petitioners also took the position that Respondent had no legal authority to support its request and they reiterated an offer to have the back of their unit painted at their own expense.

16. In a letter to Petitioners' counsel dated June 1, 2017, Respondent, through its counsel, informed Petitioners that CC&R section 9(b) provided the authority, stated its opinion that Petitioners had greatly overstated the cost of removing the patio cover, and explained that Petitioners could not do their own painting because that would not be fair to other homeowners. Respondent also informed Petitioners that if the patio cover was not removed within ten days, Respondent would do so under the authority of CC&R section 10(a) and that Petitioners would be responsible for the cost.

17. As of the hearing date, Petitioners' patio cover had not been removed.

18. Respondent presented the testimony of Wayne King who it hired to act as the project manager for the painting project.

19. Mr. King testified that the project included not only painting, but repairing any damaged siding, and that in many locations the patio covers had not been properly

flashed resulting in damage to the buildings. He also testified that the intention was to do the job right, which means sanding, power washing, and patching before painting.

20. Mr. King explained that he had received five bids for the painting project and that all five contractors required the patio covers to be removed.

21. Mr. King further explained that without removing the covers, “regular” scaffolding would not fit in the space available and that commercial scaffolding would also not work because these scaffolds would not provide access to the entire building; using a “reach” or fork lift was not a viable option because there are overhead powerlines creating a safety hazard; and allowing the painters to walk on homeowners’ patio covers was also not a safe option.

22. Regarding statements that the patio covers had not been removed the last time the buildings were painted, Mr. King testified that there have been changes in the safety laws since that time, resulting in the need to use different methods this time.

23. Mr. King also addressed Petitioners’ request to paint their own unit testifying that the paint company would not warranty such a project and to the effect that if individual homeowners were allowed to do so, Respondent would be required to pay him to manage numerous small projects rather than one project with a single painter.

24. Ms. Larson had entered into evidence two bids related to her patio cover. One shows a cost of $1250 to remove and dispose of the cover and a cost of $3980 to remove and rebuild the cover using all new wood. The second shows a cost of $5975 to remove and then replace the structure.

25. Mr. King’s opinion was that these estimates were very high and that $1000 should cover the cost of removing and rebuilding Petitioners’ patio cover, assuming that existing material was reused. Mr. King acknowledged that the decking material would most likely need to be replaced, but he estimated that as many as eighty percent of the rafters could be reused.

26. Mr. King also testified that Petitioners’ entire structure might not need to be removed and that on some units not all of the rafters needed to be taken down.

27. Petitioners purchased their unit in 1999 at which time the patio cover was in place and assert that the Respondent did not disclose that there were any alterations or improvements to the unit in violation of the declarations.[2]

28. Petitioners argue that they should not be required to prove that their cover had previously been approved before they reinstall the cover, if they choose to reinstall it. At the hearing however, Ms. Larson testified that after hearing Mr. King's testimony, Petitioners would agree not to reinstall their patio cover if Respondent would pay to remove it.

CONCLUSIONS OF LAW

1. The Department of Real Estate has authority over this matter. ARIZ. REV. STAT. Title 32, Ch. 20, Art. 11.

2. The party asserting a claim, right, or entitlement has the burden of proof, and a party asserting an affirmative defense has the burden of establishing the affirmative defense. The standard of proof on all issues in this matter is that of a preponderance of the evidence. ARIZ. ADMIN. CODE § R2-19-119.

3. A preponderance of the evidence is:

> The 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. BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

4. Statutes should be interpreted to provide a fair and sensible result. *Gutierrez v. Industrial Commission of Arizona*, 226 Ariz. 395, 249 P.3d 1095 (2011) (citation omitted).

5. The CC&Rs are a contract between the parties. In exercising its authority under the CC&Rs, Respondent must act reasonably, but the tribunal is to accord Respondent deference in decisions regarding maintenance and repair of the common areas, such as the painting project in this matter. *See Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

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[2] See ARIZ. REV. STAT. § 33-1806(E).

6. ARIZ. REV. STAT. section 33-1255(C): provides that "Any common expense associated with the maintenance, repair or replacement of a limited common element shall be equally assessed against the units to which the limited common element is assigned," and that "Any common expense or portion of a common expense benefitting fewer than all of the units shall be assessed exclusively against the units benefitted."

7. Petitioners' patio cover is a limited common element within the meaning of ARIZ. REV. STAT. section 33-1212(4).

8. CC&R section 9(b) provides that the Respondent is responsible to maintain the outsides of the buildings, and section 9 provides that "Any cooperative action necessary or appropriate to the proper maintenance and upkeep of the … [building] exteriors … shall be taken by the [Respondent]."

9. Mr. King provided credible testimony showing that the buildings cannot be properly and safely painted without the patio covers being removed and that Respondent would not receive a warranty if Petitioners were to paint their own unit. Respondent's proposed plan for repairing and painting the buildings is reasonable.

10. CC&R sections 9 and 9(b) are sufficient to show that Respondent has the authority to remove Petitioners' patio to complete the painting work. The issue then is who must pay for the removal and, if necessary, reinstallation.

11. Because the patio cover is a limited common element, under a reasonable reading of ARIZ. REV. STAT. section 33-1255(C), Petitioners must bear the cost of removing the patio cover and, if they choose to do so, the cost of reinstalling it.

12. The evidence of record supports a conclusion that Respondent has authority to require Petitioners to remove their patio cover to allow the building to be properly and safely painted, and that Petitioners are responsible for the cost to remove the patio cover and the cost to reinstall it should they choose to do so.

13. Petitioners' petition should be dismissed and the Respondent Tempe Gardens Townhouse Corporation is be deemed to be the prevailing party in this matter.

ORDER

IT IS ORDERED that Petitioners James and Shawna Larson's petition is dismissed.

NOTICE

Pursuant to ARIZ. REV. STAT. section 32-2199.02(B), this Order is binding on the parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. section 32-2199.04. Pursuant to ARIZ. REV. STAT. section 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.

Done this day, December 11, 2017

/s/ Thomas Shedden
Thomas Shedden
Administrative Law Judge

Transmitted by either mail, e-mail to:

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