

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 John L. Shields
4 Petitioner,

No. 17F-H1717034-REL-RHG

5 vs.

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 Will Rogers Equestrian Ranch
7 Respondent.

8
HEARING: February 5, 2018

9 **APPEARANCES:** Petitioner John Shields appeared on his own behalf.
10 Respondent Will Rogers Equestrian Ranch was represented by Maria R. Kupillas.

11 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer
12

13 **FINDINGS OF FACT**

14 **PETITIONER'S CLAIM**

15 1. Respondent is a homeowners' association whose members own homes
16 and lots in the Will Rogers Equestrian Ranch development in Queen Creek, Arizona.

17 2. Petitioner owns a home at 20431 E. Bronco Drive in Will Rogers Equestrian
18 Ranch and is a member of Respondent.

19 3. On or about May 3, 2017, Petitioner filed a single-issue petition with the
20 Arizona Department of Real Estate (Department) alleging that Respondent had violated §
21 6.2(A) of its Covenants, Conditions, and Restrictions (CC&Rs) by approving an
22 approximately 5' long x 6' high common block wall extension that Petitioner's next-door
23 neighbor, Joe Johnson, had built between their properties because Petitioner had not
24 approved the wall.

25 4. Respondent filed a written answer to the petition, denying all complaint
26 items.

27 5. The Department referred the matter to the Office of Administrative Hearings,
28 an independent state agency, for an evidentiary hearing.

29 6. A hearing was held on September 27, 2017. After the hearing,
30 Administrative Law Judge Diane Mihalsky issued an Administrative Law Judge Decision
in which she found that the petition should be dismissed. On December 5, 2017,

Commissioner Judy Lowe granted Petitioner's request for rehearing because Petitioner stated there were errors in the admission or rejection of evidence or other errors of law occurring during the proceeding and Petitioner claimed that there was misconduct by the Administrative Law Judge that deprived him of a fair hearing.

7. On February 5, 2018, a rehearing was held in this matter. Petitioner

8. Petitioner submitted nine exhibits and testified on his own behalf. Respondent submitted three exhibits and presented the testimony of Kristi Hancock, an attorney who since November 2017, has served as Respondent's board's president, and from November 2016 through November 2017, serves as Respondent's board's vice president.

REFERENCED CC&Rs

9. CC&R § 6.2 concerns fences as party walls. Section 6.2(A) provides in relevant part as follows:

Fences constructed upon the back of any Lot (which do not adjoin any other Lot or Common Area) by the Developer shall be maintained and repaired at the cost and expense of the Lot Owner on whose Lot (or immediately adjacent to whose Lot) the fence is installed. Such Party Walls and Fences shall not be altered, or changed in design, color, material or construction from the original installation made by the Developer without [the] approval of the adjoining Owner(s), if any, and the [Architectural Control] Committee [(“the Committee”)]. . . .

10. CC&R § 7.2 concerns review by the Committee. Section 7.2 provides in relevant part as follows:

No . . . fences . . . shall be commenced [or] erected . . . until the plans and specifications showing the same shall have been submitted to and approved by the Committee. Approval shall not be unreasonably withheld. However, the Committee shall have the right to refuse to approve any Alteration which is not suitable or desirable in their opinion for aesthetic or other reasons, and they shall have the right to take into consideration (i) the suitability of the proposed Alteration; . . . (iv) the harmony thereof with the surroundings (including color and quality of materials and workmanship); and (v) the effect of the Alteration as planned on the adjacent or neighboring property (including visibility and view). . . .

The Committee's approval of Alterations shall not be interpreted or deemed to be an endorsement or verification of . . . compliance with applicable laws

1 or building ordinances of the Alterations and the Owner and/or its agents
2 shall be solely responsible therefor. . . .

3 HEARING EVIDENCE

4 11. During the hearing, Petitioner vacillated on whether his issue with
5 Respondent was that it improperly approved Mr. Johnson's proposal to build a block wall
6 extension and move his gate forward or that it failed to enforce the requirement that Mr.
7 Johnson had to obtain Petitioner's approval of the block wall extension. After several
8 questions, Petitioner firmly asserted that his single issue against Respondent was that it
9 improperly approved Mr. Johnson's proposal to build a block wall extension and move his
10 gate forward.

11 12. Mr. Johnson had the wall extension built on or about October 13, 2016,
12 without obtaining the Board's or the Committee's approval. On or about October 16,
13 2016, Petitioner expressed his disapproval of the wall to Mr. and Mrs. Johnson.

14 13. At some point, the City of Queen Creek notified Mr. Johnson that he could
15 not move the gate forward as that would be in violation of the city codes.

16 14. Petitioner denied that he had ever approved or told anyone that he
17 approved the wall. Petitioner submitted a photograph of the wall that he took from his front
18 porch and testified that the block wall extension "was an eyesore."

19 15. On or about November 2, 2016, Mr. Johnson submitted his proposal to build
20 a block wall extension and move his gate forward to the Committee for its approval.

21 16. In November 2016, Respondent held its annual general membership
22 meeting and elected new board members. Immediately after the annual general
23 membership meeting, the newly elected board members met as the Committee to
24 consider any plans that had been submitted for its approval, including Mr. Johnson's
25 proposal to build a block wall extension and move his gate forward. The Board verbally
26 approved Mr. Johnson's block wall but advised him that "he will need to seek neighboring
27 property owner's approval."

28 17. In January 2017, the Board again considered Mr. Johnson's request and
29 formally approved Mr. Johnson's proposal to build a block wall extension and move his
30 gate forward.

1 18. Ms. Hancock testified that in granting its approval of Mr. Johnson's proposal
2 to build a block wall extension and move his gate forward, Respondent's board acting as
3 the Committee considered only whether the block wall extension that Mr. Johnson had
4 built and his proposal to move the gate forward would be aesthetically pleasing and
5 consistent with other wall extensions and gates that had been built in the Will Rogers
6 Equestrian Ranch development under CC&R § 7.2.

7 19. Petitioner argued that Respondent should not have approved Mr. Johnson's
8 proposal to build a block wall extension and move his gate forward because Mr. Johnson
9 had not demonstrated that he had obtained Petitioner's approval of the block wall
10 extension as required in CC&R § 6.2.

11 20. Ms. Hancock testified that although Respondent's board knew that
12 Petitioner objected to Mr. Johnson's block wall extension after it was built, the board was
13 less sure about whether Petitioner had actually or tacitly approved the block wall
14 extension before it was built because at least four witnesses had stated that they heard
15 Petitioner either actually approve of or fail to state an objection to the block wall extension
16 while, in Petitioner's presence, Mr. Johnson discussed having the block wall extension
17 built.

18 21. Ms. Hancock testified that CC&R § 7.2 requires that changes such as Mr.
19 Johnson's proposal to build a block wall extension and move his gate forward should not
20 be made until a proposal for the change is submitted to and approved by the Board. Ms.
21 Hancock also noted that per CC&R § 7.2, "[a]pproval shall not be unreasonably withheld."

22 **CONCLUSIONS OF LAW**

23 1. A.R.S. § 32-2199.01 permits an owner or a planned community organization
24 to file a petition with the Department for a hearing concerning violations of planned
25 community documents or violations of statutes that regulate planned communities. That
26 statute provides that such petitions will be heard before the Office of Administrative
27 Hearings.

28 2. Petitioner bears the burden of proof to establish that Respondent violated
29 applicable statutes or CC&Rs by a preponderance of the evidence. See A.A.C. R2-19-
30 119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837

1 (1952). Respondent bears the burden to establish affirmative defenses by the same
2 evidentiary standard. See A.A.C. R2-19-119(B)(2).

3 3. “A preponderance of the evidence is such proof as convinces the trier of fact
4 that the contention is more probably true than not.” MORRIS K. UDALL, ARIZONA LAW OF
5 EVIDENCE § 5 (1960). A preponderance of the evidence is “[t]he greater weight of the
6 evidence, not necessarily established by the greater number of witnesses testifying to a fact
7 but by evidence that has the most convincing force; superior evidentiary weight that, though
8 not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a
9 fair and impartial mind to one side of the issue rather than the other.” BLACK’S LAW
10 DICTIONARY at page 1220 (8th ed. 1999).

11 4. CC&R § 6.2(A) required that *the property owner*, Mr. Johnson, obtain the
12 adjoining property owner’s, Petitioner’s, approval before he built the block wall extension.
13 Respondent had no obligation under CC&R § 6.2(A) to obtain or ensure Petitioner
14 approved the block wall extension.

15 5. CC&R § 7.2 only required Respondent’s board, acting as the Committee, to
16 consider whether Mr. Johnson’s proposal to build a block wall extension and move his
17 gate forward was aesthetically pleasing and consistent with other block wall extensions
18 and gates that had been built in the Will Rogers Equestrian Ranch development when
19 deciding whether to approve Mr. Johnson’s proposal. Further, CC&R § 7.2 provides that
20 Respondent shall not unreasonably withhold approval. Nothing in CC&R § 7.2 requires
21 Respondent to consider whether the adjoining neighbor had approved the block wall
22 extension.

23 6. It is noted that Respondent considered, as a whole, Mr. Johnson’s proposal
24 to build a block wall extension and move his gate forward. In so considering, Respondent
25 inspected other block wall extensions and gates in the association and found that Mr.
26 Johnson’s proposal would be aesthetically pleasing and consistent with the other
27 properties. Ultimately, it was Mr. Johnson’s responsibility to ensure that the proposal
28 complied with the City of Queen Creek ordinances and could be completed.

29 7. Therefore, Petitioner failed to establish by a preponderance of the evidence
30 that Respondent erroneously approved Mr. Johnson’s proposal to build a block wall
extension and move his gate forward.

RECOMMENDED ORDER

In view of the foregoing, it is ORDERED that no action is required of Respondent in this matter and that the petition is dismissed.

Done this day, February 26, 2018.

/s/ Tammy L. Eigenheer
Administrative Law Judge

NOTICE

This administrative law judge order, having been issued as a result of a rehearing, is binding on the parties. A.R.S. § 32-2199.02(B). A party wishing to appeal this order must seek judicial review as prescribed by A.R.S. § 41-1092.08(H) and title 12, chapter 7, article 6. Any such appeal must be filed with the superior court within thirty-five days from the date when a copy of this order was served upon the parties. A.R.S. § 12-904(A).

Transmitted by either mail, e-mail, or facsimile February 26, 2018 to:

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By Felicia Del Sol