

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Jerry L. Webster,

4 Petitioner,

5 Mountain Rose Homeowners Association,

6 Respondent.
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No. 18F-H1817019-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

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12 **HEARING:** February 9, 2018

13 **APPEARANCES:** Petitioner Jerry L. Webster appeared on behalf of himself.
14 Nathan Tennyson, Esq. appeared on behalf of Respondent Mountain Rose
15 Homeowners Association.

16 **ADMINISTRATIVE LAW JUDGE:** Velva Moses-Thompson

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18 **FINDINGS OF FACT**

19 1. Mountain Rose ("Mountain Rose") Homeowners Association is a home
20 owners association located in Scottsdale, Arizona.

21 2. Petitioner Jerry L. Webster ("Mr. Webster") owns a home and is a member
22 of Mountain Rose.

23 3. From 2016 to 2017, Mountain Rose issued a series of notices to
24 Mr. Webster requesting that he trim his tree and clean debris around his home.

25 4. On or about December 6, 2017, Mr. Webster filed a petition with the
26 Arizona Department of Real Estate ("Department") alleging that Mountain Rose violated
27 Article 10.8 of the Declaration of Covenants, Conditions and Restrictions for Mountain
28 Rose ("CC&Rs"). The petition provides, in relevant part, as follows:

29 The intent of this action is to stop the HOA from violating our
30 civil rights by prejudicially harassing us with unclear and unwarranted
 violation notices. The HOA has harassed us for over 10 years with vague
 violation notices. Numerous, and all recent notices received, failed to
 include the following subsections of Article 10.8: Item ii, the legal

description of the Lot against which the notice is being Recorded. Item iii (assuming the Article being violated should be named), a brief description of the nature of the violation, item iv, a statement that the notice is being Recorded by the Association pursuant to this Declaration, and, most importantly, Item v, a statement of the specific steps which must be taken by the Owner or occupant to cure the violation.

Numerous requests were made for clarification of the CC&Rs in question and/or what was required to become complaint, which were ignored. Numerous violation notices, because they were prejudicial and not valid, did not result in a fine and were dropped without notice. Recently we were fined 3 time totaling \$175, which should be refunded, with no responses to multiple request for clarification. The intent has been harassment. Certainly, they were successful in causing us grief because we were forced to respond to each violation. We are now in limbo.

NOTE: To help understand the bias in recent notices sent, the ones we received fines for, on a review of the neighborhood, there were 22 trees touch dwellings, including ours. It is very doubtful any other member received notices or fines for identical circumstances. Howe many other members received notices of the tree overhanging the street: Probably zero! We were fined \$100.

Without any responses from the HOA describing what was required, we had out tree extensively trimmed on November 22nd, 2017. WE cannot address all of the harassment that has taken place. WE do not feel confident this is a good example of their behavior.

Also included: (1) An aerial photo dated 11/06/2012 showing the tree has been touching the roof and overlapping the street for a long time without notices and fines. (2) A photo dated March 20, 2017 depicting one of numerous other homes in the neighborhood with trees touching the dwelling. (3) A photo dated March 20, 2017 showing how similar tress maintained by the HOA weekly were at that time shedding faster than normal maintenance can take care of.

NOTE: page count does not include the 47 pages of the HOA CC&Rs, it was unclear if it should be included.

5. Article 10.8 of Mountain Rose's CC&Rs provides as follows:

Notice of Violation. The Association shall have the right to record a written notice of a violation by any owner or Resident of any restriction or other provision of the Project Documents. The notice shall be executed by an officer of the associate and shall contain substantially the following information; (i) the name of the Owner or Resident violating, or responsible for the violation of, the Project Documents; (ii) the legal

1 description of the Lot against which the notice is being recorded; (III) a
2 brief description of the nature of the violation; (iv) a statement that the
3 notice is being Recorded by the Association pursuant to this Declaration;
4 and (v) a statmetn of the specific steps which must be taken by the Owner
5 or occupant to cure the violation. Recordation of a notice of violation shall
6 serve as notice to the Owner or Resident, and any subsequent purchaser
7 of the Lot, that there is such a violation. If, after the recordation of such
8 notice, it is determined by the Association that he violation referred to in
9 the notice does not exist or that het violation referred to in the notice does
10 not exists or that the violation referred to if the notice has been cured, the
11 Association shall record a notice of compliance that shall state the legal
12 description of the Lot against which the notice of violation was Recorded,
13 and the recording data of the notice of violation, and shall state that the
14 violation referred to from the notice of violation has been cured or that the
15 violation did not exist. Failure by the Association to Record a notice of
16 violation shall not constitute a waiver of such violation, constitute an
17 evidence that no violation exists with respect to a particular Lot or
18 constitute a waiver of any right of the Association to enforce the Project
19 Documents.

20 6. Article 1.33 of Mountain Rose's CC&Rs provides, in relevant part, as
21 follows:

22 "Recording" means placing an instrument of public record in the office of
23 County Recorder of Maricopa County, Arizona, and "Recorded" means
24 having been so placed of public record.

25 7. On December 22, 2017, the Department issued a notice setting the
26 above-captioned matter for hearing on February 9, 2018. The December 22, 2017
27 Notice of Hearing provides, in relevant part, as follows:

28 The Petitioner alleges violation of Association CC&Rs Article 10,
29 Section 10.8 Notice of Violation by the Mountain Rose Homeowners
30 Association ("Respondent").

1. Mountain Rose filed a timely response to the petition.

2. A hearing was held on February 9, 2018.

3. Mr. Webster testified on his own behalf and presented the testimony of his
wife, Pamela Webster. Mr. Webster submitted one exhibit. Mountain Rose presented
the testimony of Frank Puma, a manager for Mountain Rose, and submitted exhibits A
through F.

1 10. Mr. Webster contended that Mountain Rose violated CC&Rs 10.8 because
2 the notices failed to provide a legal description of the Lot against which the notices is
3 being Recorded, a brief description of the nature of the violation, a statement that the
4 notice is being Recorded by the Association and a statement of the specific steps which
5 must be taken by the Owner to cure the violation.

6 11. There was no evidence presented at hearing that the notices issued to Mr.
7 Webster were recorded.

8 12. Mountain Rose contended that the notices issued to Mr. Webster were not
9 recorded. Mountain Rose also argued that it had previously informed Mr. Webster that
10 his tree needed to be trimmed 8 feet above the ground.

11 **CONCLUSIONS OF LAW**

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

17 2. The burden of proof at an administrative hearing falls to the party
18 asserting a claim, right, or entitlement and the standard of proof on all issue in this
19 matter is by a preponderance of the evidence. See A.A.C. R2-19-119.

20 3. A preponderance of the evidence is:

21 The greater weight of the evidence, not necessarily established
22 by the greater number of witnesses testifying to a fact but by
23 evidence that has the most convincing force; superior
24 evidentiary weight that, though not sufficient to free the mind
25 wholly from all reasonable doubt, is still sufficient to incline a fair
26 and impartial mind to one side of the issue rather than the other.
27 BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

28 4. Mountain Rose CC&Rs Article 10.8. applies to the recording of notices
29 and recorded notices. There was no evidence provided at hearing that the notices
30 issued by Mountain Rose were placed in the office of the County Recorder of Maricopa
County, Arizona. Mr. Webster did not even contend that Mountain Rose recorded the

1 notices issued to him. Mr. Webster failed to establish by a preponderance of the
2 evidence that Mountain Rose violated its CC&Rs as described above.

3 **ORDER**

4 IT IS ORDERED that Petitioners' petition in this matter is dismissed.

5 **NOTICE**

6 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties unless a**
7 **rehearing is granted pursuant to A.R.S. § 32-2199.04.**

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

11 Done this day, February 9, 2018.

12
13 /s/ Velva Moses-Thompson
14 Administrative Law Judge

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16 Transmitted electronically to:

17 Judy Lowe, Commissioner
18 Arizona Department of Real Estate

19 Done this day, February 28, 2018

20
21 /s/ Velva Moses-Thompson
22 Administrative Law Judge

23
24 Transmitted us mail to:

25 Jerry L. Webster
26 2115 East Rosemonte Dr.
27 Phoenix, AZ 85024

28 Mountain Rose HOA
29 c/o AZ Community Management Services, LLC
30 17787 N. Perimeter Dr., Suite A-111
Scottsdale, AZ 85255

Mountain Rose HOA
c/o Brown/Orcutt, PLLC.
373 S. Main Ave.
Tucson, AZ 85701

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