

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Jon Paul Holyoak,
4 Petitioner,

No. 18F-H1818030-REL
No. 18F-H1818031-REL

5 v.

ADMINISTRATIVE LAW JUDGE
DECISION

6 Camelback Country Club Estates I & II
7 Homeowners Association,
8 Respondent.

9 **HEARING:** May 2, 2018

10 **APPEARANCES:** Petitioner Jon Paul Holyoak appeared on his own behalf.
11 Respondent Camelback Country Club Estates I & II Homeowners Association was
12 represented by Gary Linder and Diana Elston.

13 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer

14 **FINDINGS OF FACT**

15 1. Camelback Country Club Estates I & II Homeowners Association
16 (Respondent) is an association of 61 homeowners on 62 lots located in Arizona.

17 2. Jon Paul Holyoak (Petitioner) filed a petition with the Arizona Department of
18 Real Estate (Department) on or about February 2, 2018, alleging that Respondent had
19 violated the community documents Conditions, Covenants and Restrictions (CC&Rs).
20 Petitioner's statement of the issue alleged Respondent improperly cited him for violating
21 Section 28 of the CC&Rs which provides as follows: "The owner of each lot shall at all
22 times keep shrubs, trees, grass and plantings of every kind, on his lot mostly trimmed,
23 properly cultivated, and free of trash, weeds and other unsightly material." The petition
24 was designated by the Department as HO18-18030.

25 3. Petitioner filed a petition with the Arizona Department of Real Estate
26 (Department) on or about February 2, 2018, alleging that Respondent had violated the
27 CC&Rs. Petitioner's statement of the issue alleged Respondent improperly cited him for
28 violating Section 12 of the CC&Rs which provides as follows: "No building may be erected
29 or maintained upon any lot except one single family dwelling with private appurtenant
30 garage and customary outbuildings. No Such building shall be erected or commenced

without the prior written approval of the committee, applied for and granted in the manner hereinabove set forth.” The petition was designated by the Department as HO18-18031.

4. Both matters were referred to the Office of Administrative Hearings for hearing. Upon the request of the parties, the matters were consolidated for hearing.

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5. On October 17, 2017, Respondent sent Petitioner a Courtesy Notice that provided as follows:

On behalf of the Camelback Country Club Estates, it was noted on 10/16/2017 by the Associa Arizona Inspection Team that the following maintenance matter at your property may need your attention.

Please refer to the **CC&R's, Section 28** regarding the requirements listed in your community documents about this matter.

Landscape Maintenance- Please remove the dead foliage on your lot. Thank you.

The notice included a small photograph of Petitioner's front yard.¹

6. On December 13, 2017, Respondent sent Petitioner a Courtesy Notice that provided as follows:

On behalf of the Camelback Country Club Estates, it was noted on 12/08/2017 by the Associa Arizona Inspection Team that the following maintenance matter at your property may need your attention.

Please refer to the **CC&R's, Section 28** regarding the requirements listed in your community documents about this matter.

Please remove the dead olive tree in the front yard. Thank you.

The notice did not include a photograph.

7. On December 13, 2017, Respondent sent Petitioner a Courtesy Notice that provided as follows:

On behalf of the Camelback Country Club Estates, it was noted on 12/08/2017 by the Associa Arizona Inspection Team that the following maintenance matter at your property may need your attention.

Please refer to the **CC&R's, Section 28** regarding the requirements listed in your community documents about this matter.

There are several other trees that need to be removed as they have dead branches including the cassia that is almost completely dead. Thank you.

¹ At hearing, color copies of the notices were submitted into evidence by Respondent, but Petitioner presented black and white copies that he actually received.

1 The notice did not include a photograph.

2 8. On January 25, 2018, Respondent sent Petitioner a Notice of Violation that
3 provided as follows:

4 On behalf of the Camelback Country Club Estates, it was noted that the
5 following maintenance needs to be performed at the referenced address for
6 the item(s) listed below:

7 This violation was noted on 01/22/2018 by the Associa Arizona inspection
8 department. Please refer to the **CC&R's, Section 28** regarding the
9 requirements listed in your community documents about this matter.

**2nd notice \$50 fine, There are several other trees that need to be
removed as they have dead branches including the cassia that is
almost completely dead. Thank you.**

10 The notice included a small photograph of Petitioner's back yard.

11 9. At hearing, Petitioner testified that he did not have any "dead" olive trees in
12 his front yard, but presumed the notice was in reference to his olive tree that was "in
13 distress." Petitioner asserted that he and his landscaper were trying to nurse the tree
14 back to health. Petitioner acknowledged that after months of trying to save the tree, they
15 decided the tree would not make a sufficient recovery and he had the tree removed on or
16 about April 25, 2018. As to the notice with a picture of his back yard, Petitioner argued
17 that the olive tree visible over the fence was very healthy and was intended to be a full tree
18 to provide additional privacy. Petitioner argued there were no dead trees visible in the
19 photograph. Petitioner asked that the fines be abated because he did not have any dead
20 trees in his yard that he failed to remove.

21 10. At hearing, Respondent presented the testimony of Terry Rogers, a board
22 member, who stated that the olive tree in the front yard had no leaves and certainly
23 appeared dead from the roadway. Mr. Rogers indicated that the olive tree was not
24 properly trimmed because it was dead. As to the notice with the picture of the back yard,
25 Mr. Rogers pointed out that the eucalyptus tree had several dead branches that were
26 visible from the sidewalk bordering the back of Petitioner's property and presumed the
27 violation was in reference to that.

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29 11. On October 17, 2017, Respondent sent Petitioner a Courtesy Notice that
30 provided as follows:

On behalf of the Camelback Country Club Estates, it was noted on 10/16/2017 by the Associa Arizona Inspection Team that the following maintenance matter at your property may need your attention.

Please refer to the **CC&R's, Section 27** regarding the requirements listed in your community documents about this matter.

Property Maintenance-Please remove the additional mailbox on your lot. Thank you.

The notice included a small photograph of Petitioner's front yard.

12. On December 14, 2017, Respondent sent Petitioner a Courtesy Notice that provided as follows:

On behalf of the Camelback Country Club Estates, it was noted on 12/13/2017 by the Associa Arizona Inspection Team that the following maintenance matter at your property may need your attention.

Please refer to the **CC&R's, Section 12** regarding the requirements listed in your community documents about this matter.

During a recent inspection, it has been noted there is an additional mailbox on your lot. In research of our files, there is no architectural application on file for the modification. Please remove the dead olive tree in the front yard. Thank you.

The notice did not include a photograph.

13. On January 25, 2018, Respondent sent Petitioner a Notice of Violation that provided as follows:

On behalf of the Camelback Country Club Estates, it was noted that the following maintenance needs to be performed at the referenced address for the item(s) listed below:

This violation was noted on 01/23/2018 by the Associa Arizona inspection department. Please refer to the **CC&R's, Section 12** regarding the requirements listed in your community documents about this violation.

2nd notice \$50 fine, During a recent inspection, it has been noted there is an additional mailbox on your lot. In research of our files, there is no architectural application on file for the modification. Please remove the mailbox or provide the approved architectural application.

The notice included a small photograph of Petitioner's mailbox which, at this time was painted a bright pink and yellow.

14. On January 25, 2018, Respondent sent Petitioner a Notice of Violation that provided as follows:

1 On behalf of the Camelback Country Club Estates, it was noted that the
2 following maintenance needs to be performed at the referenced address for
3 the item(s) listed below:

4 This violation was noted on 03/15/2018 by the Associa Arizona inspection
5 department. Please refer to the **CC&R's, Section 8** regarding the
6 requirements listed in your community documents about this violation.

7 **3rd notice \$100 fine, During a recent inspection, it has been noted there**
8 **is an additional mailbox on your lot. In research of our files, there is no**
9 **architectural application on file for the modification. Please remove**
10 **the mailbox or provide the approved architectural application. "[n]o**
11 **building or other structure, including fences and walls, shall be**
12 **erected, altered or repaired on any Lot until the building plans,**
13 **specifications, and plot plan showing the location, elevation grade**
14 **lines, dimension, design, and building materials of such building or**
15 **other structure, or until such other description of the proposed work**
16 **as shall be acceptable to the Committee....The Committee, in its**
17 **absolute discretion and consistent with the purposes of this**
18 **Declaration may also require that the exterior finish and color and/or**
19 **exterior lighting and the architectural style or decoration of such**
20 **building or other structure shall be such as the Committee shall deem**
21 **to be suitable in view of the general architectural style and character of**
22 **structures erected or to be erected in the subdivision. The exterior**
23 **surface of any building or other structure shall not be repainted or**
24 **refinished in a color or manner differing from the previous painting or**
25 **finishing of such building or other structure until the Committee shall**
26 **have given its written approval of such repainting or refinishing**
27 **following the submission of an acceptable description of the work**
28 **proposed to be done.**

29 The notice included a small photograph of Petitioner's mailbox which, at this time was
30 painted a bright pink and yellow.

15. At hearing, Petitioner testified that the freestanding mailbox was in place
when he purchased the home in 2012. Petitioner stated that when he lived in the
neighborhood as a child, he remembered that the United States Postal Service (USPS)
changed its policies and ended walking delivery; rather mailboxes had to be reachable
from a vehicle. Petitioner argued that because mailbox in the monument is approximately
15 feet from the curb, the USPS would not deliver his mail to that mailbox. Petitioner
indicated he had spoken to the USPS mail carrier who confirmed this information.
Petitioner asserted that he was required by USPS policy to maintain the freestanding
mailbox. Petitioner also maintained that when he purchased the home in 2012, he was

provided a statement that there were no known covenant violations existing on the property.

16. At hearing, Mr. Rogers testified that he had also spoken to the USPS mail carrier who stated he would rather deliver Petitioner's mail to the permanent mailbox in the monument because the freestanding mailbox was not secure. Mr. Rogers stated that the freestanding mailbox had been painted black at one point, but had faded and was peeling, was listing to one side, and was an eyesore in the community. Mr. Rogers stated that of the 61 homes in the neighborhood, only 3 have freestanding mailboxes, and Petitioner is the only one that has two mailboxes.

CONCLUSIONS OF LAW

1. The Department has jurisdiction to hear disputes between a property owner and a homeowners association. A.R.S. § 32-2199 *et seq.*

2. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated the community CC&Rs and A.R.S. § 33-1805(A). A.A.C. R2-19-119.

3. 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." BLACK'S LAW DICTIONARY 1220 (8th ed. 2004).

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4. As to the landscaping issues, Section 28 of the CC&Rs provides as follows:
The owner of each Lot shall at all times keep shrubs, trees, grass, and planting of every kind on his Lot neatly trimmed, properly cultivated, and free of trash, weeds, and other unsightly material.

5. Petitioner argued that his olive tree in the front yard was not "dead" and that he should not be forced to remove a tree that had dead branches. However, Petitioner presented no evidence, aside from his self-serving statements that the olive tree was alive. Any reasonable person viewing the olive tree, as depicted in the photographs presented, would understand the tree to be dead. A dead tree could reasonably be considered as not being "neatly trimmed" or "properly cultivated."

1 6. Thus, Petitioner failed to present evidence sufficient to establish by a
2 preponderance of the evidence that Respondent improperly fined him for failing to remove
3 the dead olive tree from his front yard.

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5 7. Section 8 of the CC&Rs provides, in pertinent part, as follows:

6 No building or other structure, including fences and walls, shall be erected
7 or repaired on any Lot until the building plans, specifications, and plot plan
8 showing the location, elevation grade lines, dimensions, design, and
9 building materials of such building or other structure, or until such other
description of the proposed work as shall be acceptable to the Committee,
has been approved in writing by the Committee.

10 8. Section 12 of the CC&Rs provides as follows:

11 No building may be erected or maintained upon any Lot except one single
12 family dwelling with private appurtenant garages and customary
13 outbuildings. No such building shall be erected or commenced without the
14 prior written approval of the Committee, applied for and granted in the
manner hereinabove set forth.

15 9. Section 27 of the CC&Rs provides as follows:

16 No building, residence, improvement structure upon any Lot shall be
17 permitted to fall into disrepair, and the owners thereof shall keep each such
18 building and structure at all times in good condition and adequately painted
19 or otherwise finished. Such owners shall maintain in good repair the
20 exterior faces, including but not limited to, walls, roofs, porches, patios, and
21 appurtenances. Nothing shall be done in or to any such building which will
22 impair the structural integrity of any building except in connection with
alterations or repairs specifically permitted or required by the Committee.
Carports and garages must be kept in a neat and tidy manner at all times,
the determination of which shall be solely vested in the Committee.

23 10. The initial courtesy notice sent to Petitioner referenced Section 27 in noting
24 that he needed to remove the additional mailbox, while the second courtesy notice and
25 first notice of violation referenced Section 12. It was not until the second notice of violation
26 issued on April 11, 2018, that Respondent referenced Section 8 of the CC&Rs.²

27 11. Petitioner established by a preponderance of the evidence that the
28 freestanding mailbox was in place when he purchased the property in 2012 and he was
29

30 ² The April 11, 2018 notice was issued after the filing of the petition in this matter, and therefore is not properly before this tribunal.

1 notified then that there were no known covenant violations. Therefore, Respondent's
2 reliance on the lack of an architectural committee request and approval of the
3 freestanding mailbox is without merit. That is not to say that Respondent does not have
4 the authority to enforce the CC&Rs with respect to maintenance and repair issues.

5 12. It is problematic that in the course of four notices sent to Petitioner,
6 Respondent relied on three different sections of the CC&Rs.

7 13. The plain language of Section 12 of the CC&Rs relates to a "building" on a
8 property. As such, Section 12 cannot be read to apply to Petitioner's mailbox. As Section
9 12 was the basis for the second courtesy notice and first notice of violation, Respondent
10 was in violation of the CC&Rs when it imposed the fine in the first notice of violation.

11 14. There is no question that Respondent could impose fines for Petitioner's
12 failure to properly maintain the freestanding mailbox and/or Petitioner's painting of the
13 mailbox without approval; however, those alleged violations are not properly before this
14 tribunal.

15 **ORDER**

16 In view of the foregoing, it is ORDERED that Petitioner's petition in Case Number
17 18F-H1818031-REL is denied.

18 It is further ORDERED that Petitioner be deemed the prevailing party in Case
19 Number 18F-H1818031-REL.

20 It is further ORDERED that Respondent pay Petitioner his filing fee of \$500.00, to
21 be paid directly to Petitioner within thirty (30) days of this Order.

22 Pursuant to A.R.S. § 32-2199.02(B), this Order is binding on the parties unless a
23 rehearing is granted pursuant to A.R.S. § 32-2199.04 based on a petition setting forth the
24 reasons for the request for rehearing, in which case the order issued at the conclusion of
25 the rehearing would be binding on the parties.

26 Done this day, May 25, 2018

27 /s/ Tammy L. Eigenheer
28 Administrative Law Judge
29
30

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

Judy Lowe, Commissioner
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