IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Brent J. Mathews, Petitioner, vs. American Ranch Community Association, Respondent.	**No. 18F-H1818050-REL** **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: September 21, 2018.

APPEARANCES: Petitioner Brent J. Mathews appeared on his own behalf. Respondent American Ranch Community Association (Respondent or American Ranch) was represented by Lynn Krupnik and Timothy Krupnik.

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer.

FINDINGS OF FACT

1. On or about May 16, 2018, Petitioner Brent J. Mathews filed a Homeowners Association (HOA) Dispute Process Petition (Petition) with the Arizona Department of Real Estate (Department). Petitioner indicated a single issue would be presented and paid the appropriate $500.00 filing fee, but then asserted violations of A.R.S. § 33-1804, American Ranch Bylaws 3.11 and 3.11.3, and American Ranch CC&Rs 3.28 and 9.3.1. Petitioner's narrative of the issue opened with the statement, "The subject of this Complaint is an Open Meeting Violation regarding an 'Action Outside of Meeting' on August 6, 2016 wherein the Association entered into a 'Well Agreement' with Mark and Diane Kaplan."

2. On or about June 22, 2018, the Department issued a Notice of Hearing in which it set forth the issue for hearing as follows:

> The Petitioner alleges that the American Ranch Community Association (Respondent) has violated A.R.S. § 33-1804, Community Bylaws Article 3.11, 3.11.3, Community CC&Rs Article 3.26 and amended CC&Rs Article 9.3.1 when the board entered into an agreement that they did not have the power to enter into.

3. After the matter was referred to the Office of Administrative Hearings, an independent state agency, Respondent filed a Motion to Dismiss and Denial of Claims in which Respondent asserted that the statute of limitations had run on an alleged violation of A.R.S. § 33-1804.

4. On or about August 15, 2018, the undersigned Administrative Law Judge issued an order indicating that Petitioner had filed a Petition listing three or four alleged violations, but had only paid for a single issue. Petitioner was directed to identify the single issue on which he wished to proceed to hearing.

5. On or about August 23, 2018, Petitioner submitted a clarification of his single issue provided as follows:

> When the Board entered into the ‘Well Agreement’ they may have assumed they had the power to grant exceptions to the CC&R’s. The American Ranch Community Association Bylaws do not empower the Board to grant exceptions to the CC&R’s. Therefore the single complaint is an alleged violation of the American Ranch Bylaws, Article 3.11.

6. At hearing, Petitioner testified on his own behalf and submitted six exhibits. Respondent presented the testimony of Tiffany Taylor, Community Manager, and Brad Baker, Respondent Vice President, and submitted ten exhibits. Based on the evidence presented at hearing, the following occurred:

a. Section 3.26 of the CC&Rs provided as follows:

> The placement, drilling and operation of water wells is prohibited on all Lots except Equestrian Lots. Any placement, drilling and operation of wells on Equestrian Lots shall be subject to the prior written approval of the Architectural Review Committee and shall solely serve to irrigate pasture land and provide drinking water for horses.

b. In or around 2007, a well was installed on Lot 2 in American Ranch.

c. In or about June 2011, the owners of Lot 2 and the Board entered into a Well and Easement Agreement (Well Agreement 1). By the terms of the Well Agreement 1, the owners of Lot 2 were using the well for irrigation on the lot in violation of the CC&Rs. Well Agreement 1 provided, among other things, that the owners of the lot would be allowed to continue using the well for irrigation on the lot, must purchase and install a water meter on the water line from the well to measure the gallons of water pumped from the well, and must pay to the applicable water district, the same per gallon charge payable by the other owners for water used from the water district.

d. On or about November 23, 2013, the owners of Lot 2 sold the property to Steven and Frances Galliano.

e. On or about July 30, 2016, Mark and Diane Kaplan emailed Ms. Taylor, Community Manager, indicating that they were interested in buying Lot 2, but a review of the property records included the Well Agreement 1, which caused the Kaplans some concerns. The Kaplans stated that they were in escrow to purchase the property, but they needed to know Respondent's position on the agreement or they would be unable to proceed with the purchase. The Kaplans also asserted that the Gallianos told them that they had never been charged for the water used from the well.

f. Because time was of the essence, Respondent's Board of Directors decided that the best course of action was to enter into a second well agreement invalidating Well Agreement 1. The Board of Directors' decision was based in part on the fact that they did not believe they had the authority to enter into Well Agreement 1; while the Board of Directors may have approved a variance from the CC&Rs relating to the existence of the well, they had no ability or authority to bill the owners of the lot for water used from the well as that would have been the responsibility of the water district.

g. On or about August 8, 2016, Respondent's Board of Directors executed an Acceptance and Approval of Well Agreement for Lot 2.

h. On or about August 9, 2016, Respondent's Board of Directors and the Kaplans executed a Well Agreement (Well Agreement 2). According to the terms of the Well Agreement 2, Respondent and the Kaplans agreed that the existing private water well located on Lot 2 would continue to be used for irrigation purposes and the owners would not be billed for the water used.

CONCLUSIONS OF LAW

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

2. Petitioner bears the burden of proof to establish that Respondent committed the alleged violations by a preponderance of the evidence.[1] Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.[2]

3. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."[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; 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."[4]

4. Section 3.11 of the Bylaws provides, in relevant part, as follows:

> **Powers and Duties.** The Board shall have all of the powers and duties necessary for the administration of the affairs of the Association and may exercise all corporate powers of the Association, subject to any limitation set forth in the Project Documents. . . . [T]he Board shall have the following powers and duties:
>
> . . . .
>
> **3.11.8** Exercise for the Association all powers, duties and authority vested in or delegated to the Association and not reserved to the membership by other provisions of the Project Documents;

5. Section 3.26 of the CC&Rs provides, in relevant part, as follows:

> **Water Wells**. The placement, drilling and operation of water wells is prohibited on all Lots except Equestrian Lots. Any placement, drilling and operation of wells on Equestrian Lots shall be subject to the prior written

---

[1] *See* ARIZ. REV. STAT. section 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).
[2] *See* A.A.C. R2-19-119(B)(2).
[3] MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).
[4] BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

approval of the Architectural Review Committee and shall solely serve to irrigate pasture land and provide drinking water for horses.

6. Section 3.31 of the CC&Rs provides, in relevant part, as follows:

> **Variances; Diminution**. The Architectural Review Committee may, at its option and in extenuating circumstances, grant variances from the restrictions set forth in Sections 3.1 through 3.30 if the Architectural Review Committee determines in its sole discretion that: (i) a restriction would create an unreasonable hardship or burden on an Owner, Lessee or Resident or a change of circumstances since the Recordation of this Declaration has rendered such restriction obsolete and (ii) the activity permitted under the variance will not have any substantial adverse effect on the Owners, Lessees and Residents of the Project and is consistent with the high quality of life intended for Residents of the Project.

7. It was uncontested that the well at issue was in violation of the CC&Rs.

8. Petitioner argued that Well Agreement 2 constituted an amendment of the CC&Rs and that, pursuant to Section 9.3.1 of the CC&Rs, the CC&Rs could only be amended by the written approval or affirmative vote of 75 percent of the total owners. Therefore, Petitioner concluded that the Board did not have the authority to enter into Well Agreement 2 and doing so was a violation of the governing documents. Petitioner's argument is faulty.

9. A variance granted to an individual owner from a restriction under the CC&Rs does not constitute an amendment of the CC&Rs. Rather, the CC&Rs specifically provide a method by which variances may be granted in certain circumstances and delegates the authority to grant such variances to the Architectural Review Committee.

10. Pursuant to Section 3.11 of the Bylaws, and specifically Section 3.11.8, the Board of Directors may exercise all powers delegated to the Association and not reserved to the membership. As the power to grant variances was delegated to the Architectural Review Committee and was not reserved to the membership, the Board had the authority to grant such a variance.

11. Petitioner failed to establish by a preponderance of the evidence that the Board of Directors lacked the authority to enter into Well Agreement 2. Thus, Petitioner failed to sustain his burden to establish a violation of Section 3.11 of the Bylaws.

ORDER

In view of the foregoing, IT IS ORDERED that the Petition be dismissed.

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.

Done this day, October 11, 2018.

/s/ Tammy L. Eigenheer
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile October 11, 2018 to:

Judy Lowe, Commissioner
Arizona Department of Real Estate
100 N. 15th Avenue, Suite 201
Phoenix, Arizona 85007
Attn:
jlowe@azre.gov
LDettorre@azre.gov
AHansen@azre.gov
djones@azre.gov
DGardner@azre.gov
ncano@azre.gov

Lynn M Krupnik & Timothy J Krupnik
Krupnik & Speas, PLLC
3411 N 5th Ave., Suite 316
Phoenix, AZ 85013
tim@krupniklaw.com

Brent J Mathews
8875 N Callahan Rd.
Prescott, AZ 86305

By Felicia Del Sol