

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 John A Sellers,

4 Petitioner,

5 vs.

6 Rancho Madera Condominium Association,

7 Respondent.
8

No. 19F-H1918010-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

9 **HEARING:** November 5, 2018, at 8:30 a.m. and December 12, 2018, at 1:00
10 p.m.

11 **APPEARANCES:** John A. Sellers ("Petitioner") appeared on his own behalf;
12 Rancho Madera Condominium Association was represented by Edward D. O'Brian,
13 Esq., and Edith I. Rudder, Esq., Carpenter, Hazlewood, Delgado & Bolen, LLP.

14 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky
15

16 **FINDINGS OF FACT**

17 **BACKGROUND AND PROCEDURE**

18 1. The Arizona Department of Real Estate ("the Department") is authorized
19 by statute to receive and to decide Petitions for Hearings from members of
20 condominium unit owners' associations and from unit owners' associations in Arizona.

21 2. Respondent is a condominium unit owners' association whose members
22 own the 46 condominiums in the Rancho Madera condominium development in Cave
23 Creek, Arizona.

24 3. Petitioner owns condominium unit 12 in Rancho Madera and is a member
25 of Respondent.

26 4. On August 23, 2018, Petitioner filed a single-issue petition with the
27 Department that alleged that Respondent had violated its Covenants, Conditions, and
28 Restrictions ("CC&Rs") § 3.10 by failing to require condominium owners to remove
29 vegetation and fencing materials from the stormwater channel behind their homes,
30 causing a risk that Petitioner's unit 12 could be flooded.

1 5. Respondent filed a written answer to the petition, denying that it had
2 violated any CC&Rs by failing to clean out the drainage channel behind Petitioner's unit
3 12. The Department referred the petition to the Office of Administrative Hearings, an
4 independent state agency, for an evidentiary hearing.

5 6. A hearing was held on November 5, 2018, and December 12, 2018.
6 Petitioner submitted 25 exhibits and testified on her own behalf. Respondent submitted
7 twelve exhibits and presented the testimony of its President, Jeffrey Kaplan.

8 **HEARING EVIDENCE**

9 7. No part of Rancho Madera lies in a designated floodplain, although there
10 is a wash that is designated as part of the floodplain to the north. The elevation of
11 Rancho Madera was raised to make it higher than the development next door.

12 8. The original developer designed a drainage swale behind units 9, 10, 11,
13 12, 13, 14, 15, 16, 17, and 18, which are located on the eastern side of the
14 development. After the original developer went bankrupt, the second developer
15 converted the drainage swale into a 3' x 3' drainage canal with short wall so that the
16 affected units could have a larger back patio. Because the drainage canal is a
17 designated common area, Respondent is responsible for maintaining the wall and the
18 drainage easement.¹

19 9. Sections 3.10, 3.10.2, and 3.10.4 of the CC&Rs provide in relevant part
20 as follows:

21 **3.10 Easement for Stormwater Drainage.**

22 Stormwater may enter the Condominium from the property
23 adjacent to the eastern boundary of the Condominium.
24 Perpetual non-exclusive drainage easements (each a
25 "**Drainage Easement**") are hereby created over, under, upon
26 and across the eastern five (5) feet of Units (the "**Drainage**
27 **Easement Units**") for the purpose of constructing,
28 maintaining, repairing and replacing a drainage channel,
29 which may consist entirely or partially of decomposed
30 granite, rip rap (large stones) or concrete (the "**Drainage**
Improvements") as originally constructed by Declarant. The
Drainage Improvements will carry the stormwater entering
the Condominium from the Drainage Easement Units to
Common Elements designed for stormwater conveyance.

¹ See Respondent's Exhibit 1.

1 The portion of each Drainage Easement Unit encumbered by
2 a Drainage Easement (i.e., the eastern five (5) feet) is
3 hereafter referred to as the "**Drainage Easement Area.**"
4 The rights and duties of Declarant, the Association and the
5 Unit Owners of Drainage Easement Units with respect to the
6 Drainage Easement Areas shall be provided in this Section
7 3.10.

8

9 **3.10.2** The Unit Owners of the Drainage Easement
10 Units shall retain all rights and privileges in their respective
11 Drainage Easement Areas as may be used without
12 interfering with the operation of the Drainage Improvements.
13 Each Unit Owner of a Drainage Easement Unit shall keep
14 his Drainage Easement Area Free of weeds and other debris
15 so that the stormwater can flow freely through the Drainage
16 Easement Area. No Improvement, including plant materials,
17 shall be constructed, installed or allowed to grow on, over or
18 within the Drainage Easement Area that may disturb or
19 damage the Drainage Improvements or impede the flow of
20 water over, under or through the Drainage Easement Areas.

21

22 **3.10.4** If any portion of the Drainage Improvements
23 are damaged or destroyed through the act of a Unit Owner,
24 Lessee or Resident, or their Invitees, or if the failure of one
25 Unit Owner to maintain his Drainage Easement Area free of
26 weeds and other debris results in damage to another
27 Drainage Easement Unit, the Association shall repair or
28 replace such damage or destruction and the cost to the
29 Association of any such repair or replacement shall be paid
30 by the Unit Owner that caused the damage or destruction,
upon demand, to the Association.²

10. Some large succulents, shrubs, and cacti are growing in the rip rap in the
drainage easement area behind the drainage easement units. In addition, at least one
owner of a small dog has strung chicken wire across the easement to keep his pet
contained in the area behind his units.³ Petitioner testified that the plants and chicken
wire could catch storm debris and cause the drainage channel to become clogged.

² Respondent's Exhibit 2 at 15-16.

³ See Petitioner's Exhibit 18.

1 11. Petitioner wrote many letters to Mr. Kaplan and Respondent expressing his
2 concerns about the drainage easement area. No other members of Respondent
3 expressed any concerns about drainage. Although the item was not put on
4 Respondent's agenda, noticed board meetings were held in March, April, May, July, and
5 August 2018. Mr. Kaplan testified that although Respondent's Board would have
6 discussed Petitioner's concerns, he never attended any of Respondent's noticed Board
7 meetings.⁴

8 12. Mr. Kaplan reached out to officials with the Maricopa County Flood Control
9 District and the Town of Cave Creek about Petitioner's concerns about flooding.
10 Officials from both agencies informed Mr. Kaplan that because the drainage easement
11 area in Rancho Madera was not listed on any official map as a flood plan or official
12 drainage area, neither the county nor the town would enforce any public ordinances with
13 the respect to the drainage easement area. The Association was solely responsible for
14 the drainage easement area.⁵

15 13. Mr. Kaplan testified that to assuage Petitioner's concerns, the board
16 instructed Respondent's management company to send letters to the drainage
17 easement owners, reminding them of their responsibility to keep the drainage easement
18 free of obstruction. On April 18, 2018, and July 19, 2018, the management company
19 sent such letters.⁶

20 14. Petitioner submitted videos of torrential rains behind his unit 12 and of
21 flooding in other areas of Cave Creek. However, he acknowledged that unit 12 had
22 never sustained any damages from flooding.

23 15. Mr. Kaplan testified that he bought one of the first units that were sold in
24 Rancho Madera in 2012. Water has never entered Rancho Madera from the east,
25 including in the 100-year storm in 2014. Mr. Kaplan testified that the builder had
26 planted the plants in the drainage easement shown in Petitioner's photographs.

27 16. Mr. Kaplan testified that after a significant rainstorm in August 2018, he
28 went to the end of the drainage easement and did not see any water in it. Mr. Kaplan

29 ⁴ See Respondent's Exhibits 3, 4, 6, 9, and 11.

30 ⁵ See Respondent's Exhibits 7 and 8.

⁶ See Respondent's Exhibits 5 and 10.

1 testified that the units are designed to drain from the front to the back of the property,
2 into the drainage easement.

3 17. Petitioner testified that he is going through a contentious divorce and,
4 because unit 12 is a community asset, it is on the market for sale through the Maricopa
5 County Superior Court Domestic Relations Court Commissioner who is overseeing
6 Petitioner and his wife's divorce. Petitioner testified that because Respondent only
7 contains 46 units, less than the 50 units required by Arizona statute for public
8 disclosure, he was obligated to disclose the fact of his petition to the Department about
9 drainage issues on MLS listing for the sale of unit 12. Petitioner asserted that the price
10 of unit 12 is \$40,000 less than it would have been had Respondent properly addressed
11 the flood risk.

12 18. Respondent submitted Petitioner's wife Debborah Sellers' June 22, 2018
13 email to Petitioner and Respondent's Board that stated in relevant part as follows:

14 There has never been any issue with the storm drain behind
15 our house and it is not a major disclosure item – it is simply a
16 disclosure item and as such, is listed in the documents
17 properly. The open part of the drainage ditch begins just
18 below The Vacc/Thomas house and proceeds from there
19 behind units 15 down to 9 whereupon it empties into the
20 street and the natural downhill slope to the wash.
21 Additionally, there are double sided openings which allow
22 overflow to proceed down the interior side of our exterior wall
23 and the outside of same exterior wall – which of course is
24 our ten foot easement for the power company. The drainage
25 ditches in the back garden areas of all these homes (Units
26 14, 13, 12, 11, 10, and 9) are all rocked and have minimal
27 planting of upright growing shrubs. No one has built
28 structures or impeded the flow of water except – to my
29 knowledge – a bit of chicken wire to keep a small dog in.

30 Above Unit 15 the water collects in the ten foot easement
and runs down a rip rapped slope with minimal plant growth
to impede water flow and then it either empties into the ditch
or continues to run down the easement to the street.

Just because something bad has happened in Tucson does
not mean something bad will happen everywhere and we all
believe, including yourself, John, that Keystone [the
developer] did a good job. Why else would you have

convinced your girlfriend into buying a Keystone home?
Stop making something out of nothing.

AND I HOPE YOU AREN[']T FREAKING POTENTIAL
BUYERS AND OTHER REALTORS WITH THIS
NONSENSE.⁷

CONCLUSIONS OF LAW

1. A.R.S. § 32-2199(1) permits a condominium unit owner to file a petition with the Department for a hearing concerning the condominium association's alleged violations of the Condominium Act set forth in Title 33, Chapter 9. This matter lies within the Department's jurisdiction.

2. Petitioner bears the burden of proof to establish that Respondent violated the CC&Rs by a preponderance of the evidence.⁸ Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.⁹

3. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."¹⁰ 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."¹¹

4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give effect to the intent of the parties.¹² "Restrictive covenants must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein."¹³ .CC&R § 3.10 creates the stormwater drainage canal behind

⁷ Respondent's Exhibit 12.

⁸ See 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).

⁹ See A.A.C. R2-19-119(B)(2).

¹⁰ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

¹¹ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

¹² See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

¹³ *Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. App. 1993) (quoted in *Powell*, 211 Ariz. at 557 ¶ 16, 125 P.3d at 377).

Petitioner's unit 12. CC&R §§ 3.10.2 and 3.10.4 require that Respondent ensure that there is no impediment to the flow of water in the drainage canal.

5. Petitioner established that there are some plants and chicken wire in the stormwater drainage canal, but did not establish that the plants or chicken wire impede the flow of water. Respondent established that despite historic rains, the stormwater drainage canal behind Petitioner's unit 12 has functioned as intended since 2012, and that Respondent's unit 12 has never flooded.

6. Although Petitioner's pending divorce cast a long shadow over his administrative complaint, the divorce is not relevant to the issue of whether Respondent violated the CC&Rs. The Administrative Law Judge will not comment on the fair market value of unit 12 or any reasons why less than the fair market value might be obtained in a court-ordered sale. The Administrative Law Judge resolves the only issue that is before her by finding that because the drainage system functions as intended and there is no unreasonable risk that Unit 12 will flood, Petitioner has not established the merits of the petition he filed with the Department against Respondent.

ORDER

IT IS ORDERED that Petitioner John A. Sellers' petition against Respondent Rancho Madera Condominium Association is denied because Petitioner has not established that Respondent violated the CC&Rs in designing or maintaining the drainage easement behind Petitioner's unit 12.

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, December 26, 2018.

/s/ Diane Mihalsky
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
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