

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Travis Prall,
4 Petitioner,
5 vs.

6 Villas at Tierra Buena Homeowners
7 Association,
8 Respondent.

No. 18F-H1818053-REL-RHG

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARING: January 11, 2019

APPEARANCES: Petitioner Travis Prall appeared on his own behalf.
Respondent Villas at Tierra Buena HOA was represented by Lydia Pierce Linsmeier.

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

13 **FINDINGS OF FACT**

14 1. On or about June 4, 2108, Petitioner Travis Prall filed a Homeowners
15 Association (HOA) Dispute Process Petition (Petition) with the Arizona Department of
16 Real Estate (Department). Petitioner asserted a violation of Section 7.1.4 of the
17 Declaration of Covenants, Conditions, Restrictions and Easements (CC&Rs).

18 2. On or about July 16, 2018, the Department issued a Notice of Hearing in
19 which it set forth the issue for hearing as follows:

20 The Petitioner alleges that the Villas at Tierra Buena Homeowner's
21 Association (Respondent) violated the Association's CC&R's Article 7.1 by
22 neglecting yard maintenance in visible public yards.

23 3. Following the hearing, the Administrative Law Judge issued an
24 Administrative Law Judge Decision finding in favor of Respondent. Petitioner,
25 unsatisfied with the outcome, submitted a request for rehearing to the Commissioner of
26 the Department of Real Estate. The request was granted and the rehearing was
27 conducted on January 11, 2019.

28 4. At the initial hearing, Petitioner testified on his own behalf; Respondent
29 presented the testimony of Maureen Karpinski, President of the Board; Frank Peake,
30 Owner of Pride Community Management; and Rebecca Stowers, Community Manager.

1 At the rehearing, Petitioner again testified on his own behalf; Respondent presented the
2 testimony of Ms. Karpinski and Mr. Peake.

3 5. Based on the evidence presented at the hearings, the following facts were
4 established:

5 a. Respondent is a gated community with 43 homes along the outside perimeter
6 of the community and 19 homes on the interior of the community. The exterior
7 homes have six to seven foot tall block wall fences enclosing the back yards.
8 The interior homes have a walkway that runs along the back yards. The back
9 walls of the interior homes have a two foot tall block wall with a two foot tall
10 aluminum fence on top of that. All told, the back walls of the interior homes are
11 approximately four feet tall.

12 b. Ms. Karpinski, a real estate agent at the time, entered into a contract for the
13 purchase of her home in Respondent's community from the developer in 2002.
14 Ms. Karpinski also assisted other individuals to purchase their home in
15 Respondent's community from the developer. As Ms. Karpinski was not in a
16 hurry to move in, she did not close on her home until 2004. Ms. Karpinski walked
17 the community with many individual buyers during the construction phase and as
18 houses were sold. Ms. Karpinski's backyard was "just dirt" with no landscaping
19 and no irrigation when she purchased her home; she installed landscaping and
20 irrigation in her back yard after she moved into the home. To the best of Ms.
21 Karpinski's knowledge, none of the homes in Respondent's community were sold
22 with any landscaping or irrigation in the back yards and were just dirt.

23 c. Respondent provides landscaping maintenance to all front yards and
24 common areas throughout the community.

25 d. Petitioner purchased his home, one of the interior homes, in Respondent's
26 community in 2010. When Petitioner moved in, he believed, based on his
27 reading of the CC&Rs that Respondent was responsible for maintenance of his
28 front yard and his back yard. Also, there was a large tree in the back yard of the
29 home.
30

1 e. On or about July 26, 2014, a storm knocked over a tree in Petitioner's back
2 yard. Petitioner arranged for and paid to have the tree removed although he
3 asserted at the time that Respondent had that responsibility under the CC&Rs.

4 f. At some point, the tree regrew from the remaining trunk of the cut down tree.

5 g. In 2018, Respondent noted that the block wall near the tree was buckling and
6 had Sun King Fencing & Gates repair the wall. After the repair was effectuated,
7 the company contacted Respondent and reported that "the reason the pony wall
8 buckled was the tree roots in the area." It was recommended that "you have the
9 landscapers remove the tree in question and dig out the roots so that the same
10 problem does not recur."

11 h. On or about May 3, 2018, Respondent issued a Courtesy Letter to Petitioner
12 that provided, "Please trim or remove the tree in the back yard causing damage
13 to the pony wall."

14 i. Petitioner responded to the Courtesy Letter arguing again that Respondent
15 had the responsibility under the CC&Rs to maintain his back yard.

16 2. Petitioner testified that from when he bought his home in 2010 until
17 sometime in 2013, Respondent provided landscaping maintenance to his front and back
18 yard. Petitioner also argued that the majority of homes in Respondent's community had
19 one of two types of irrigation systems on the side of the house accessible from the front
20 yard, which would indicate they were all installed during the original construction and
21 therefore, it could be concluded that the back yard irrigation systems were put in place
22 at the same time as the front yard irrigation systems to care for the plants that must
23 have been planted by the developer. Petitioner also posited that, given the size of the
24 tree in his back yard when he bought the home in 2010, it must have been planted at
25 the time the home was built. Petitioner noted that his sprinkler system in his back yard
26 wrapped around the tree as further evidence the sprinkler system and tree were "likely"
27 installed by the developer. Petitioner acknowledged that the only vegetation in his back
28 yard was the tree while other interior homes had other vegetation such as bushes.

29 3. Respondent denied that it had ever provided any landscaping
30 maintenance to any back yards in the community. Respondent controlled the irrigation
and sprinkler systems for the front yards in the community, but did not have any access

1 to control the irrigation or sprinkler systems for any back yards in the community.
2 Respondent also argued that entering into residents' back yards posed a liability issue
3 in the event small pets were able to escape the enclosed yard when yard maintenance
4 workers entered the property. Respondent asserted that sprinkler systems are modular
5 in nature and sections, such as a back yard, may be added to an existing system at a
6 later time as necessary.

7 CONCLUSIONS OF LAW

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

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

16 3. "A preponderance of the evidence is such proof as convinces the trier of
17 fact that the contention is more probably true than not."³ A preponderance of the
18 evidence is "[t]he greater weight of the evidence, not necessarily established by the
19 greater number of witnesses testifying to a fact but by evidence that has the most
20 convincing force; superior evidentiary weight that, though not sufficient to free the mind
21 wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one
22 side of the issue rather than the other."⁴

23 4. Section 7.1.4 of the CC&Rs provides that Respondent must
24 [r]eplace and maintain all landscaping and other Improvements as
25 *originally installed by Declarant* on the Public Yards of Lots in accordance
26 with the standards for Common Area landscape maintenance set forth in
27 Section 7.1.3 above.

28 Emphasis added.

29 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).

30 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).

1 5. Section 7.1.3 of the CC&Rs provides that Respondent must
2 [m]aintain and replace all landscaping and plantings in the Common Area
3 and in public right-of-way and public utility easement areas to the extent
4 the Board deems reasonably necessary for the conservation of water and
5 soil, to replace damaged or injured trees, and for aesthetic purposes;
6 provided, however, that the Board shall not vary the landscape plan
7 installed by the Declarant and approved by the City of Phoenix without the
8 prior written approval of the City of Phoenix.

9 6. Section 1.38 of the CC&Rs defines "Yard" as follows:

10 "Yard" means the portion of the Lot devoted to Improvements other than
11 the Residential Dwelling. "Private Yard" means that portion of a Yard
12 which is enclosed or shielded from view by walls, fences, hedges or the
13 like so that it is not generally Visible from Neighboring Property. "Public
14 Yard" means that portion of a Yard which is generally visible from
15 Neighboring Property, whether or not it is located in front of, beside, or
16 behind the Residential Dwelling.

17 7. Section 1.37 of the CC&Rs defines "Visible from Neighboring Property" as
18 follows:

19 "Visible from Neighboring Property" means, with respect to any given
20 object, that such object is or would be visible to a person six feet tall
21 standing on any part of such neighboring property at an elevation no
22 greater than the elevation of the base of the object being viewed;
23 provided, however, that an object shall not be considered as being Visible
24 From Neighboring Property if the object is visible only through a wrought
25 iron fence and would not be Visible From Neighboring Property if the
26 wrought iron fence were a solid fence.

27 8. The parties argued as to their opposing interpretations of Private Yard in
28 the CC&Rs. Respondent argued that the definition should be read as that portion of a
29 Yard which is 1) shielded from view by walls, fences, hedges or the like so that it is not
30 generally Visible from Neighboring Property or 2) enclosed. Petitioner argued that the
definition should be read as that portion of a Yard which is 1) enclosed so that it is not
generally Visible from Neighboring Property or 2) shielded from view by walls, fences,
hedges or the like so that it is not generally Visible from Neighboring Property.

9. Under Respondent's interpretation, Petitioner's backyard is enclosed, and therefore, is a private yard. As a private yard, Respondent is not responsible for yard maintenance.

10. Under Petitioner's interpretation, his back yard, which is enclosed but is generally visible from neighboring property, would be a public yard that Respondent would be responsible to maintain. As further support for Petitioner's interpretation is that the definition of Public Yard includes that it may be behind the residential dwelling and all the back yards in the community are enclosed.

11. While the language of the CC&Rs may lend itself to a reading that Respondent is responsible for the maintenance of the enclosed back yards of the interior homes even if that is contrary to the intention of the drafters of the CC&Rs, the tribunal is not required to reach that issue in this matter.

12. Petitioner failed to present any evidence as to the landscaping or other improvements *originally installed by Declarant* in his back yard aside from his suppositions and inferences. The only credible evidence offered regarding the landscaping of the homes in Respondent's community was the testimony of Ms. Karpinski who stated none of the homes had any landscaping or irrigation installed in the back yard at the time they were sold; they were just dirt.

13. As there was no evidence there was any landscaping or improvements originally installed by Declarant, there is no reason to conclude Respondent would be required to replace and maintain Petitioner's back yard under the terms of Section 7.1.4 of the CC&Rs.

14. Thus, Petitioner failed to establish by a preponderance of the evidence that Respondent violated Section 7.1.4 of the CC&Rs.

ORDER

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

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.

1 **Any such appeal must be filed with the superior court within thirty-**
2 **five days from the date when a copy of this order was served upon**
3 **the parties. A.R.S. § 12-904(A).**

4
5 Done this day, January 31, 2019.

6 /s/ Tammy L. Eigenheer
7 Administrative Law Judge

8
9 Transmitted electronically to:

10
11 Judy Lowe, Commissioner
12 Arizona Department of Real Estate

13 Transmitted US Mail to:

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