

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Loraine Brokaw,
4 Petitioner,

5 vs.

6 Sin Vacas Property Owners Association,
7 Respondent.

No. 19F-H1918017-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

8 **HEARING:** March 25, 2019 at 1:30 PM.

9 **APPEARANCES:** Loraine Brokaw ("Petitioner") appeared on her own behalf.
10 Jason Smith, Esq., and Sean Moynihan, Esq., appeared on behalf of Sin Vacas
11 Property Owners Association ("Association" and "Respondent"). Robert Brokaw and
12 Jack Juraco observed.

13 **ADMINISTRATIVE LAW JUDGE:** Jenna Clark.

14 After review of the hearing record in this matter, the undersigned Administrative
15 Law Judge makes the following Findings of Fact and Conclusions of Law, and issues
16 this ORDER to the Commissioner of the Arizona Department of Real Estate
17 ("Department").

18
19 **FINDINGS OF FACT**

20 **BACKGROUND AND PROCEDURE**

21 1. The Department is authorized by statute to receive and to decide petitions
22 for hearings from members of homeowners' associations and from homeowners'
23 associations in Arizona.

24 2. On or about September 04, 2018, Petitioner filed a single-issue petition¹
25 with the Department which states in pertinent part, "The relief I request is that Board be
26 compelled to respect the 30 years of the assessment schedule that has been in place
27 without objection and continue to charge me the 150% assessment. I further request
28 that the Board reimburse me for the costs associated with bringing this Petition."

29 ¹ See Department's electronic file at HO19-18017_Notice_Petition.pdf. Notably, Petitioner erroneously
30 checked that Respondent is a Condominium/Community Association when in fact Respondent is a
Planned Community Association.

1 3. On November 02, 2018, Respondent returned its ANSWER to the
2 Department whereby it denied all complaint items in the petition.²

3 4. On November 05, 2018, Respondent issued a formal response to the
4 petition.³

5 5. Per the NOTICE OF HEARING, the Department referred this matter to the
6 Office of Administrative Hearings ("OAH"), an independent state agency, for an
7 evidentiary hearing on January 08, 2019⁴, regarding the following issue:

8 **Whether Sin Vacas Property Owners Association (Respondent)**
9 **arbitrarily and capriciously raised annual assessments for some**
10 **homeowners and not others in contravention of decades of past**
11 **board practice and contractual agreements based on utterly flawed**
12 **legal theory, which, in fact, changed from attorney to attorney.**⁵

13 **THE PARTIES AND GOVERNING DOCUMENTS**

14 6. Respondent is a homeowners' association whose members own
15 properties in a residential real estate development located in Tucson, Arizona.
16 Membership for the Association is compromised of the Sin Vacas subdivision.

17 7. Petitioner is a Sin Vacas subdivision property owner and a member of the
18 Association.

19 8. The Association is governed by its Covenants, Conditions, and
20 Restrictions ("CC&Rs")⁶, and overseen by a Board of Directors ("the Board"). The
21 CC&Rs empower the Association to control certain aspects of property use within the
22 development. When a party buys a residential unit in the development, the party
23 receives a copy of the CC&Rs and agrees to be bound by their terms. Thus, the CC&Rs
24 form an enforceable contract between the Association and each property owner.

25 9. The Association's CC&Rs were recorded with the Pima County Recorder's
26 Office on April 13, 1978.

27 ² See Department's electronic file at HO19-18017_ADRE Answer form 4811-1040-6778 v.1.pdf.

28 ³ See Department's electronic file at HO19-18017_Response to Petition for Hearing 4849-4344-4857
29 v.pdf.

30 ⁴ The matter was continued on January 08, 2019, and reset for March 25, 2019, at 1:30 p.m. whereby it
was heard.

⁵ See Department's electronic file at HO19-18017_Notice_Hearing.pdf.

⁶ See Department's electronic file at HO19-18017_SinVaca_CCR.pdf.

1 10. Bylaws Article I, Definitions, Section 3 states “[Properties] shall mean and
2 refer to that certain real property hereinabove described, including all CR-1, SR and TR
3 Lots.”

4 11. Bylaws Article I, Definitions, Section 5 states “[Lot] shall mean and refer to
5 any numbered lot shown upon any recorded subdivision map of the Sin Vacas
6 Properties with the exception of the Common Area.”

7 12. Bylaws Article IV, Covenant For Maintenance Assessments, Section 2
8 states, in pertinent part “The assessments levied by the Association shall be used
9 exclusively to promote the recreation, health, safety, and welfare of the residents in the
10 Properties and for the improvement and maintenance of the Common Areas and private
11 streets within the Properties. The Sin Vacas Property Owners Association shall be
12 responsible for future construction, maintenance, safety, liability and control of all
13 private streets and roadways covered by these Covenants, Conditions, and
14 Restrictions.

15 13. Bylaws Article IV, Covenant For Maintenance Assessments, Section 3
16 states, in pertinent part Until January 1 of the year immediately following the
17 conveyance of the first CR-1, SR or TR Lot to an Owner, the maximum annual
18 assessment shall be not more than FIVE DOLLARS (\$5.00) per CR-1 lot, not more than
19 FIVE DOLLARS (\$5.00) per SR lot and not more than TWENTY-FIVE DOLLARS
20 (\$25.00) per TR lot. (*Emphasis in original*).

21 a. From and after January 1 of the year immediately following the
22 conveyance of the first CR-1, SR or TR lot to an Owner, the maximum
23 annual assessment may be increased by the Board of Directors each year
24 not more than TEN PERCENT (10%) above the maximum assessment for
25 the previous year without a vote of the membership.

26 b. From and after January 1 of the year immediately following the
27 conveyance of the first CR-1, SR or TR lot to an Owner, the maximum
28 annual assessment may be increased by 10% by a vote of fifty-one
29 percent (51%) of the total votes outstanding at a meeting duly called for
30 this purpose.

1 c. The Board of Directors may fix the annual assessment at an amount not in
2 excess of the maximum.

3 2. Bylaws Article IV, Covenant For Maintenance Assessments, Section 5
4 states "Written notice of any meeting called for the purpose of taking any action
5 authorized under Section 3 and 4 shall be sent to all members not less than 30 days in
6 advance of the meeting."

7 3. Bylaws Article IV, Covenant For Maintenance Assessments, Section 6
8 states "Special assessments must be fixed and apportioned at a uniform rate for all
9 CR-1 lots, SR lots, and each 20,000 square feet of TR lots."

10 4. Bylaws Article IV, Covenant For Maintenance Assessments, Section 7
11 states "The annual assessments provided for herein shall commence as to all Lots on
12 the first day of the month following the conveyance of the Common Area. The first
13 annual assessment shall be adjusted according to the number of months remaining in
14 the calendar year. The Board of Directors shall fix the amount of the annual assessment
15 against each Lot at least thirty (30) days in advance of each annual assessment period.
16 Written notice of the annual assessment shall be sent to every Owner subject thereto.
17 The due dates shall be established by the Board of Directors. The Association shall,
18 upon demand, and for a reasonable charge, furnish a certificate signed by an officer of
19 the Association setting forth whether the assessment on a specified Lot have been paid.
20 A property executed certificate of the Association as to the status of assessments on a
21 lot is binding upon the Association as of the date of its issuance.

22 5. Bylaws Article VI, General Provisions, Section 3 states "the covenants and
23 restrictions of this Declaration shall run with and bind the land, for a term of twenty-five
24 (25) years from the date this Declaration is recorded, after which time they shall
25 automatically be extended for successive periods of ten (10) years. This Declaration
26 may be amended during the first twenty-five (25) year period by an instrument signed by
27 the Lot Owners representing not less than ninety (90%) of the votes herein established,
28 and thereafter by an instrument signed by the Lot Owners representing no less than
29 seventy-five (75%) percent of the votes herein established. Any amendment must be
30 recorded and prior to amending must be approved by Pima County for conformance to
 present or future Zoning Ordinances and Subdivision Regulations.

HEARING EVIDENCE

6. Petitioner testified on her own behalf and submitted one exhibit. Respondent declined to present any witnesses or exhibits of its own, but did cross-examine Petitioner. The Department's electronic file was also admitted into the record.

7. Respondent's position at the hearing was that the parties had different interpretations of the language contained in the Bylaws, and that the matter would be resolved however the tribunal chose to settle their dispute regarding the interpretation of relevant portions of the governing text.

Petitioner's testimony

8. Per Petitioner, she brought forth her action as a result of alleged action taken by Respondent which unlawfully raised her Lot assessment.

9. Petitioner clarified that the issue she sought to have resolved was whether it was legal for the Association to raise her assessment without raising assessments for all other Homeowners. Specifically, Petitioner requested that the Tribunal enforce an approximately thirty-year practice, pursuant to a Board Order based on a Restatement.

10. Petitioner testified that her husband first bought property in San Vacas in 1979. In 2003 the couple purchase an adjacent Lot and built a new home which spanned across both Lots.⁷

11. Petitioner testified that she legally had both Lots combined.⁸

12. Petitioner testified that as of 2003 the Association issued assessments as follows: 100% for a home on a single Lot, 25% for an undeveloped vacant Lot, and 150% for a residence on two Lots, regardless of what percentage of the home was located on either Lot.

13. Petitioner testified that she had never requested to be assessed for a single Lot, but that during a Board meeting in 2003 the Board voted to grant her a reduced assessment. She received written confirmation of her reduced assessment, to 150%, from the Board on March 24, 2003.⁹

⁷ See Department's electronic file at HO19-18017_Exhibit B – Answer – 28-54 Plat.pdf; see *a/so* Petitioner Exhibit 1.

⁸ Petitioner presented no documentation to the Tribunal to substantiate this claim.

⁹ It is unclear how Petitioner's Lots were assessed prior to 2003.

1 14. On or about December 04, 2017, Petitioner received a letter from the
2 Association's management company which advised that the Board decided to raise her
3 assessment, from 150% to 200%, pursuant to "advice of counsel."

4 15. Per Petitioner, she was given varying reasons as to the underlying reason
5 for the assessment increase but was ultimately informed that it was because the Board
6 determined that all plats needed to be assessed uniformly, per the Association's
7 Restatement.

8 16. On or about June 22, 2018, Petitioner received an assessment invoice.
9 When she inquired with the Board's counsel as to her assessment increase, she was
10 informed that she would have to have her Lots combined on the county's plat map in
11 order to be assessed as a single Lot. Per Petitioner, she would have to pay be between
12 \$3,000.00 and \$10,000.00, and get permission from every other homeowner in Sin
13 Vacas in order to do so.

14 **CONCLUSIONS OF LAW**

15 1. This matter lies within the Department's jurisdiction pursuant to ARIZ. REV.
16 STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a
17 planned community association. The owner or association may petition the department
18 for a hearing concerning violations of community documents or violations of the statutes
19 that regulate planned communities as long as the petitioner has filed a petition with the
20 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

21 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-
22 2199.01(D), 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide
23 the contested case at bar. OAH has the authority to interpret the contract between the
24 parties. See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d
25 173 (App. 2007).

26 3. In this proceeding, Petitioner bears the burden of proving by a
27 preponderance of the evidence that Respondent violated a community document and/or
28 ARIZ. REV. STAT. § 33-1803.¹⁰

29
30

¹⁰ See ARIZ. ADMIN. CODE R2-19-119.

1 4. "A preponderance of the evidence is such proof as convinces the trier of
2 fact that the contention is more probably true than not."¹¹ A preponderance of the
3 evidence is "[t]he greater weight of the evidence, not necessarily established by the
4 greater number of witnesses testifying to a fact but by evidence that has the most
5 convincing force; superior evidentiary weight that, though not sufficient to free the mind
6 wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one
7 side of the issue rather than the other."¹²

8 5. ARIZ. REV. STAT. § 33-1802(4) provides, in pertinent part, that a "Planned
9 community' means a real estate development that includes real estate owned and
10 operated by or real estate on which an easement to maintain roadways or a covenant to
11 maintain roadways is held by a nonprofit corporation or unincorporated association of
12 owners, that is created for the purpose of managing, maintaining or improving the
13 property and in which the owners of separately owned lots, parcels or units are
14 mandatory members and are required to pay assessments to the association for these
15 purposes."

16 6. ARIZ. REV. STAT. § 33-1803(A) provides, in pertinent part, that "Unless
17 limitations in the community documents would result in a lower limit for the assessment,
18 the association shall not impose a regular assessment that is more than twenty percent
19 greater than the immediately preceding fiscal year's assessment without the approval of
20 the majority of the members of the association."

21 7. Based upon a review of the credible and relevant evidence in the record,
22 Petitioner has failed to sustain her burden of proof.

23 8. Here, the material facts are not at issue.

24 9. It is undisputed that Petitioner owns Lots 156 and 157, that both Lots are
25 CR-1 Lots, that the Lots have never been combined or consolidated per the Pima
26 County Assessor's Office plat map into an individually numbered Lot, and that
27 Petitioner's residence is constructed on both lots.

28 10. Additionally, it is undisputed that Bylaws Article IV of the Declaration
29 therefore require that the Association assess all developed CR-1 lots at a uniform rate.

30 ¹¹ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

¹² BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

1 Thus, the Declaration requires that the Association assess Lots 156 and 157 at the
2 same rate as every other developed CR-1 lot in Sin Vacas. By assessing both of
3 Petitioner's lots at the same full rate as every other developed CR-1 lot in Sin Vacas,
4 the Association is already complying with the Declaration.

5 11. Petitioner has not established that her assessments were raised
6 selectively or unlawfully. What Petitioner established is that she owns two Lots that
7 were assessed at differing rates per a long standing Board Order, but increased due to
8 a new Board's Order based on its interpretation of the Association's Declaration.
9 Petitioner has not established that this interpretation is in error or in violation of an
10 applicable community document or statute. Petitioner's argument that her 2003 Board
11 Order to reduce her assessment supersedes the 2017 Board Order to uniformly fix and
12 apportion all CR-1 lot assessments is inaccurate. Notably, the Board's action does not
13 constitute a breach of contract either, as Petitioner provided no proof of consideration
14 tendered to the Association.

15 12. In this case the governing documents for the Association take precedent
16 over any informal agreement Petitioner had with the Board, regardless of the duration of
17 that agreement. Moreover, the governing documents themselves are clear: special
18 assessments must be fixed and apportioned at a uniform rate for all CR-1 lots.

19 13. Therefore, the undersigned Administrative Law Judge concludes that the
20 Board's action to uniformly assess all Cr-1 Lots in Sin Vacas does not violate ARIZ. REV.
21 STAT. § 33-1803 or the Association Bylaws.

22 **ORDER**

23 Based on the foregoing findings and conclusions,

24 **IT IS ORDERED** that Petitioner's petition be denied.

25 *In the event of certification of the Administrative Law Judge Decision by the*
26 *Director of the Office of Administrative Hearings, the effective date of the Order will be*
27 *five days from the date of that certification.*

28 **NOTICE**

29 **Pursuant to ARIZ. REV. STAT. §32-2199.02(B), this Order is binding on the parties**
30 **unless a rehearing is granted pursuant to ARIZ. REV. STAT. § 32-2199.04. Pursuant**

1 to ARIZ. REV. STAT. § 41-1092.09, a request for rehearing in this matter must be
2 filed with the Commissioner of the Arizona Department of Real Estate within 30
3 days of the service of this Order upon the parties.

4 Done this day, April 01, 2019.

5 /s/ Jenna Clark
6 Administrative Law Judge
7

8
9 Transmitted electronically to:

10 Judy Lowe, Commissioner
11 Arizona Department of Real Estate

12 Transmitted US Mail to:

13
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