

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Michael Stoltenberg,

4 Petitioner,
5 vs.

6 Rancho Del Oro Homeowners Association,
7 Respondent.
8

No. 19F-H1918038-REL

**ADMINISTRATIVE LAW JUDGE
DECISION (Amended)**

9 **HEARING:** March 19, 2019, at 8:30 a.m.

10 **APPEARANCES:** Michael Stoltenberg ("Petitioner") appeared on his own
11 behalf; Rancho Del Oro Homeowners Association ("Respondent") was represented by
12 Nicole D. Payne, Esq., Carpenter, Hazlewood, Delgado & Bolen LLP.

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

15 The Administrative Law Judge amended Finding of Fact No. 7, as shown by the
16 italicized language below.

17 **FINDINGS OF FACT**

18 **BACKGROUND AND PROCEDURE**

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

22 2. Respondent is a homeowners' association ("HOA") whose members own
23 homes in Rancho Del Oro in Yuma, Arizona.

24 3. Petitioner owns a home in Rancho Del Oro at 11777 E. Calle Gaudi and is a
25 member of Respondent.

26 4. On or about December 29, 2018, Petitioner filed a single-issue petition with
27 the Department that alleged that Respondent had violated its Covenants, Conditions,
28 and Restrictions ("CC&Rs") §§ 1.8, 1.9, 2.1, 3.1, 4.1, 4.2, 4.3, 5.1, and 14.2 by charging
29 him the same assessments as his neighbors, even though he had rock landscaping and
30 his neighbors had grass yards .

5. Respondent filed a written answer to the petition, denying that it had violated any CC&Rs in assessing HOA dues to Petitioner. The Department referred the petition to the Office of Administrative Hearings, an independent state agency, for an evidentiary hearing.

6. A hearing was held on March 19, 2019. Petitioner submitted twenty exhibits and testified on his own behalf. Respondent submitted two exhibits and presented the testimony of its property manager, Diana Crites, who is also a designated broker licensed by the Department.

HEARING EVIDENCE

7. Petitioner brought his house in 2010. Petitioner testified that *Respondent* spent \$54,000 on lawn maintenance and landscaping in 2016 and that lawn maintenance was 39% of the total budget.¹ He argued that it is not fair for *Respondent* to assess him the same amount, since his neighbors have grass yards and his front yard is rock.

8. Respondent submitted a letter dated January 25, 2016, from Dawn Simpson, Respondent's former bookkeeper, in relevant part as follows:

I . . . worked with [Respondent] from October 2006 thru February 2014. . . .

Under my employ with [Respondent] I have experienced several encounters with [Petitioner]. During my earlier employ, [Petitioner] made several complaints regarding his home not being connected to [Petitioner's] water system. It was expressed by the Board members that [Petitioner] knew when he purchased his home that it was not connected to the community water system. . . .

In 2013 [Respondent's] Board . . . voted to install a well that would serve [Respondent's] community for landscaping purposes. . . . It was also voted that the construction would be done to tie in homes that were not a part of the community system. This would include [Petitioner's] home. . . .

Approximately mid-way thru the construction process [Petitioner] became very heated with [Respondent's

¹ See Petitioner's Exhibit R.

contractor]. . . . At this time, [Petitioner] declared that no one was to enter his yard for any purpose. This was also to include his front yard. This halted all construction that was currently in place in his back yard, and all landscaping being provided by the HOA for the front yard.²

9. Petitioner acknowledged that he refused to allow Respondent access to his property to install irrigation pipes from the well or to maintain his front yard. Petitioner accused Respondent of killing his trees when it maintained his yard. Petitioner stated that he has undertaken maintenance of his own yard.

10. The CC&Rs that Petitioner referenced in the petition that he filed with the Department provide in relevant part as follows:

10.1 Article I of the CC&Rs provides definitions, including §§ 1.8 and 1.9, as follows:

1.8 "Common Area" shall mean and refer to those portions of the Project to which title is held by the Association for the common use and enjoyment of the Owners and excepting the individual units.

1.9 "Common Expenses" mean and include the actual and estimated expenses of operating the association, both for general and Parcel purposes, and any reasonable reserves for such purposes as found and determined to be necessary by the Board, and all sums designated Common Expense by or pursuant to the Project Documents.³

10.2 Article II of the CC&Rs is entitled Creation of Property Rights. Section 2.1 provides "Non-Exclusive Easements of Enjoyment and that "Every Owner of a Unit shall have a non-exclusive easement and equitable right of use and enjoyment in, to, and throughout the Common Area, and for ingress and egress over and through the Common Area. . . ."⁴

10.3 Article III of the CC&Rs is entitled Association, Administration, Membership and Voting Rights. Section 3.1 provides that "[t]he management of the Common Area shall be vested in the Association"⁵

² Respondent's Exhibit 5 at 1-2.

³ Petitioner's Exhibit A and Respondent's Exhibit 1 at 2.

⁴ *Id.* at 4.

⁵ *Id.* at 8.

10.4 Article IV of the CC&Rs is entitled Assessments. Sections 4.1, 4.2, and 4.3 provides in relevant part as follows:

4.1 Purpose of Assessment. The assessments provided for herein shall be used for the general purposes of promoting the recreation, health, safety, welfare, common benefit, and enjoyment of the Owners and occupants of the Units, including the maintenance of real and personal property, all as may be more specifically authorized from time to time by the Board of Directors. . . . ***[Assessments] shall constitute common expenses for which the apartment owners shall be severally liable in proportion to their respective common interests.*** [Emphasis added.]

4.2 Creation of Assessments. Each Owner of any Unit, by acceptance of a deed therefor, whether or not it shall be so expressed in such deed, covenants and agrees to pay to the Association: (a) annual assessments or charges

4.3 Computation of Assessment. It shall be the duty of the Board, at least sixty (60) days before the beginning of the fiscal year and thirty (30) days prior to the meeting at which the budget shall be presented to the membership, to prepare a budget covering the estimated costs of operating the Association during the coming year. . . .⁶

10.5 Article V of the CC&Rs is entitled Duties and Powers of the Association. Section 5.1 provides in relevant part as follows:

5.1 Duties. In addition to the powers delegated to it by its articles or the Bylaws, and without limiting their generality, the Association, acting by and through the Board . . . has the obligation to conduct all business affairs of common interest to all Owners and to perform the duties set forth below.

(a) Maintenance. The Association shall maintain, repair, replace, restore, operate and manage all facilities, improvements, furnishings, equipment and landscaping thereon, and all property that may be acquired by the Association. . . . Maintenance shall include, without limitation, landscaping, painting, maintaining, repairing and

⁶ *Id.* at 11-12.

replacing of the Common Area. ***It shall also include maintenance of the landscaping on individual Lots outside of structures. . . .***
[Emphasis added.]

10.6 Article XIV of the CC&Rs is entitled Miscellaneous. Section 14.1 provides in relevant part as follows:

14.1 Enforcement. The Association, or any Owner, shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens, and charges now or hereafter imposed by the provisions of this Declaration⁷

11. Ms. Crites testified that she hired Ms. Simpson and her company to provide accounting services to Respondent. Ms. Crites noted that CC&R § 5.1(a) specifically requires Respondent to maintain members' yards. Ms. Crites also pointed out that CC&R § 4.1 requires all owners to be assessed uniformly, not based on the type of landscaping that they have chosen or whether they will allow Respondent onto their property.

12. Ms. Crites testified that eight units, including Respondent's, were constructed after the original development by a different developer, who did not install an irrigation system or grass. The owners of two of those eight lots have requested that Respondent remove the rock landscaping and install grass, and Respondent has agreed to perform this work. Ms. Crites testified that she believes that rock was placed in the front yards of the eight lots due to the high cost of water. Since Respondent has drilled the well and connected all the lots to the irrigation system, this is no longer an issue.

13. Ms. Crites testified that Petitioner did not allow workers to complete the irrigation system on his property to link it to the community well. Petitioner does not allow Respondent to perform any landscape maintenance on his property. Ms. Crites testified that if Petitioner wanted, he could have grass on his property maintained by Respondent.

CONCLUSIONS OF LAW

⁷ *Id.* at 43.

1 1. A.R.S. § 32-2199(B) permits an owner or a planned community organization
2 to file a petition with the Department for a hearing concerning violations of planned
3 community documents under the authority Title 33, Chapter 16.⁸ This matter lies with
4 the Department's jurisdiction.

5 2. Petitioner bears the burden of proof to establish that Respondent violated on its
6 CC&Rs by a preponderance of the evidence.⁹ Respondent bears the burden to establish
7 affirmative defenses by the same evidentiary standard.¹⁰

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

15 4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give
16 effect to the intent of the parties.¹³ "Restrictive covenants must be construed as a whole
17 and interpreted in view of their underlying purposes, giving effect to all provisions
18 contained therein."¹⁴ Section 5.1(a) of the CC&Rs requires Respondent to maintain
19 members' yards. Section 4.1 of the CC&Rs requires each member to be assessed the
20 same, regardless of the kind of landscaping that they have on their property or whether
21 they will allow Respondent to perform the landscaping maintenance that § 5.1(a) of the
22 CC&Rs requires Respondent to perform. Because Petitioner has not pointed to any
23 CC&R that allows, much less requires, Respondent to assess Petitioner less because
24

25 ⁸ See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce
26 the development's CC&Rs

27 ⁹ See A.R.S. § 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74
28 Ariz. 369, 372, 249 P.2d 837 (1952).

29 ¹⁰ See A.A.C. R2-19-119(B)(2).

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

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

¹³ See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

¹⁴ *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).

1 he has a rock yard and will not allow Respondent to maintain his yard, Petitioner has
2 not borne his burden in this matter.

3 **ORDER**

4 IT IS ORDERED that Petitioners' petition is denied because he has not
5 established that any CC&R allows or requires Respondent to assess Petitioner less
6 than his neighbors.

7 **NOTICE**

8 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties**
9 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S.**
10 **§ 41-1092.09, a request for rehearing in this matter must be filed with the**
11 **Commissioner of the Department of Real Estate within 30 days of the service of**
12 **this Order upon the parties.**

13 Done this day, April 3, 2019.

14 /s/ Diane Mihalsky
15 Administrative Law Judge
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22 Transmitted by either mail, e-mail, or facsimile February 22, 2019 to:

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