

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Pointe Tapatio Community Association,
4 Petitioner,
5 vs.
6 Lanye C. Wilkey and Devin E. Wilkey,
 Respondent.

No. 19F-H1919044-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

7 **HEARING:** April 26, 2019

8 **APPEARANCES:** Lauren Vie, Esq. for Petitioner; Joseph Velez, Esq. for
9 Respondent

10 **ADMINISTRATIVE LAW JUDGE:** Thomas Shedden

11 **FINDINGS OF FACT**

12 1. On February 28, 2019, the Arizona Department of Real Estate issued a
13 Notice of Hearing setting the above-captioned matter for hearing on April 26, 2019 at
14 the Office of Administrative Hearings in Phoenix, Arizona.

15 2. The Notice of Hearing shows that Petitioner Pointe Tapatio Community
16 Association alleges that Respondent Layne C. Wilkey and Devin E. Wilkey have
17 violated Association CC&Rs Article 3, section 3.1. More specifically, Pointe Tapatio
18 alleges that the Wilkeys are using their unit as an office and not as a residence.

19 3. As pertinent to this matter, section 3.1 provides that
20 Residential. Each Residence shall be used, improved, and
21 devoted exclusively to first class residential use, and no
22 gainful occupation, profession, trade, business, religion, or
23 other non-residential use which creates traffic [or] parking ...
24 shall be conducted from any Residence [or part thereof.]”

25 4. Pointe Tapatio presented the testimony of Board member Paula
26 Duistermars. Ms. Wilkey and Mr. Wilkey both appeared at the hearing and each
27 testified.

28 5. Ms. Wilkey and Mr. Wilkey are mother and son, who are co-owners of 720
29 E. North Lane, Unit 1 (Lot 50). The Wilkeys own and operate Devau Human Resources,
30

1 a payroll processing company, out of that unit. Prior to his passing in 2016, the Wilkeys'
2 husband/father was also involved in the business.

3 6. Devau also operates out of a second site located in Tempe that Mr. Wilkey
4 acknowledged was in a commercial building.

5 7. Through a letter dated August 8, 2018, Pointe Tapatio informed the
6 Wilkeys that they were out of compliance with section 3.1 and it notified the Wilkeys that
7 they were required to come into compliance by August 31, 2018.

8 8. On or about January 17, 2019, Pointe Tapatio filed with the Department
9 the petition that gave rise to this matter.

10 9. Devau's website shows that it has an office at the E. North Lane address,
11 with office hours from 9:00 a.m. to 5:00 p.m. Monday through Friday. The website
12 shows that this a mailing address only. Devau receives mail at the unit.

13 10. Google maps show that Devau operates out of 720 E. North Lane Unit 1.

14 11. The Wilkeys acknowledged that two of Devau's employees drive to the unit
15 to work. One employee works from 9:30 to 4:00 Monday through Thursday, and the
16 second from 9:30 to 5:00 Monday through Friday. At times, these employees park on
17 Pointe Tapatio's streets.

18 12. Ms. Wilkey acknowledged that they consider the unit to be an office.

19 13. Devau does not have clients or customer come to the unit to conduct
20 business.

21 14. Devau began conducting business in the unit in late 2009. At that time they
22 moved from a commercial location to the unit.

23 15. The Wilkeys assert that property manager Howard Flisser told them they
24 could move the business in, but they acknowledged that they had nothing in writing to
25 confirm that, and the evidence shows that neither had actually talked to Mr. Flisser to
26 confirm that this was true.

27 16. Mr. Wilkey testified that he knew Devau had permission to move into the
28 unit because considering the nature of the business (processing payroll) it would be too
29 risky to move without that permission and his father would not have moved Devau in
30 without permission.

1 17. Ms. Wilkey testified to the effect that in 2009, she asked her husband if
2 they could operate the business from the unit, her husband asked a salesperson who
3 then asked Mr. Flisser, and it came back that we could.

4 18. Ms. Duistermars testified that she and Pointe Tapatio's attorney were
5 talking to Mr. Flisser a few days before the hearing, and he said he could not recall
6 giving permission for the Wilkeys to operate the business from the unit. She also
7 testified that Mr. Flisser had volunteered that he never gave permission for Devau to
8 operate out of the unit, and that Mr. Flisser had spoken to the issue twice during their
9 conversation.

10 19. Ms. Duistermars also testified that Mr. Flisser indicated that the Wilkeys
11 had asked about bringing the issue up at a Board meeting in April 2016, but Mr. Wilkey
12 testified that the issue they intended to raise at that meeting was unrelated to their
13 business.

14 20. According to Ms. Duistermars, Mr. Flisser does not have authority to give
15 permission for a resident to operate a business out of her unit, but rather only the Board
16 can do so.

17 21. Pointe Tapatio does allow residents to operate some types of businesses
18 out of their units; examples are telecommuting and teaching on-line classes. These
19 residents do not require permission from the Board.

20 22. Mr. Wilkey testified that he considers the unit to be one of his two primary
21 residences. He was asked first by his attorney and then by Pointe Tapatio's attorney
22 how often he stayed there, but he did not provide a responsive answer in either case.

23 23. Ms. Duistermars acknowledged that she was unaware of any complaints
24 against the Wilkeys regarding traffic, parking or noise, and that it was likely that she
25 would know if any complaints had been filed. But she also testified that the Board
26 became aware that the Wilkeys were operating a business from their unit when a
27 resident brought the issue to its attention.

28 24. Pointe Tapatio requests that the Wilkeys be ordered to abide by the
29 CC&Rs, that a civil penalty be imposed, and that its filing fee be refunded.

30 **CONCLUSIONS OF LAW**

1 1. The Department of Real Estate has authority over this matter. ARIZ. REV.
2 STAT. Title 32, Ch. 20, Art. 11.

3 2. At an administrative hearing, the party asserting a claim, right, entitlement,
4 or affirmative defense has the burden of proof, and the standard of proof on all issues in
5 this matter is that of a preponderance of the evidence. ARIZ. ADMIN. CODE § R2-19-119.

6 3. A preponderance of the evidence is:

7 The greater weight of the evidence, not necessarily established
8 by the greater number of witnesses testifying to a fact but by
9 evidence that has the most convincing force; superior
10 evidentiary weight that, though not sufficient to free the mind
11 wholly from all reasonable doubt, is still sufficient to incline a
12 fair and impartial mind to one side of the issue rather than the
13 other.

14 BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

15 4. The CC&Rs are a contract between the parties and the parties are
16 required to comply with its terms. *See Johnson v. The Pointe Community Association*,
17 205 Ariz. 485, 73 P.3d 616 (App. 2003).

18 5. In Arizona, when a restrictive covenant is unambiguous, it is enforced to
19 give effect to the intent of the parties. *See Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9,
20 125 P.3d 373, 376 (2006); *see also Grubb & Ellis Management Services, Inc. v. 407417*
21 *B.C., L.L.C.*, 213 Ariz. 83, 138 P.3d 1210 (App. 2006)(the tribunal must give effect to a
22 contract's clear and unambiguous terms).

23 6. The preponderance of the evidence shows that the Wilkeys are operating
24 a business from their unit.

25 7. The Wilkeys acknowledge that two of Devau's employees are driving to
26 their unit Monday through Thursday and at times parking on the street, and that one
27 employee also does so on Fridays. As such, the Wilkeys' business is creating both
28 traffic and parking. CC&R Article 3, section 3.1 clearly and unambiguously prohibits the
29 operation of businesses in the residences if those businesses create traffic or parking.

30 8. There is no requirement that the parking or traffic cause any other violation
of the CC&Rs, and so the fact that Pointe Tapatio has not alleged any other violations is
of little or no probative value.

 9. The Wilkeys are in violation of CC&R Article 3, section 3.1.

10. If a violation of the planned community documents is found to exist:

The administrative law judge may order any party to abide by the statute, condominium documents, community documents or contract provision at issue and may levy a civil penalty on the basis of each violation.... If the petitioner prevails, the administrative law judge shall order the respondent to pay to the petitioner the filing fee required by section 32-2199.01.

ARIZ. REV. STAT. § 32-2199.02

11. Pointe Tapatio requests that its filing fee be refunded but cites no authority showing that this is within the tribunal's authority, so that request is denied.

12. Considering that CC&Rs Article 3, section 3.1 unambiguously prohibits businesses that create traffic or parking, and that the Wilkeys do not dispute that two employees of Devau have been driving to their unit to conduct business and at times are parking on the street, a civil penalty \$500.00 is appropriate.

ORDER

IT IS ORDERED that within thirty-five days of the effective date of the Order entered in this matter, Respondent Layne C. Wilkey and Devin E. Wilkey must comply with CC&R Article 3, section 3.1 by ceasing business operations at 720 E. North Lane, Unit 1 (Lot 50), Phoenix, Arizona;

IT IS FURTHER ORDERED that within sixty days of the effective date of the Order entered in this matter, Respondent Layne C. Wilkey and Devin E. Wilkey must pay to the Department of Real Estate a civil penalty in the amount of \$500.00, and such payment shall be made by cashier's check or money order made payable to the Department.

NOTICE

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

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3 Done this day, May 7, 2019.

4
5 /s/ Thomas Shedden
6 Thomas Shedden
7 Administrative Law Judge

8 Transmitted by either mail, e-mail, or facsimile March 1, 2019 to:

9 Judy Lowe, Commissioner
10 Arizona Department of Real Estate
11 100 N. 15th Avenue, Suite 201
12 Phoenix, Arizona 85007

13 Lauren Vie, Esq.
14 Beth Mulchay, Esq.
15 Mulchay Law Firm, P.C.
16 3001 E Camelback Rd., Suite 130
17 Phoenix, AZ 85016

18 Joseph A Velez, Esq.
19 7272 E. Indian School Rd., Ste. 111
20 Scottsdale, AZ 85251-3921

21 By Felicia Del Sol
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