

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Rick and Lisa Holly,

4 Petitioners,

5
6 vs.

7 La Barranca II Homeowners Association,

8 Respondent.

No. 20F-H2019020-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

9
10
11 **HEARING DATES:** February 5, 2020, at 1:30 p.m. and February 7, 2020, at
12 8:30 a.m.

13 **APPEARANCES:** Rick and Lisa Holly ("Petitioners") were represented by Kevin
14 P. Nelson, Esq., Tiffany & Bosco; La Barranca II Homeowners Association
15 ("Respondent") was represented by Edward D. O'Brien, Esq. and Alexia Firehawk, Esq.,
16 Carpenter, Hazlewood, Delgado & Bolen, LLP.

17 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

18 **FINDINGS OF FACT**

19 **BACKGROUND AND PROCEDURE**

20 1. The Arizona Department of Real Estate ("the Department") is authorized by
21 statute to receive and to decide Petitions for Hearings from members of homeowners'
22 associations and from homeowners' associations in Arizona. Homeowners'
23 associations and their members are governed by the Chapter 16 of Title 33, the
24 Planned Communities Act, A.R.S. §§ 33-1801 to 33-1818 ("the Act").

25 2. Respondent is a homeowners' association whose members own single-family
26 houses or lots in the La Barranca II development in Oak Creek, Arizona, approximately
27 five miles north of Sedona. There are approximately 71 lots, all close to an acre, in La
28 Barranca II.

29 3. Petitioners own Lot 50 in La Barranca II and are members of Respondent.

1 4. On or about October 16, 2019, Petitioners' attorney filed a three-issue petition
2 with the Department that alleged that Respondent had violated A.R.S. §§ 33-1803, 33-
3 1811, and 33-1817 and Covenants, Conditions, and Restrictions ("CC&Rs") Articles 4.7,
4 11.2.5, 11.3, 12.9, and 12.18 in three ways, to wit: (1) Intentional delay of construction,
5 (2) Conflict of interest, and (3) Retaliatory fines.

6 5. Petitioners attached a statement to their petition that explained that it had
7 been over eleven months since they first began the process of seeking approval from
8 Respondent and its Architectural Review Committee ("ARC") for the construction of a
9 new home on Lot 50. Petitioners also explained that Respondent's Board's vice
10 president, William Bohan, and secretary, Nancy Williams, jointly owned three lots in La
11 Barranca II, including a lot that shared a boundary with Lot 50 and were blocking
12 approval of the home. Petitioners also explained that they feared retaliatory imposition
13 of fines because Respondent had imposed fines against other owners in the community
14 for what Petitioners considered to be petty offenses.

15 6. Respondent filed an answer to the petition, denying that it had engaged in the
16 conduct that Petitioners alleged or violated any statutes or CC&Rs. The Department
17 referred the petition to the Office of Administrative Hearings, an independent state
18 agency, for an evidentiary hearing.

19 7. A hearing was held on February 5, 2020, and February 7, 2020. Petitioners
20 submitted twenty exhibits and presented the testimony of three witnesses: (1) Brian
21 Bracken, a member and 50% owner of Brilar Homes, LLC ("Brilar"), the general
22 contractor that Petitioners hired to prepare plans for the home, obtain Respondent's
23 approval, and construct the home; (2) Larry E. Smith, Mr. Bracken's partner and a
24 member and owner of the other 50% of Brilar; and (3) Petitioner Mrs. Holly.
25 Respondent submitted five exhibits and presented the testimony of Mr. Bohan.

26 **RELEVANT STATUTES AND CC&Rs**

27 8. A.R.S. § 33-1803(B) provides in relevant part:

28 After notice and an opportunity to be heard, the board of
29 directors may impose reasonable monetary penalties on
30 members for violations of the declaration, bylaws and rules
of the association. . . .

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

9. A.R.S. § 33-1811 provides as follows:

If any contract, decision or other action for compensation taken by or on behalf of the board of directors would benefit any member of the board of directors or any person who is a parent, grandparent, spouse, child or sibling of a member of the board of directors or a parent or spouse of any of those persons, that member of the board of directors shall declare a conflict of interest for that issue. The member shall declare the conflict in an open meeting of the board before the board discusses or takes action on that issue and that member may then vote on that issue. Any contract entered into in violation of this section is void and unenforceable.

10. A.R.S. § 33-1817(B) provides in relevant part as follows:

Notwithstanding any provision in the community documents:

1. Membership on a design review committee, an architectural committee or a committee that performs similar functions, however denominated, for the planned community shall include at least one member of the board of directors who shall serve as chairperson of the committee.

2. For new construction of the main residential structure on a lot or for rebuilds of the main residential structure on a lot and only in a planned community that has enacted design guidelines, architectural guidelines or other similar rules, however denominated, and if the association documents permit the association to charge the member a security deposit and the association requires the member to pay a security deposit to secure completion of the member's construction project or compliance with approved plans, all of the following apply:

(a) The deposit shall be placed in a trust account with the following instructions:

(i) The cost of the trust account shall be shared equally between the association and the member.

(ii) If the construction project is abandoned, the board of directors may determine the appropriate use of any deposit monies.

(iii) Any interest earned on the refundable security deposit shall become part of the security deposit.

(b) The association or the design review committee must hold a final design approval meeting for the purpose of issuing approval of the plans, and the member or member's agent must have the opportunity to attend the meeting. If the plans are approved, the association's design review representative shall provide written acknowledgement that the approved plans, including any approved amendments, are in compliance with all rules and guidelines in effect at the time of the approval and that the refund of the deposit requires that construction be completed in accordance with those approved plans.

11. Article 4.7 of Respondent's CC&Rs concerns Rules and Regulations and provides in relevant part as follows:

The Board shall be empowered to adopt, amend or repeal such Rules and Regulations as it deems reasonable and appropriate, binding upon all Persons subject to this Declaration and governing the use and/or occupancy of the Lots, the Common Areas or any other part of the Project. . . . The Rules and Regulations shall govern such matters in furtherance of the purposes of the Association, including, without limitation, the use of the Common Areas; provided, however, that the Rules and Regulations may not discriminate among Owners and Members except as expressly provided in this Declaration, and shall not be inconsistent with the other Constituent Documents. A copy of the Rules and Regulations as they may from time to time be adopted, amended or repealed or a notice setting forth the adoption, amendment or repeal of specific portions of the Rules and Regulations shall be delivered to each Owner and Member in the same manner established in this Declaration for the delivery of notices. Upon completion of the notice requirements, the Rules and Regulations shall have the same force and effect as if set forth in and a part of this Declaration, and shall be binding on the Owners and Members, and all other Persons having any interest in, or making any use of, the Property, whether or not actually received thereby. The Rules and Regulations, as adopted, amended or repealed, shall be available at the principal

office of the Association to each Owner, Member or other Person reasonably entitled thereto, upon request. . . .¹

12. Article 11 of Respondent's CC&Rs concerns Architectural and Landscape Control. Article 11.2.5 provides as follows:

[The ARC shall establish Design Guidelines, which may include] [s]uch other limitations and restrictions as the Board or [ARC] in its reasonable discretion shall adopt, including without limitation, the regulation of all landscaping (including without limitation absolute prohibition of certain types of landscaping, trees and plants) and/or removal of same, prohibition of removal of any landscaping or alteration of any land, construction, reconstruction, exterior additions, (including exterior lighting) change or alteration to or maintenance of any building, structure, wall or fence, including without limitation, the nature, kind, shape, architectural style, height, materials, exterior color, surface texture, and location of any such Improvement.²

13. Article 11.3 of Respondent's CC&Rs concerns general provisions for the ARC, including that it may assess reasonable fees in connection with its review of plans, may delegate plan review responsibilities to architectural consultants, except for final review, and shall approve or disapprove any plans submitted to it in accordance with the Design Guidelines.³

14. Article 12.9 of Respondent's CC&Rs concerns garbage and provides that "[n]o garbage or trash shall be kept, maintained or contained in any Lot so as to be visible for another Lot or Common Areas. No incinerators shall be kept or maintained in any Lot."⁴

15. Article 12 of Respondent's CC&Rs concerns Use and Occupancy. Article 12.18 concerns Enforcement and provides in relevant part as follows:

The Association or its authorized agents may enter any Lot on which a violation of these restrictions exists and may correct such violation at the expense of the Owner of such

¹ Petitioner's Exhibit 1 at 10-11.

² Petitioners' Exhibit 1 at 25.

³ See Petitioner's Exhibit 1 at 26.

⁴ Petitioner's Exhibit 1 at 29.

1 Lot. Such expenses, and such fines as may be imposed
2 pursuant to the Constituent Documents, shall be an
3 Enforcement Assessment secured by a lien upon such Lot
4 enforceable in accordance with the provisions of Section 6
5 hereof. All remedies described in the Constituent
6 Documents, and all other rights and remedies available at
law or equity shall be available in the event of any breach by
any Owner, Member, Occupant or other Person of any
provision of this Section 12.

7 HEARING EVIDENCE

8 16. On April 11, 2018, Petitioners purchased Lot 50. Mrs. Holly testified that the
9 La Barranca II community was beautiful. She knew that La Barranca II had a
10 homeowners' association when Petitioners purchased Lot 50.

11 17. Mr. Bohan and Ms. Williams own Lot 49, which is vacant and shares a
12 boundary with Lot 50. They also own Lot 48, on the other side of Lot 49, on which they
13 have constructed their 2-story residence.

14 18. Mrs. Holly testified that she can see the roof of Mr. Bohan and Ms. Williams'
15 house from Lot 50. Mr. Bohan testified that he does not believe that he will be able to
16 see any part of Petitioners' one-story residence on Lot 50 after it is constructed from his
17 residence because the lots are heavily wooded.

18 19. During the summer of 2018, Petitioners hired Brilar to prepare plans, obtain
19 Respondent's approval, and construct the home because it had built two other homes in
20 La Barranca II. Mrs. Holly testified that, Brilar's principals told her that, based on their
21 prior experience in La Barranca II, after plans were submitted to ARC, it would take
22 about 3 months for ARC to review and approve the plans, 4-6 weeks for Petitioners to
23 obtain permits, and 6 months for Brilar to construct the home.

24 20. Mrs. Holly testified that, relying on Brilar's timeline, Petitioners placed their
25 former home in Peoria on the market and sold the house at the end of July 2019. Since
26 that time, Petitioners have had to rent another house because Brilar has not completed
27 construction of their new home in La Barranca II.

28 21. Respondent's management company is Hoamco. Hoamco's employees
29 assigned to its Architectural Department for Respondent during the relevant time

1 periods were Luke Hyde and, then, Josh Hall. Hoamco also retains registered architect,
2 Neil True, to act as a consultant in reviewing plans.

3 22. Mr. Bohan testified that members and contractors submit plans to Hoamco,
4 Hoamco distributes the documents to ARC members for their review, and ARC
5 schedules a meeting to consider whether the plans meet Respondent's Architectural
6 Guidelines and Standards ("the Guidelines"). Mr. Bohan testified that the Guidelines
7 provide for a 4-step process for getting ARC's approval for plans, with the first step
8 being optional:

9 The owners or their architect may meet with ARC and/or its consultant to
10 discuss "overall design concepts" and to obtain "guidance prior to initiating
11 preliminary design."⁵ Mr. Bohan testified that this step is not required and
12 that many owners request preliminary review and never take any other
13 steps to build the house or other improvement.

14 A preliminary plan submittal, which must include a preliminary site plan,
15 including lot boundaries and dimensions, utilities, building location, existing
16 grades, paving, and exterior lighting, a preliminary landscape plan, a
17 preliminary roof plan and floor plans, preliminary roof plans, preliminary
18 elevations, preliminary drainage report, slope analysis, a completed design
19 review application and construction agreement, and fees that are paid to
20 the consultant.⁶ Mr. Bohan testified that the preliminary plan submittal was
21 the beginning of the substantive ARC design review process. The fees
22 must paid at that time to Hoamco's architect consultant.

23 A preliminary plan review. The Guidelines provide that "[u]pon receipt of
24 the complete Preliminary Design Submittal, [ARC] and the Consultant will
25 review the plans and *promptly* respond. If [ARC] has not issued its
26 Preliminary Approval and a re-submittal is necessary, the response time
27 will be longer."⁷ Mr. Bohan testified that the requirement of a prompt

28 ⁵ Petitioners' Exhibit 20 at 5 (§ 3.1.1).

29 ⁶ Petitioners' Exhibit 20 at 5-6 (§ 3.1.2).

30 ⁷ Petitioners' Exhibit 20 at 6 (§ 3.1.3) (emphasis added).

1 response to a complete preliminary design submittal was the only deadline
2 in the CC&Rs or the Guidelines for ARC to take action.

3 The final plan submittal. The final plan submittal had to be submitted within
4 nine months after ARC's or Hoamco's written notification or approval of the
5 preliminary plans. The final plan submittal included all the documents
6 required for the preliminary plan submittal, as well as additional documents,
7 such as a "complete set containing samples of all exterior materials and
8 colors and window and glass specifications," along with a "detailed list of all
9 appropriate colors and materials" to accompany the physical samples and a
10 refundable construction deposit in the amount of \$20,000.00.⁸ Upon receipt
11 of the final plan submittal, the consultant and ARC would conduct a final
12 plan review meeting to which the owners or their agents would be invited.⁹

13 23. On or about October 30, 2018, Brilar submitted predesign documents on
14 Petitioners' behalf to Hoamco, which Hoamco forwarded to ARC members for their
15 review. Mr. Bohan testified that other ARC members called him and expressed their
16 concern that the predesign documents did not show that the planned construction met
17 Respondent's Guidelines.

18 24. The ARC met on November 9, 2018, to review Brilar's predesign
19 documents. Mr. Bracken and Mr. Smith attended the meeting, as well as Mr. Hyde,
20 Hoamco's Architectural Department Manager at the time. Mr. Bohan testified that the
21 plans did not meet the Guidelines because computer assisted design ("CAD") drawings
22 did not include dimensions or window treatments, and the plans included a dog run that
23 was outside the building envelope. The October 30, 2018 plans were not submitted into
24 evidence. The minutes of the November 9, 2018 meeting provided in relevant part as
25 follows:

26 II. New Business

27 a. Review of Law Barranca II Architectural Standards and
28 Design Guidelines Philosophy

29 ⁸ Petitioners' Exhibit 20 at 6-7 (§ 3.1.4).

30 ⁹ Petitioners' Exhibit 20 at 7 (§ 3.1.5).

Discussed how the Philosophy of the Guidelines and Brilar Homes design and construction practices could be more closely aligned

III. Old Business

a. Review of Preliminary Plans and Building Lot 50
Discussed ways that the preliminary elevations and site plan could be revised to more closely meet the requirements of the Design Guidelines. [Brilar] Homes will be resubmitting the elevations and site plans with revisions¹⁰

25. On December 8, 2018, Brilar submitted to Mr. Hyde and Mr. Hall at Hoamco CAD drawings of the exterior of the proposed home and the site plan, which Mr. Bracken stated included changes to address the ARC's concerns. The CAD drawings do not include any dimensions.¹¹

26. Mr. Bohan testified that the ARC faced a dilemma because neither of the plans that Brilar had submitted met the Guidelines. Although the ARC was trying to help Brilar, it did not appear that Mr. Bracken and Mr. Smith understood the Guidelines.

27. On January 14, 2019, certain members of ARC, including Mr. Bohan, as well as a Hoamco representative and Ms. Williams met with Mr. Smith and Mr. Bracken. Mr. Bohan testified that he and the others spent several hours with Mr. Bracken and Mr. Smith, trying to explain the Guidelines. He gave them photographs of homes that complied with the Guidelines to illustrate his remarks. Mr. Bohan testified that it was a good meeting and that Mr. Bracken and Mr. Smith thanked him after the meeting, although he made no promises about ARC's eventual approval of the revised plans. Mr. Bohan testified that he has never before held a meeting like that to help a home builder and that he hoped that he never would have to hold such a meeting again. It is not ARC's job to help an owner design a home that complies with Respondent's Guidelines, only to review plans that are submitted for compliance.

28. Mr. Bohan testified that because ARC did not have a quorum at the January 14, 2019 meeting, no minutes were prepared, although the minutes of the January 2019

¹⁰ Respondent's Exhibit 2.

¹¹ See Petitioner's Exhibit 7.

1 Board meeting referred to the meeting because he discussed it at the Board meeting.
2 Mrs. Holly acknowledged that Mr. Bracken or Mr. Smith told her about the January 14,
3 2019 meeting.

4 29. On January 23, 2019, Respondent adopted updated Guidelines, which
5 Petitioners submitted. Mr. Bohan testified that the main change between the updated
6 Guidelines that were in effect when Brilar submitted the preliminary plans for Petitioners'
7 home were the definition and requirements for a minor home addition, which was less
8 than 250 square feet, and a major home addition. Mr. Bohan testified that the changes
9 to the updated January 23, 2019 Guidelines did not affect the plans or construction for
10 Petitioners' home.

11 30. Mr. Bohan testified that Hoamco sends updated rules to its members at the
12 email address that they provide when the purchase a lot. In addition, members may
13 obtain minutes of meetings at which rules are changed and may view rules at the
14 website. Mr. Bohan testified that Respondent never gave the wrong Guidelines to
15 Petitioners.

16 31. Complainants did not submit the Guidelines in effect in November 2018,
17 although Mrs. Holly testified that Brilar told her that Respondent had only required that
18 owners pay a \$5,000.00 construction deposit for the two homes that it had previously
19 built in La Barranca II. Mr. Bracken and Mrs. Holly testified that they did not receive the
20 updated January 23, 2019 Guidelines until June 20, 2019, when Mr. Hall attached them
21 to an email.¹² Mrs. Holly testified that she looked on Respondent's website but that the
22 website was not current.

23 32. Although Mr. Bracken testified that changes to the updated January 23,
24 2019 Guidelines increased the cost of Petitioners' home by \$30,000.00, neither he, Mr.
25 Smith, nor Mrs. Holly testified about specifically what the amended Guidelines required
26 Brilar to change in its design of Petitioners' home.

27 33. On or about April 9, 2019, Petitioners submitted a Design Review
28 Application and Construction Agreement to Hoamco.¹³

29 ¹² See Petitioners' Exhibit 15.

30 ¹³ See Petitioners' Exhibit 2.

1 34. Mr. Bohan testified that this was the second step set forth in the Guidelines.
2 Mr. Bohan testified that when ARC reviewed the submissions, its members were
3 pleased because Brilar seemed to have heeded the advice from the January 14, 2019
4 meeting in the plans, which were dated as having been prepared during mid-March
5 2019.

6 35. Mr. Bohan testified that Brilar requested a preliminary plan submittal
7 meeting. On April 18, 2019, the ARC met with Mr. Hall of Hoamco to consider the
8 revised plans. The minutes reflect that after reviewing the proposed plans, ARC
9 required eight revisions or additional clarification or material samples. The final bullet
10 point noted that "Josh Hall had additional items on the marked-up drawings." The
11 minutes also reflect that after the ARC discussed the plans, Mr. Bracken and Mr. Smith
12 joined the meeting.¹⁴

13 36. Mr. Bracken testified that he only remembered the ARC making six changes
14 to the plans.

15 37. On May 6, 2019, Mr. Hall sent an email to Petitioners and Mr. Bracken, to
16 which he attached an April 26, 2019 letter from Respondent, signed by Mr. Hall and Mr.
17 Bohan, providing a total of 16 comments to the plans. The letter stated that "[o]verall,
18 the [ARC] is pleased with the design of the home, and agrees that it will be a welcomed
19 addition to the community."¹⁵

20 38. Mrs. Holly and Mr. Bracken testified that they did not receive the letter until
21 May 6, 2019.

22 39. Mr. Bohan testified that the additional comments came from the review by
23 Hoamco's consultant architect, Neil True, to whom Petitioners had paid a \$2,500.00 fee.
24 Mr. Bohan testified that the April 26, 2019 letter did not change ARC's conditional
25 preliminary approval of the plans. The next step was for Petitioners to submit final plans
26 to ARC.

28
29 ¹⁴ Respondent's Exhibit 3.

30 ¹⁵ Petitioners' Exhibit 12.

1 40. Mr. Bohan testified that, in early July 2019, Petitioners submitted a Design
2 Review Application and Construction Agreement,¹⁶ which was the third step of the
3 process.

4 41. On July 4, 2019, Mrs. Holly sent an email to Mr. Hall at Hoamco, stating that
5 she had "wet signatures" on all the documents and that she wanted to know when ARC
6 would be available to review the plans. On July 8, 2019, Mr. Hall responded that he had
7 sent the documents to ARC members and was waiting for a response. On July 10,
8 2019, Mrs. Holly sent an email to Mr. Hall, asking if he had received any news. Mr. Hall
9 responded that they would not be able to schedule a meeting on the following Thursday
10 because some ARC members were out of town, which would prevent a quorum.¹⁷

11 42. On July 15, 2019, ARC approved Petitioners' final plans, with 6 stipulations.
12 In a letter dated July 19, 2019, Mr. Hall and Mr. Bohan informed Petitioners of ARC's
13 approval and advised them to contact Mr. Hall to arrange a Pre-Construction Site
14 Meeting, at which the location of the property boundaries, building envelope, and
15 footings would be demonstrated. Mr. Hall also advised Petitioners that a \$20,000.00
16 refundable construction deposit was required at the time of the pre-construction
17 meeting.¹⁸

18 43. Mr. Bohan testified that he checked Yavapai County's records and found
19 that Petitioners applied for a building permit on August 16, 2019, and that the building
20 permit was approved on September 16, 2019. Mr. Bohan testified that he waited to
21 hear from Brilar before scheduling the preconstruction meeting. A preconstruction site
22 meeting was scheduled on September 26, 2019.

23 44. Mr. Bracken testified that he heard on the morning of the meeting that
24 someone had removed the pins that the surveyor had used to mark the four corners of
25 the location of the house the day before the September 26, 2019 preconstruction
26 meeting.

27
28 ¹⁶ See Respondent's Exhibit 4. The document that Respondent submitted was signed by Petitioners, who
provided a date of 6/22/2019 for their signatures.

29 ¹⁷ See Petitioners' Exhibit 4.

30 ¹⁸ See Respondent's Exhibit 5.

1 45. Petitioners submitted a police report to the Yavapai County Sheriff's Office
2 that Mr. Smith made on September 26, 2019, regarding the removal of the pins.¹⁹ No
3 evidence was submitted at the hearing on who removed the pins, although Mrs. Holly
4 stated that no children lived La Barranca II.

5 46. The members of ARC, Mr. Hall, Mr. Smith, and Mr. Bracken met on Lot 50 at
6 1:00 p.m. on September 26, 2019, on Lot 50. The minutes of the meeting noted the
7 missing pins and that Mr. Bracken requested that ARC approve the location of the
8 dumpster on the street on Lost Eden Circle. The minutes concluded that "[b]ecause the
9 location of the house was not indicated on the lot and the trees to be saved were not
10 marked so that placement of the construction fence could be specified, the ARC did not
11 give approval for construction to begin."²⁰ Mr. Bohan testified that the ball was in Brilar's
12 court to show that they were ready to begin construction.

13 47. Mr. Bohan explained that the area inside the construction fence would be
14 stripped of all vegetation except for large trees and the Respondent's Guidelines require
15 as much native vegetation as possible to be saved.

16 48. The minutes also reflected that it was later learned that the construction
17 deposit had not been paid. Mr. Bohan testified that non-payment of the deposit would
18 have provided a second reason for ARC to not approve Brilar beginning construction.

19 49. Petitioners paid the \$20,000.00 construction deposit on October 4, 2019.

20 50. Mr. Bohan testified that at the September 26, 2019 meeting, Mr. Smith
21 insisted that Brilar be allowed to place the construction dumpster on the street. Mr.
22 Bohan testified that all the streets in La Barranca II are private streets that may not meet
23 county ordinances regarding width. Lost Eden Circle is one of the narrowest streets,
24 being only 20' wide. A typical construction dumpster is 8' wide, 22' long, and 8' high.
25 Mr. Bohan was concerned about ambulance access because in the past, a resident who
26 lived on Lost Eden Circle had required emergency transport. Mr. Bohan testified that he
27 told Mr. Bracken and Mr. Smith that he would have to think about the proposed

28
29 ¹⁹ See Petitioner's Exhibit 6.

30 ²⁰ Petitioners' Exhibit 19.

1 placement of the dumpster, but that he should have said he would investigate the
2 matter.

3 51. Mr. Bohan testified that on October 1, 2019, he called John Davis, the
4 Sedona District Fire Marshall, about whether Lost Eden Circle was too narrow to place
5 a dumpster on the street. On October 8, 2019, he spoke to someone at Patriot about
6 whether dump trucks would be able to access the site. Finally, Mrs. Holly suggested to
7 him that a smaller dumpster that would fit inside the construction fence be used.

8 52. Mr. Bohan testified that in mid-October 2019, Mr. Bracken contacted
9 Hoamco about rescheduling the pre-construction meeting.

10 53. A pre-construction meeting was held on October 29, 2019. The ARC
11 approved the placement of the house and construction fence. Mr. Bohan testified that
12 construction began on October 30, 2019. On February 3, 2020, he saw a cement truck
13 with a big boom at Lot 50, pouring the slab.

14 54. Petitioners argued that Respondent only approved construction because
15 they had filed the petition with the Department on October 16, 2019. Mrs. Holly testified
16 that the ARC required changes to the plans, then required the changes to be taken out
17 and that, after Respondent communicated requirements, it added more for approval.
18 Mrs. Holly testified that she believes that Mr. Bohan and Ms. Williams did not like the
19 style of Petitioners' home and tried to prevent the house from being constructed. Mrs.
20 Holly testified that the ARC was not responsive. By July 4, 2019, she was getting
21 frustrated with the process, yet she was told that the ARC would not have a quorum.
22 Mrs. Holly testified that she did not feel that Respondent or the ARC had treated her
23 fairly.

24 55. Respondent has not assessed any fines or penalties against Petitioners or
25 Bilar, although it has issued two warnings for Brilar's crew not parking in the designated
26 area and a piece of metal culvert in the swale, which had sharp edges and could have
27 hurt someone.
28
29
30

CONCLUSIONS OF LAW

1
2 1. A.R.S. § 32-2199(B) permits an owner or a planned community organization
3 to file a petition with the Department for a hearing concerning violations of planned
4 community documents under the authority Title 33, Chapter 16.²¹ Such petitions will be
5 heard before the Office of Administrative Hearings, an independent state agency.

6 2. Petitioners bear the burden of proof to establish that Respondent violated the
7 Act or Respondent's CC&Rs by a preponderance of the evidence.²² Respondent bears
8 the burden to establish affirmative defenses by the same evidentiary standard.²³

9 3. "A preponderance of the evidence is such proof as convinces the trier of fact
10 that the contention is more probably true than not."²⁴ A preponderance of the evidence is
11 "[t]he greater weight of the evidence, not necessarily established by the greater number of
12 witnesses testifying to a fact but by evidence that has the most convincing force; superior
13 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
14 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather
15 than the other."²⁵

16 4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give
17 effect to the intent of the parties.²⁶ "Restrictive covenants must be construed as a whole
18 and interpreted in view of their underlying purposes, giving effect to all provisions
19 contained therein."²⁷

20 5. Petitioners acknowledge that Respondent has not assessed any fines or
21 penalties against them for any reason. Any prospective prohibition on fines would be
22 based on nothing but speculation. Therefore, Petitioners have not established that
23 Respondent violated A.R.S. § 33-1803(B) or Articles 11.3 or 12 by assessing retaliatory

24 ²¹ See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce
25 the development's CC&Rs.

26 ²² 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
27 Ariz. 369, 372, 249 P.2d 837 (1952).

28 ²³ See A.A.C. R2-19-119(B)(2).

29 ²⁴ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

30 ²⁵ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

²⁶ See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

²⁷ *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 fines or penalties against Petitioners. If in the future Respondent assesses fines
2 against Petitioners that they feel are retaliatory, they may file another petition with the
3 Department.

4 6. Although Mr. Bohan and Ms. Williams own land that is next to and contiguous
5 to Lot 50, Petitioners have not submitted any evidence that Mr. Bohan and Ms Williams
6 bear any animus toward Petitioners or have any personal negative opinion about the
7 design of their house. They offer only suppositions and their inferences about why it
8 has taken so long to begin construction on their home. In any homeowners'
9 association, but especially In a small development having only 71 lots, the persons who
10 volunteer to serve on homeowners' associations' boards and ARCs will necessarily be
11 regulating their neighbors. Petitioners have not established that Mr. Bohan had an
12 undeclared conflict of interest that should have prevented him from sitting on the ARC
13 that reviewed Petitioners' plans under A.R.S. § 33-1811 or that he discriminated against
14 Petitioners under CC&R article 4.7 in the ARC's various reviews of Petitioners' plans.

15 7. Mrs. Holly candidly testified that Petitioners' expectations about how long it
16 would take to build their house was based on Brilar's principles' estimates, not anything
17 in statutes or Respondent's CC&Rs or anything said by anyone associated with
18 Respondent. Petitioners did not submit any evidence that various changes to the house
19 that the ARC required were not based on the Guidelines or that ARC's responses to
20 Brilar's plan submittals were not based on valid considerations. On this record, it
21 appears that Hoamco and the ARC were reasonably responsive to Petitioners' and
22 Brilar's requests and that any delay in construction appears more likely based on Brilar
23 principal's imperfect understanding of the Guidelines' requirements. Because
24 Petitioners have not established any undue delay attributable to Respondent or that the
25 various changes to plans that the ARC required were not based on the Guidelines,
26 Petitioners have not established that Respondent unreasonably delayed the
27 construction of their home on Lot 50 under A.R.S. § 33-1817(B) or CC&R Article 11.2.5.

28 8. Because Petitioners have not established by a preponderance of the
29 evidence that Respondent violated any statute or CC&R, their petition must be
30 dismissed.

RECOMMENDED ORDER

IT IS ORDERED that Petitioners Rick and Lisa Holly's petition against Respondent La Barranca II Homeowners Association is dismissed.

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, February 14, 2020.

/s/ Diane Mihalsky
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate
100 N. 15th Avenue, Suite 201
Phoenix, AZ 85007

Edward D. O'Brien, Esq.
Carpenter, Hazlewood, Delgado &
Bolen LLP
1400 E Southern Ave., Suite 400
Tempe, AZ 85282-5691

Kevin P. Nelson, Esq.
Tiffany and Bosco
Seventh Floor Camelback, Esplanade II
2525 E Camelback Rd
Phoenix, AZ 85016

By: fds