

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Jennie Bennett,
4 Petitioner,

5 vs.

6 Catalina Del Rey Homeowners Association,
7 Respondent.

No. 20F-H2019002-REL-RHG

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARING: February 7, 2020.

APPEARANCES: Maxwell Riddiough, attorney, appeared on behalf of Jennie Bennett, Petitioner. Nathan Tennyson, attorney, appeared on behalf of Catalina Del Rey Homeowners Association, Respondent.

ADMINISTRATIVE LAW JUDGE: Antara Nath Rivera.

12 **FINDINGS OF FACT**

13 1. On or about July 10, 2019, Petitioner filed a Homeowners Association
14 (HOA) Dispute Process Petition (Petition) with the Arizona Department of Real Estate
15 (Department). Petitioner asserted a violation of Sections 12(c) and 12(h)(1) of the
16 Declaration of Covenants, Conditions, Restrictions and Easements (CC&Rs) by
17 Respondent c/o Cadden Community Management.

18 2. On or about August 19, 2019, the Department issued a Notice of Hearing in
19 which it set forth the issue for hearing as follows:

20 The Petitioner alleges that Catalina Del Rey Homeowners
21 Association violated community documents CC&Rs Sections 12(c)
22 and 12(h)(1) in a single-issue petition.

23 3. At the hearing, Petitioner presented nine exhibits. Respondent presented
24 four exhibits, including photos, and presented the testimony of Vanessa Lubinsky,
25 Manager for Respondent.

26 **HEARING EVIDENCE**

27 4. At the hearing, Petitioner testified that she lived at her residence for 20
28 years.

29 5. On or about March 3, 2019, Petitioner experienced a sewage overflow due
30 to malfunctioning back flow valves. When Petitioner informed her neighbor of the issue,

1 he told her that Respondent was responsible for paying for any repairs. When Petitioner
2 told Respondent about the sewage issue, Respondent informed her that Respondent's
3 Sewer Maintenance Policy (Policy)¹ that had been in place was rescinded on February 13,
4 2019.

5 6. Petitioner was not notified of the rescission. Despite knowledge of the
6 rescission, Petitioner got an estimate for the repair and presented it to Respondent at the
7 board meeting. Respondent did not address Petitioner's concerns at the March, April, or
8 May board meetings.

9 7. On or about May 22, 2019, Respondent finally responded to Petitioner after
10 Petitioner's attorney sent a letter to Respondent.²

11 8. On an unspecified date, Petitioner obtained 97 signatures on a Grassroots
12 petition which stated, "My shower backed up with feces March 3-my plumber said my flap
13 on the back flow was gone-needed to be replace. JC Niles informed me that the HOA
14 covered this-I was told by Daniel at Cadden that the Board had rescinded the sewer policy
15 Feb 13th-No written notice had gone out. I am asking to be covered because of the 2 week
16 time frame and no notice. I agree with being covered by the HOA for the flap."³

17 9. Petitioner argued that the Policy indicated that all issues must be reported to
18 Respondent. Petitioner opined that she reported it to Respondent accordingly and that
19 she should be compensated for her repair of the backflow flap based on the estimates she
20 submitted. Petitioner did not have any additional overflow after March 3, 2019, but lived in
21 fear of a future overflow.

22 10. At the hearing, Ms. Lubinsky testified that she was the community manager
23 at Cadden. Ms. Lubinsky explained that Petitioner experienced a plumbing issue that was
24 Petitioner's responsibility because it was on Petitioner's private property.

25 11. The plat map specified all property lines, including Petitioner's property
26 lines. All areas inside of the lines were considered Petitioner's responsibility. In this case,
27 the backflow flap was located inside the lines and on Petitioner's private property, thus

28 ¹ See Petitioner's Exhibit #2.

29 ² Petitioner did not testify how Respondent answered the issue.

30 ³ See Petitioner's Exhibit #5.

1 was covered under Section 15 of the CC&R's. Section 15 provided that Petitioner was
2 responsible for the maintenance of electricity, plumbing, and other utilities, similar to that
3 of single family residences.

4 12. The Policy was adopted March 2017. The purpose of the Policy was to
5 outline the process with respect to sewage maintenance and issues and addressed
6 Sections 12(c), 12(h)(1), and 15. After Respondent received additional legal guidance, it
7 was determined that the backflow flaps were located within the homeowners' units and on
8 private property. Thus, the backflow flap fell under the purview of Section 15 and was the
9 homeowner's responsibility. As a result, the Policy was rescinded on February 13, 2019.

10 13. Ms. Lubinsky clarified that the rescission did not require a vote because it
11 was not an amendment to the CC&R's. Additionally, notice of the rescission was issued to
12 the homeowners via email and postal mail in the form of postcards.

13 14. The photos presented by Respondent illustrated that the backflow flap was
14 on Petitioner's property. In fact, it was next to Petitioner's walk up to her front door. It was
15 not on common elements. Ms. Lubinsky opined that the backflow flap was a plumbing
16 issue, not a sewer issue, because it was located on Petitioner's private property.

17 **CONCLUSIONS OF LAW**

18 1. Arizona statute permits an owner or a planned community organization to
19 file a petition with the Department for a hearing concerning violations of planned
20 community documents or violations of statutes that regulate planned communities.
21 A.R.S. § 32-2199 et seq. That statute provides that such petitions will be heard before the
22 Office of Administrative Hearings.

23 2. Petitioner bears the burden of proof to establish that Respondent committed
24 the alleged violations by a preponderance of the evidence.⁴ Respondent bears the burden
25 to establish affirmative defenses by the same evidentiary standard.⁵

26 3. "A preponderance of the evidence is such proof as convinces the trier of fact
27 that the contention is more probably true than not."⁶ A preponderance of the evidence is

28 ⁴ 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).

29 ⁵ See A.A.C. R2-19-119(B)(2).

30 ⁶ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 “[t]he greater weight of the evidence, not necessarily established by the greater number of
2 witnesses testifying to a fact but by evidence that has the most convincing force; superior
3 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
4 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
5 the other.”⁷

6 4. Section 12(c) of the CC&Rs, provides that:

7 The Association shall maintain and landscape all front and side
8 yards open to the street, and shall maintain sewer lines,
9 sidewalks, walkways, brick trim, streets and common recreation
10 areas. ...The words “repair or maintain” shall not be construed
11 that the Association shall repair or maintain any individual lot
12 owner’s roof or similar structure.

13 5. Section 12(h)(1) of the CC&Rs, provides that:

14 The owner or owners of each of said Lots 1 to 20, inclusive, and
15 Lots 22 to 178, inclusive, and Lot 180 shall be subject to all of the
16 provisions of the Association’s Articles of Incorporation, By-
17 Laws, Management Agreement (if any), this Declaration, as now
18 in effect or duly adopted and amended, and rules and
19 regulations adopted by the Board of Directors. Each such lot will
20 be subject to assessments and the owner thereof shall pay to the
21 Association’s assessments as follows:

22 Such lots pro rata share of the actual cost to the Association of all
23 repair, maintenance, safety and control of common elements,
24 including but not limited to maintenance of walkways, sidewalks,
25 streets and sewers, care of lawns and landscaping in common
26 areas and front and side yards of residences... .

27 6. It is undisputed that Petitioner’s backflow flap malfunctioned and caused an
28 overflow into her house. It was extremely unfortunate that Petitioner experienced such a
29 sewage overflow just after Respondent rescinded the Policy. Even though the Policy was
30 in effect almost two years before its rescission, once the Policy was rescinded,
Respondent was not obligated to share the cost of repairs.

7. The evidence showed that the backflow flap was on Petitioner’s property
near her front door. Petitioner failed to establish that the backflow flap was located within

⁷ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

1 the common elements area and within the purview of CC&R's Sections 12(c) or 12(h)(1)
2 and Respondent's responsibility.

3 8. Thus, Petitioner failed to establish by a preponderance of the evidence that
4 Respondent violated Sections 12(c) and 12(h)(1) of the CC&Rs.

5 **ORDER**

6 In view of the foregoing,

7 **IT IS ORDERED** that Petitioner Jennie Bennett's Petition be dismissed.

8 **NOTICE**

9 This administrative law judge order, having been issued as a result of a
10 rehearing, is binding on the parties. A.R.S. § 32-2199.02(B). A party wishing to
11 appeal this order must seek judicial review as prescribed by A.R.S. § 41-1092.08(H)
12 and title 12, chapter 7, article 6. Any such appeal must be filed with the superior
13 court within thirty-five days from the date when a copy of this order was served
14 upon the parties. A.R.S. § 12-904(A).

15 Done this day, February 26, 2020.

16 /s/ Antara Nath Rivera
Administrative Law Judge

17 Transmitted electronically to:
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19 Arizona Department of Real Estate

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