

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Will Schreiber,
4 Petitioner,

5 vs.

6 Cimarron Hills at McDowell Mountain
7 Homeowners Association,
8 Respondent.

No. 20F-H2019003-REL-RHG

**ADMINISTRATIVE LAW JUDGE
DECISION**

9 **HEARING:** January 30, 2020.

10 **APPEARANCES:** Aaron Green, attorney, represented Will Schreiber,
11 Complainant. Nick Nogami, attorney, represented Cimarron Hills at McDowell Mountain
12 Homeowners Association, Respondent.

13 **ADMINISTRATIVE LAW JUDGE:** Antara Nath Rivera.

14 **FINDINGS OF FACT**

15 1. Will Schreiber (Petitioner) owned a house located at 11551 East Caribbean
16 Lane, Scottsdale, Arizona, 85255. Petitioner's house belonged to the Cimarron Hills at
17 McDowell Mountain Homeowners Association (Respondent). Respondent was a
18 subdivision of a master association called McDowell Mountain Ranch Homeowners
19 Association (MMRHA).

20 2. All properties within Respondent were governed by the Declaration of
21 Covenants, Conditions, Restrictions and Easements for Cimarron Hills, as amended
22 (CC&R's) and by the Cimarron Hills Design Guidelines For Community Living (Design
23 Guidelines).

24 3. On or about July 2, 2019, Petitioner filed a single issue Homeowners
25 Association Dispute Process Petition (Petition) with the Arizona Department of Real
26 Estate (Department). Petitioner alleged a violation of the "Cimarron Hills at McDowell
27 Mountain Homeowners Association community documents, Design Guidelines HH
28 Walls/View Fences and CC&R's Article 12."

29 All errors in original.

1 4. On or about August 9, 2019, Respondent filed its "Answer Re: Case #H020-
2 19/003" (Answer). In its Answer, Respondent denied all complaint items in the Petition.
3 Respondent also filed a "Motion to Dismiss Pursuant to A.R.S. § 32-2.199.01(C)" (Motion).

4 5. On or about October 2, 2019, the Administrative Law Judge (ALJ) granted
5 Respondent's Motion.

6 6. On or about December 10, 2019, the Department issued a Notice of
7 Rehearing setting the matter for January 30, 2020, at the Office of Administrative
8 Hearings, an independent state agency.

9 7. At the rehearing, Petitioner presented six exhibits. Respondent presented
10 four exhibits and presented the testimony of Whitney Bostic.

11 **REHEARING EVIDENCE**

12 8. At the rehearing, Petitioner testified that he applied for a glass viewing fence
13 on or about January 24, 2019.

14 9. On or about March 5, 2019, Respondent sent a letter to Petitioner and
15 requested Petitioner to return the condition of the fence to a wrought iron fence.

16 10. Respondent's Design Review Committee (DRC) met with Petitioner prior to
17 their decision and explained the process to him. However, the DRC did not give Petitioner
18 verbal or written reasons for their disapproval. Petitioner believed that he should have
19 been given a reason for the denial.

20 11. On or about May 10, 2019, Respondent notified Petitioner that his appeal
21 was denied because Petitioner did not timely file his application.

22 12. Petitioner acknowledged that he installed a glass fence and then applied for
23 its approval on or about January 24, 2019. Other residents did not complain about his
24 glass fence. Petitioner testified that his neighbor did not have a wrought iron fence in
25 place. A glass fence was "just as invisible" as not having a fence. In essence, both were
26 the same concept.

27 13. Petitioner argued that Respondent's denial did not make sense especially if
28 it allowed his neighbor not to have a fence. Petitioner added that he was willing to waive
29 the Respondent's maintenance of the glass fence.
30

1 14. At the rehearing, Ms. Bostic testified that in January 2019, during a violation
2 tour, Respondent discovered that Petitioner had replaced the preexisting wrought iron
3 view fencing with glass fencing. The glass fence was not requested and was unapproved.
4 Once it was discovered, Respondent contacted the Petitioner and informed him of the
5 violation.

6 15. On or about January 24, 2019, Petitioner submitted a second variance
7 request to Respondent's DRC and sought retroactive approval for the glass fence.
8 Respondent denied Petitioner's second variance request.

9 16. Ms. Bostic explained that in November 2017, Petitioner submitted a
10 proposed architectural form to Respondent's DRC, pursuant to Respondent's governing
11 documents. The architectural form included work to his backyard but never mentioned
12 fencing. The architectural form was approved by the DRC. Petitioner proceeded with the
13 planned improvements.

14 17. Ms. Bostic testified that the governing regulation for fencing requirements
15 was located in Section GG of the DRC's Design Guidelines. The DRC's Design
16 Guidelines Section (E) addressed consistency of Respondent's designs and decisions.

17 18. Ms. Bostic opined that of the 656 homes under Respondent and of the 3800
18 homes under MMRHA none of the homes had a glass fence. Not only was that
19 inconsistent with other homes, it was a maintenance concern as well. There were safety
20 aspects of having a glass fence. In the event something happened and it were damaged,
21 or broke entirely, large amount of glass shards would fall onto an area of Respondent's
22 responsibility, causing additional liability for Respondent.

23 19. The CC&Rs require Respondent to maintain the exterior half of the viewing
24 fence, no matter what type of fence. Additionally, Respondent was responsible for the five
25 foot easement from the boundary wall. Thus, Respondent was responsible for any
26 damages that may result from the glass or any consequences thereof.

27 20. In Petitioner's case, Respondent sought approval from MMRHA.
28 Respondent and MMRHA considered several factors in making its decision, including but
29 not limited to consistency, responsibility, and maintenance. After considering those
30 factors, MMRHA denied Petitioner's request.

21. Ms. Bostic opined that based on the rules and regulations, Petitioner could either have a wrought iron fence or no fence at all to maintain conformity with the design of Respondent's community property.

CONCLUSIONS OF LAW

1. The Arizona Revised Statutes (A.R.S.) § 32-2199(B) permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of planned community documents under the authority Title 33, Chapter 16.¹

2. This matter lies with the Department's jurisdiction. The Department is authorized by statute to receive and to decide petitions for hearings from members of homeowners' associations in Arizona.

3. Petitioner bears the burden of proof to establish that Respondent violated Article 12.3 of its CC&Rs.² Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.³

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

5. Article 12.3 of the CC&Rs provides as follows:

Boundary Walls and Association Responsibility.

Any Boundary Wall which is placed on or near the boundary line of a Lot or Lots and which separates a Lot or Lots and Areas of Association Responsibility, shall be maintained, repaired and

¹ See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce the development's CC&Rs.

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

³ See A.A.C. R2-19-119(B)(2).

⁴ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁵ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

1 replaced by the Resident of the Lot or Lots pursuant to the
2 Section 12.2, except that the Association shall be responsible
3 for the repair and maintenance of the side of the Boundary Wall
4 which faces the Area of Association Responsibility. Any
5 Boundary Wall which is placed on or near the boundary line
6 between Areas of Association Responsibility and right-of-way
7 or any other property dedicated to the public, or the exterior
8 boundary of the Project, including entry walls, shall be
9 maintained, repaired and replaced by the Association.

6. Section HH of the Design Guidelines provides, in relevant part:

View Fencing

The Owner shall submit for approval from the DRC including detailed drawings or proposed changes along with photographs of the existing view fencing for view fence modifications.

Professional installation shall be used for view fence alterations.

View Fencing shall be painted in the Community approved color “MMR Brown Fence” Sherwin Williams B54W2113.

7. Section E of the Design Guidelines provides:

General Principles

The Design Guidelines promote the high quality of MMR, which enhance the attractiveness and functional utility of the community. These qualities include a harmonious relationship among structures, vegetation, topography, and overall design of the Community. The MMRCAs monitor any portion of any Lot or Parcel that is Visible to ensure consistent application of the Design Guidelines.

The DRC strives to maintain consistency of the community and of its decisions. Variances may be granted on a case by case basis, but shall remain consistent with the architectural and neighborhood characteristics. Owners shall indicate in their submittal plans any variance they may be requesting.

8. Section GG of the Design Guidelines provides, in relevant part:

1 View Decks

2 The following information must be included in the detailed
3 submittal/application to the DRC:

- 4 • Type of material to be used
- 5 • All color must match house color scheme
- 6 • Exact dimensions of the structure
- 7 • Lot dimensions and home placement on the Lot
8 (plot map)
- 9 • Aerial, side views an rear view of the deck
- 10 • Detail on the view fence, including height
- 11 • Spiral staircase design and detail, including
12 railing, if applicable (railing must match the detail
13 of the view fence)
- 14 • Full rear yard elevation view

15 9. Petitioner argued that Respondent did not give him any reason for its denial.
16 Petitioner further argued that continuity, safety, and fire barriers, were excuses made up
17 by Respondent and were not applicable in this case. Petitioner compared the safety glass
18 he used in his fence to that of the railing of the Grand Canyon Skywalk tourist attraction.
19 Petitioner's glass was inspected and approved by the Scottsdale City Inspector. Petitioner
20 further argued that the glass fence was significantly above the ground and far from any
21 trees or shrubs that required Respondent's maintenance.

22 10. Petitioner, however, failed to establish by a preponderance of the evidence
23 that he rightfully sought approval to change his existing fence, pursuant to Section HH of
24 the Design Guidelines.

25 11. Respondent established that Petitioner must submit for approval, from the
26 DRC, proposed changes to an existing fence. The Design Guidelines call for specific
27 criteria for view fencing and uniformity and consistency throughout Respondent's
28 property. Respondent asserted that the aesthetics of the glass fence were not in dispute.
29 At issue was whether Respondent's denial of Petitioner's design was reasonable because
30 Petitioner failed to abide by the regulations to get approval for the glass fence prior to
 installing it.

12. The evidence showed that Respondent was reasonable in its denial and that it did not violate any rules or regulations that would facilitate any orders or sanctions thus making the issue moot.

ORDER

IT IS ORDERED that Petitioner Will Schreiber's Petition be dismissed.

NOTICE

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

Done this day, March 16, 2020.

/s/ Antara Nath Rivera
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate

Transmitted through US Mail to:

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