

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Douglas J. Karolak,
4 Petitioner,

5 vs.

6 VVE - Casa Grande Homeowners
7 Association,
8 Respondent

No. 20F-H2020041-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARING: May 1, 2020

APPEARANCES: Petitioner Douglas J. Karolak appeared on his own behalf.
Respondent VVE – Casa Grande Homeowners Association was represented by David
Fitzgibbons.

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

13 **FINDINGS OF FACT**

14 1. On or about January 12, 2020, Petitioner Douglas J. Karolak filed a
15 Homeowners Association (HOA) Dispute Process Petition (Petition) with the Arizona
16 Department of Real Estate (Department) alleging a violation of community documents by
17 Respondent VVE – Casa Grande Homeowners Association. Petitioner indicated a single
18 issue would be presented, paid the appropriate \$500.00 filing fee, and asserted a violation
19 of A.R.S. § 33-1817(A)(1) and Part 10, Section 10.4 of the CC&Rs.

20 2. On or about October 31, 2019, the Department issued a Notice of Hearing in
21 which it set forth the issue for hearing as follows:

22 The Petitioner alleges in the petition that VVE – Casa Grande Homeowners
23 Association is in violation of A.R.S. § 33-1817(A)(1) and community document
24 CC&Rs Part 10, Section 10.4.

25 3. At hearing, Petitioner testified on his own behalf and Respondent presented
26 the testimony of CV Mathai, John Kelsey, Kristi Kelsey, William Findley, Kay Niemi, and
27 Mark Korte. Based on the evidence presented at hearing, the following occurred:

- 1 a. VVE – Casa Grande Homeowners Association is an association of lot
2 owners in Casa Grande, Arizona. Of the 56 lots in the association, 19
3 are vacant.
4 b. On or about April 30, 1999, the Restated Declaration of Covenants,
5 Conditions and Restrictions for VVE (CC&Rs) was recorded with the
6 Pinal County Recorder.
7 c. The relevant portions of the CC&Rs provided as follows:

8 3.4 Association Rules. The Board shall be empowered to adopt, amend,
9 or repeal such rules and regulations as it deems reasonable and
10 appropriate (the “Association Rules”), binding upon all Persons subject to
11 this Declaration and governing the use and/or occupancy of the Common
12 Area or any other part of the Project. The Association Rules may include the
13 establishment of a system of fines [sic] and penalties enforceable as Special
14 Assessments. The Association Rules shall govern such matters in
15 furtherance of the purposes of the Association, including, without limitation,
16 the use of the Common Area; provided, however, that the Association Rules
17 may not discriminate among Owners except as expressly provided or
18 permitted herein, and shall not be inconsistent with this Declaration, the
19 Articles or Bylaws. The Association Rules shall have the same force and
20 effect as if they were set forth in and were part of this Declaration and shall
21 be binding on the Owners and all other Persons having any interest in, or
22 making any use of, the Real Property, whether or not actually received
23 thereby. . . . The Association Rules, as adopted, amended or repealed, shall
24 be available at the principal office of the Association to Association Rules
25 and any provisions of this Declaration or the Articles or Bylaws, the
26 provisions of this Declaration, the Articles or Bylaws shall prevail.

27
28 7.43 Modification. Except where Declarant's rights are involved or
29 Declarant's consent is required, the Board may modify or waive the
30 foregoing restrictions contained in this Part 7 or otherwise restrict and
regulate the use and occupancy of the Project, the Lots and the Dwelling
Units by reasonable rules and regulations of general application adopted by
the Board from time to time which shall be incorporated into the Association
Rules.

31
32 10.4 Amendments. . . . [T]his Declaration may be amended by instrument
33 executed by the Owners of at least two-thirds (2/3) of the Lots, including or
34 incorporated within this Declaration, and such amendment shall not be
35 effective until the recording of such instrument.

- 1 d. After attempts to amend the CC&Rs through membership votes were
2 unsuccessful in 2014 and 2015, the Board determined in 2018, that it
3 would make changes to the “rules section” of the CC&Rs under the
4 authority granted to it by Section 3.4.
- 5 e. On or about October 5, 2018, the Board a document entitled Restated
6 Declaration of Covenants, Conditions and Restrictions for Val Vista
7 Estates (Amended CC&Rs) with the Pinal County Recorder.
- 8 f. The only identified changes between the original CC&Rs and the
9 Amended CC&Rs were found in Part 7, Use Restrictions. Respondent
10 acknowledged that the amendments to the CC&Rs had not been
11 approved by owners of at least two-thirds of the lots.

12 4. Petitioner argued that the Amended CC&Rs was not valid because owners
13 of at least two-thirds of the lots in the association did not approve of the amendments.
14 Petitioner asserted that the recording of the Amended CC&Rs was not equivalent to the
15 Board adopting Association Rules that may function as an amendment to the CC&Rs.

16 5. Respondent argued that because the only changes in the Amended CC&Rs
17 were of the kind that the Board was authorized to adopt, amend, or repeal as Association
18 Rules, the Amended CC&Rs were a valid exercise of the Board's authority. Respondent's
19 counsel acknowledged at one point that perhaps the Amended CC&Rs should not have
20 been recorded with the Pinal County Recorder.

21 **CONCLUSIONS OF LAW**

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

27 2. Petitioner bears the burden of proof to establish that Respondent committed
28 the alleged violations by a preponderance of the evidence. See ARIZ. REV. STAT. section
29 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74
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1 Ariz. 369, 372, 249 P.2d 837 (1952). Respondent bears the burden to establish affirmative
2 defenses by the same evidentiary standard. See A.A.C. R2-19-119(B)(2).

3 3. “A preponderance of the evidence is such proof as convinces the trier of fact
4 that the contention is more probably true than not.” MORRIS K. UDALL, ARIZONA LAW OF
5 EVIDENCE § 5 (1960). A preponderance of the evidence is “[t]he greater weight of the
6 evidence, not necessarily established by the greater number of witnesses testifying to a fact
7 but by evidence that has the most convincing force; superior evidentiary weight that, though
8 not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a
9 fair and impartial mind to one side of the issue rather than the other.” BLACK’S LAW
10 DICTIONARY at page 1220 (8th ed. 1999).

11 4. A.R.S. § 33-1817 provides, in pertinent part, as follows:

12 A. Except during the period of declarant control, or if during the period of
13 declarant control with the written consent of the declarant in each instance,
the following apply to an amendment to a declaration:

14 1. The declaration may be amended by the association, if any, or, if there is
15 no association or board, the owners of the property that is subject to the
16 declaration, by an affirmative vote or written consent of the number of
owners or eligible voters specified in the declaration, including the assent of
any individuals or entities that are specified in the declaration.

17 5. The plain reading of the CC&Rs provided that any amendments to the
18 CC&Rs must be approved by two-thirds of the owners of the lots in the Association. While
19 the Board had the authority to adopt, amend, and repeal Association Rules, which could
20 serve to completely override the recorded CC&Rs, that was a separate process than the
21 amendment process outlined in the CC&Rs. The fact that the two topics are covered as
22 separate topics in the CC&Rs leads to the conclusion that the original drafters of the
23 CC&Rs did not contemplate that the Board had the authority to, on its own, amend the
24 CC&Rs.

25 6. Because the Board did not have the authority to amend the CC&Rs without
26 approval of two-thirds of the owners of the lots, the Board acted improperly when it
27 recorded the Amended CC&Rs on October 5, 2018.

28 7. Accordingly, Petitioner established Respondent acted in violation of the
29 community documents and A.R.S. § 33-1817(A)(1).
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1 8. Petitioner requested as a remedy that the improper Amended CC&Rs be
2 rescinded.

3 9. A.R.S. § 32-2199.02, provides, in pertinent part, as follows:

4 A. The administrative law judge may order any party to abide by the statute,
5 condominium documents, community documents or contract provision at
6 issue and may levy a civil penalty on the basis of each violation.

7 10. The Administrative Law Judge does not have the authority under the
8 applicable statute to order the Amended CC&Rs rescinded.

9 **ORDER**

10 **IT IS ORDERED** that Petitioner be deemed the prevailing party in this matter.

11 **IT IS FURTHER ORDERED** that Respondent pay Petitioner his filing fee of
12 \$500.00, to be paid directly to Petitioner within thirty (30) days of this Order.

13 No Civil Penalty is found to be appropriate in this matter.

14 **NOTICE**

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

20 Done this day, May 21, 2020.

21
22 /s/ Tammy L. Eigenheer
23 Administrative Law Judge
24

25 Transmitted by either mail, e-mail, or facsimile May 21, 2020 to:

26 Judy Lowe
27 Commissioner
28 Arizona Department of Real Estate
29 100 N. 15th Avenue, Suite 201
30 Phoenix, Arizona 85007

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30 By Felicia Del Sol