

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Don France,
4 Petitioner,
5 vs.
6 Mesa East Property Owners Association,
 Respondent

No. 20F-H2020056-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

7 **HEARING:** September 1, 2020

8 **APPEARANCES:** Don France on his own behalf; B. Austin Bailio, Esq. for
9 Respondent

10 **ADMINISTRATIVE LAW JUDGE:** Thomas Shedden

11
12 **FINDINGS OF FACT**

13 1. On June 8, 2020, the Arizona Department of Real Estate issued a Notice
14 of Hearing setting the above-captioned matter for hearing on July 28, 2020 at the Office
15 of Administrative Hearings in Phoenix, Arizona. The matter was continued and the
16 hearing was conducted on September 1, 2020.

17 2. The Notice of Hearing shows that Petitioner Don France alleges that
18 Respondent Mesa East Property Owners Association has violated CC&R section 2.7.

19 3. Mr. France appeared and testified and presented the testimony of Joann
20 Van Kirk; the Association presented the testimony of Michael Estey and Donald Smith.

21 4. On April 16, 2020, Mr. France filed a single issue petition through which he
22 alleged that Respondent was in violation of CC&R section 2.7

23 5. As pertinent to this matter, that section requires that RVs stored on a
24 property be behind a structure with a six foot high gate. The City of Mesa's code also
25 requires RVs to be behind a six foot gate.

26 6. On March 11, 2019, the Association issued to Mr. France a Notice of
27 Violation because his RV structure did not have a six foot gate. On May 31, 2019, the
28 Association fined Mr. France \$500 because his RV structure did not have a six foot
29 gate.

1 7. At the hearing, Mr. France acknowledged that he was not actually
2 asserting that the Association was in violation of section 2.7, but rather that the
3 Association was estopped from finding that he was in violation of that provision.

4 8. Mr. France is requesting that the tribunal rule that the Association may not
5 require him to install a gate and that any outstanding fines be found invalid.

6 9. Prior to the hearing, Mr. France had installed a six foot gate to comply with
7 a Notice of Violation issued by the City of Mesa.

8 10. In 2014, Mr. France applied for and received approval from the Association
9 to make improvements to his property, including building an RV port or shelter on the
10 side of his house.

11 11. In his application, Mr. France acknowledged that he had read and
12 understood the deed restrictions and would abide by the same; he also acknowledged
13 that he would comply with the City of Mesa's codes.

14 12. In 2014, the version of the CC&Rs adopted in 1994 was in effect; section
15 2.7 provided that recreational vehicles could be stored behind a wall or fence provided
16 that the wall or fence and gate was at least six feet tall and was sufficiently tall as to
17 prevent a person from seeing the RV.

18 13. The City of Mesa code requires a six foot high gate for RV storage; Mr.
19 France knew that at the time of the hearing, but not in 2014.

20 14. On September 4, 2014, the City issued its final permit for the structure.
21 The Association issued its final approval on October 21, 2014.

22 15. As built, Mr. France's structure did not have a gate.

23 16. The structure would not have required a gate if there was no RV parked
24 behind it.

25 17. In 2014, Ms. Van Ark was the chairperson of Architectural Review
26 Committee ("ARC"). She testified to the effect that she had called the past chair and
27 learned that no gate was required because other property owners had RV shelters
28 without gates. She also called the City of Mesa and was told no gate was required if the
29 structure was attached to the house.
30

1 18. According to Mr. Smith, people were threatening to sue the Association if it
2 did not enforce the CC&Rs, and in or about 2018, he met with the City of Mesa to see if
3 those homes without a gate could be grandfathered in, but the City would not allow that.
4 Consequently, the Association began to enforce the requirement for a six foot gate.

5 19. The Association informed the members of the need to comply through its
6 newsletter and online; Residents were given until 2019 to come into compliance.

7 20. Mr. France did not comply with the requirement to install a six foot high
8 gate.

9 21. On March 11, 2019, the Association issued to Mr. France a first NOV,
10 requiring that he install a gate. Through an attorney, on April 5, 2019, Mr. France
11 asserted that the Association was estopped from enforcing section 2.7 because of its
12 approval of the work in 2014. In a response dated May 15, 2019, the Association's
13 attorney informed Mr. France's attorney that it did not agree that estoppel applied, and
14 that it would begin assessing fines of \$500 a week until Mr. France filed an application
15 for a permit to add the required gate.

16 22. On May 31, 2019, the Association assessed against Mr. France a \$500
17 fine for violating section 2.7. Additional fines were assessed, and the parties attempted
18 to resolve the matter informally but were not successful.

19 23. According to Mr. Smith, at the time the NOV was issued to Mr. France,
20 eleven other residents were not in compliance; as of the hearing date there were six
21 residents still in violation, with five having agreed to come into compliance. The Board
22 had not been able to contact the sixth resident.

23 24. On July 24, 2019, the City issued to Mr. France a Notice of Violation, citing
24 Code section 11-34-5(B). That code provision requires RVs taller than six feet to be
25 screened by a six foot tall fence. Mesa Code 11-34(5)(B)(3)(c)(iii).

26 25. As of the hearing date, Mr. France had installed a temporary gate to
27 comply with the City Code. The cost of the gate was about \$800.

28 **CONCLUSIONS OF LAW**

1. In his petition, Mr. France alleges that the Association has violated its CC&Rs. Consequently, the Department of Real Estate has authority over this matter. ARIZ. REV. STAT. Title 32, Ch. 20, Art. 11.

2. Mr. France bears the burden of proof to show that the alleged violation occurred. The standard of proof on all issues in this matter is that of a preponderance of the evidence. ARIZ. ADMIN. CODE § R2-19-119.

3. A preponderance of the evidence is:

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

4. "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(A).

5. Mr. France's petition is limited to the single issue of whether the Association had violated CC&R section 2.7. But at the hearing, Mr. France acknowledged that the Association is not in violation of section 2.7. Consequently, the preponderance of the evidence shows that there is no violation.

6. At the hearing, Mr. France asserted that the fines levied against him by the Association were not in conformity with the law, which the Association disputes. This issue is not properly before the tribunal because Mr. France did not raise this issue in his petition, he did not pay a filing fee for a second issue, and it was not included in the Notice of Hearing. See ARIZ. REV. STAT. § 41-1092.07(F)(6).

7. Consequently, Mr. France's petition should be dismissed.

ORDER

IT IS ORDERED that Don France's petition is dismissed.

NOTICE

1 Pursuant to ARIZ. REV. STAT. section 32-2199.02(B), this Order is binding on the
2 parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. section 32-
3 2199.04. Pursuant to ARIZ. REV. STAT. section 41-1092.09, a request for rehearing
4 in this matter must be filed with the Commissioner of the Department of Real
5 Estate within 30 days of the service of this Order upon the parties.

6 Done this day, September 21, 2020.

7 /s/ Thomas Shedden
8 Thomas Shedden
9 Administrative Law Judge

10 Transmitted by US Mail to:

11 Judy Lowe
12 Commissioner
13 Arizona Department of Real Estate
14 100 N. 15th Avenue, Suite 201
15 Phoenix, Arizona 85007

16 B. Austin Baillio
17 Maxwell & Morgan, P.C.
18 Pierpont Commerce Center
19 4854 East Baseline Rd., Suite 104
20 Mesa, AZ 85206

21 Don France
22 7596 E Ananea Cir.
23 Mesa, AZ 85208
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