

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Susan E Abbass,

4 Petitioner,

5 vs.

6
7 10000 North Central Homeowners
8 Association,

9 Respondent.

No. 20F-H2020057-REL-RHG

**ADMINISTRATIVE LAW JUDGE
DECISION**

10
11 **HEARING:** November 24, 2020

12 **APPEARANCES:** Petitioner Susan E. Abbas, Petitioner, appeared via Google
13 Meet. Ronald Pick appeared as a witness for Petitioner via Google Meet. Respondent
14 was represented by Blake Johnson, Esq. via Google Meet. Robert Kersten, property
15 manager, appeared as a witness for Respondent via Google Meet.

16 **ADMINISTRATIVE LAW JUDGE:** Adam D. Stone

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18 **FINDINGS OF FACT**

19 **BACKGROUND AND PROCEDURE**

20 1. The Arizona Department of Real Estate ("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.

23 2. On or about May 5, 2020, Petitioner filed a single-issue petition against the
24 Association with the Department.¹ Petitioner tendered \$500.00 to the Department with her
25 petition.²

26 3. At the July 28, 2020 hearing, Petitioner argued that Respondent had
27 violated the CCR's Article XII, Section 6 and Article XIII, Sections 1(d) and 4, by failing to
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29 ¹ See HOA_Form_DisputePetitionForm_Rev. 12.2019.pdf.

30 ² *Id.*

1 allow an inspection to be performed on the neighboring property to determine from where
2 a water leak was emanating.

3 4. Petitioner argued that the Respondent had a duty and obligation to allow
4 access to the neighboring property as this was an “emergency” situation because every
5 time it rained water would enter Petitioner’s house.

6 5. Respondent argued that it was aware of Petitioner’s request and not only
7 reached out to the neighbor to grant access, but also sent a warning letter due to some of
8 the improper vegetation that was growing on the neighbor’s property.

9 6. Respondent reviewed the information Petitioner provided, but ultimately
10 determined that without more proof, it could not justify granting access to the neighboring
11 property.

12 7. Following the hearing, the Administrative Law Judge issued a Decision
13 dated August 17, 2020, concluding that Petitioner failed to meet its burden of proof that
14 Respondent violated the CCR’s as Respondent only had the right to enter the property but
15 not an obligation for the same.

16 8. On or about August 31, 2020, after issuance of the Administrative Law
17 Judge Decision, Petitioner filed a Homeowner’s Association (HOA) Dispute Rehearing
18 Request citing as particular grounds for the request that the findings of fact were arbitrary,
19 capricious, or an abuse of discretion, and that the findings of fact or decision was not
20 supported by the evidence or contrary to law.

21 9. On or about October 14, 2020, the Commissioner of the Arizona
22 Department of Real Estate issued an Order Granting Rehearing and Notice of Hearing
23 (Order). In the Order, the Commissioner indicated “the Department hereby grants the
24 Petitioner’s request for rehearing for the reasons outlined in the Petitioner’s Rehearing
25 Request,” stating that Petitioner had claimed, “the findings of fact or decision is arbitrary,
26 capricious, or an abuse of discretion”, and “the findings of fact or decision is not supported
27 by the evidence or is contrary to law.”
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10. On November 24, 2020, the Tribunal conducted a rehearing.³ Based on consideration of the evidence presented at the first administrative hearing and at the rehearing, the Administrative Law Judge finds as follows:

a. Petitioner agreed that Respondent does not have an obligation to enter the property, only the right.

b. Petitioner argued that it was over a year since the first leaking occurred and there has been no movement from the HOA or the neighbor.

c. Petitioner remained ready, willing and able to be financially responsible for the cost of any inspections/surveys which needed to be performed on the neighboring property.

d. Petitioner had inspections and surveys done on its property and it was determined that the leaking was not coming from their property.

e. Respondent again argued that the Board is seeking specific fault of the neighboring property and the information provided by Respondent did not meet that criteria to allow for entrance on the neighbor's property.

f. Respondent was concerned that if it overstepped its authority, it could open itself up to other causes of action.

g. Respondent contacted the neighboring property owner and to its knowledge, the neighbor had her insurance company inspect the water flow. Upon information and belief, the insurance company determined that the neighbor was not at fault. To date, that was the only action taken by the neighbor.

h. Respondent provided Exhibits K, L, and M into the record which were photographs purportedly showing where a pipe was fixed and how the drainage moves to the west (or away from) Petitioner's property.

CONCLUSIONS OF LAW

1. Arizona statute permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of planned

³ At the rehearing, Respondent admitted Exhibits G, K, L, and M into the record.

community documents or violations of statutes that regulate planned communities. A.R.S. § 41-2198.01. That statute provides that such petitions will be heard before the Office of Administrative Hearings.

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

3. “A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not.”⁶ 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.”⁷

4. On rehearing, Petitioner failed to provide new evidence or witness testimony demonstrating that Respondent violated Article XII and Article XIII of the CCR’s. While the possibility of future leaking is certainly frustrating, it appears that Petitioner has or the incorrect venue and possibly party to grant the relief for which it seeks.

5. The Administrative Law Judge is bound by A.R.S. § 32-2199.02(A) which states, “[t]he administrative law judge may order any party to abide by the statutes, condominium documents, community documents or contract provision at issue...” Thus, it too cannot force the neighbor or the Respondent to grant access to the property. The only relief that can be granted is the abidance of the CCR’s. As to that sole directive, again, there was no evidence provided that the Respondent violated the CCR’s. Respondent was receptive to the information provided by Petitioner and requested the neighboring property owners cooperation. While the neighboring owner may not have

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).

⁵ See A.A.C. R2-19-119(B)(2).

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

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

1 fully cooperated to the liking of Petitioner, Respondent still followed the CCR's to the best
2 of its ability at this point.

3 6. Given an exhaustive review of the hearing records and the exhibits
4 presented for consideration in both hearings, the Administrative Law Judge concludes
5 herein that there was no violation by the Respondent. Thus, Petitioner failed to sustain
6 her burden to establish a violation by Respondent of Article XII Section 6, and Article XIII
7 Section 1(d) and 4 or the CCR's. The Administrative Law Judge concludes that the
8 hearing record demonstrates that the Respondent acted in compliance with the CCR's,
9 and the Respondent is the prevailing party in this rehearing.

10 ORDER

11 IT IS ORDERED that the Respondent is the prevailing party with regard to the
12 rehearing, and Petitioner's appeal is dismissed.

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

20 Done this day, December 1, 2020.

21 /s/ Adam D. Stone
22 Administrative Law Judge

23 Transmitted electronically to:

24 Judy Lowe, Commissioner
25 Arizona Department of Real Estate

26 Blake R. Johnson & Kelly Oetinger
27 Brown Olcott, PLLC
28 120 S. Ash Ave, B101
29 Tempe, AZ 85281
30 BlakeJ@azhoalaw.net

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Susan E Abbass
40 W Foothill Dr.
Phoenix, AZ 85021
susan.abbass@gmail.com

By: c. serrano