

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Michael and Nancy Berent
4 Petitioners,

5 vs.

6 Bell West Ranch Homeowners Association,
7 Respondent.

No. 18F-H1818047-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

8 **HEARING:** August 15, 2108, and August 22, 2018

9 **APPEARANCES:** Petitioners Michael and Nancy Berent appeared on their own
10 behalf. Respondent Bell West Ranch Homeowners Association was represented by
11 Maria Kupillas.

12 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer

13
14 **FINDINGS OF FACT**

15 **Background**

16 1. On or about April 26, 2018, Petitioners Michael and Nancy Berent filed a
17 Homeowners Association (HOA) Dispute Process Petition (Petition) with the Arizona
18 Department of Real Estate (Department). Petitioner indicated four issues would be
19 presented and paid the appropriate \$2000.00 filing fee. Petitioner included a narrative
20 referencing various statutes and bylaws.

21 2. On or about May 31, 2018, the Department issued a Notice of Hearing in
22 which it set forth the issue for hearing as follows:

23 The Petitioner alleges that the Bell West Ranch Homeowners Association
24 (Respondent) has violated A.R.S. § 33-1803(A-E) by its failure to enforce
25 city fire and municipal codes and association governing documents CC&Rs
26 Article 9.02, 6.02, 8.21 and Article 5 E by its failure to procure and maintain
adequate liability and hazard insurance.

27 3. At the outset of the hearing in this matter, Petitioners were asked to clarify
28 the four issues on which they wished to proceed to hearing. Ms. Berent identified the four
29 issues as follows: 1) Section 8.02 of the CC&Rs; 2) Section 8.06 of the CC&Rs; 3) A.R.S.
30 § 33-1803(B); and 4) Section 6.02 of the CC&Rs.

4. At hearing, Ms. Berent testified on her own behalf.¹ Respondent presented the testimony of Regis Salazar, VISION Community Management. At the conclusion of Ms. Salazar's testimony, the tribunal recessed for lunch. When the hearing reconvened, Ms. Berent stated she was feeling ill and requested a continuance. Counsel for Respondent did not object, but indicated she would rest Respondent's case so the parties could present closing arguments. Ms. Berent asserted she was not able to proceed with closing arguments. The matter was continued to the following week for closing arguments. While Petitioners sought to continue the closing arguments for various reasons, none of those requests provided good cause for a continuance and were, therefore, denied.²

Referenced CC&Rs

5. Section 8.02 of the CC&Rs provides as follows:

Restrictions Apply to All Structures. All *structures* must be constructed on the Property in compliance with any county or municipal zoning regulations applicable to the Property, must be architecturally compatible with contiguous structures as determined by the Architectural Committee, and must comply with the provisions of this Declaration.

Emphasis added.

6. Section 8.06 of the CC&Rs provides as follows:

No Obstruction of Easements. Easements, as indicated upon the recorded map or plat of the Property, are reserved for the installation and maintenance of public service utilities and other uses for public or quasi-public good. No buildings or other structures shall be placed upon such easements or placed so as to interfere with the free use of the same for the purposes intended. No fences will be allowed in public utility easements.

7. Section 6.02 of the CC&Rs provides, in relevant part, as follows:

Membership. The Architectural Committee shall be composed of three (3) individuals who need not be Members.

¹ At the conclusion of Ms. Berent's testimony, the Administrative Law Judge asked if she had any other witnesses she wished to call. Ms. Berent responded, "I don't think it's necessary."

² Often presented as a reason for a continuance was that Ms. Berent felt she should have been able to cross examine one of Respondent's witnesses prior to closing argument. Respondent called only one witnesses, Ms. Salazar, whom Petitioners cross examined. It appears Ms. Berent was concerned she was not able to cross examine a witness that Respondent decided not to call to testify.

Referenced Statute

8. A.R.S. § 33-1803(B) provides, in relevant part, as follows:

B. After notice and an opportunity to be heard, the board of directors *may* impose reasonable monetary penalties on members for violations of the declaration, bylaws and rules of the association.

Emphasis added.

Hearing Evidence

9. As presented at the hearing, on or about July 7, 2015, Petitioners' neighbors (Neighbors) submitted an Application for Design Review (Application) to install an expanded driveway at their home. The Application included a drawing of the proposed driveway showing a concrete driveway that would be 10 feet across by 35 feet long.

10. On or about July 15, 2015, the Architectural Review Committee approved the Application.

11. At the July 16, 2015 Board of Director's Meeting, Ken Hawkins presented the report for the Architectural Review Committee (ARC) detailing the applications submitted to the ARC and the action taken. Mr. Hawkins report included Neighbors' driveway extension that was approved with conditions.

12. On or about July 17, 2015, the VISION Community Management sent a notice to Neighbors a notice that the Application was received, reviewed, and approved. Specifically, the notice provided:

Concrete Driveway

The edge of driveway can be no closer than 13 inches from property line (City Requirement)

Please follow the plan that you submitted. If you decide to alter the plan, you must submit a revision to the application. *You also must follow all local building codes and setback requirements, if applicable.*

Emphasis added.

13. When Neighbors started installing the driveway in August 2015, Petitioners took photographs and emailed members of Respondent's Board to complain about the project. Petitioners questioned whether Neighbors had obtained approval from the city for the project given that a fire hydrant was located at the border between her property and Neighbors' property.

1 14. On or about May 16, 2016, the City of Surprise issued a Notice of Ordinance
2 Violation (Notice) to Neighbors. The Notice specifically identified "Nonconforming Uses
3 and Structures" in violation of 122.46(f). The Notice provided, in pertinent part, as follows:

4 **Description:**

5 Sec. 122-46 (f) Nonconforming uses and structures. A legal nonconforming use
6 shall not be changed except in conformance with the use requirements of the zone
7 in which it is located.

8 **Violation Details:**

9 A driveway extension was added contrary to code requirements.

10 **Corrective Action:**

11 All legal nonconforming uses shall not be changed except in conformance with the
12 use requirements of the zoning district in which it is located. Cease any non-
13 compliant changes.

14 15. Apparently the City of Surprise took no further enforcement action against
15 Neighbors.

16 16. After Petitioners filed a civil action against Respondent, Neighbors, and the
17 City of Surprise, Respondent reached out to Neighbors for information regarding what, if
18 any, approval they received from the City of Surprise regarding the driveway extension.
19 In response, Neighbors notified Respondent that they spoke to Lana Collins,
20 Development Service Specialist with the City of Surprise, to see if they would need
21 approval from the city in addition to the approval from Respondent. Neighbors stated
22 that they were told they did not need any additional approvals from the city prior to
23 installing the driveway.

24 17. At hearing, Ms. Berent testified on behalf of Petitioners.

25 18. Ms. Berent testified extensively that the ARC should not have approved the
26 Application because the Application was not properly completed and demonstrated, on
27 its face, a violation of the City of Surprise municipal codes. Specifically, Ms. Berent
28 asserted that the 10 foot extension of the driveway meant that the driveway entrance then
29 took up more than 50 percent of the front lot line.

30 19. Ms. Berent also argued that because Mr. Hawkins was the only person
identified in the July 16, 2015 Board of Director's Meeting Minutes under the ARC section
of the meeting, he was the only member of the ARC at that time. Ms. Berent referenced
similar meeting minutes from May 19, 2016, listing Mr. Hawkins, and a single page from

1 meeting minutes for a meeting held after July 11, 2016, listing Larry Bolton, as evidence
2 that the ARC was comprised of only one member at that time. Ms. Berent also presented
3 Board of Directors Meeting Minutes of the January 19, 2017 meeting that listed that part
4 of the ARC report as "**ARC Committee:** Larry Bolton" and then for the three ARC
5 meetings being reported on listed who was present for each of those meetings. Ms.
6 Berent did not provide any documentation from an ARC meeting to establish who was
7 present at a particular meeting. Ms. Berent argued that after she raised the issue in this
8 matter, Respondent changed how the ARC was comprised because they realized they
9 were violating the CC&Rs.

10 20. Ms. Berent also testified that the fire hydrant in question constituted a "public
11 utility easement" and as such, the driveway should not have been constructed. Ms.
12 Berent acknowledged in closing argument that a residential fire occurred two houses
13 away from her and the fire department had to use the fire hydrant at the corner of her
14 property to assist in putting out the fire. Ms. Berent indicated that the fire hose was
15 running across Neighbors' driveway during that time.

16 21. Ms. Berent testified that "common sense" required that Respondent had to
17 enforce the provisions of the CC&Rs and impose sanctions for violations of those
18 provisions. Ms. Berent referenced her receiving notices from Respondent regarding
19 weeds in her yard, so Respondent should certainly pursue Neighbors for their violations
20 of the CC&Rs.

21 22. Ms. Salazar testified that at all times relevant to this matter, the ARC
22 consisted of three members. Ms. Salazar indicated that the meeting minutes referenced
23 by Ms. Berent were indicative of who was presenting the report for the ARC at the Board
24 of Directors Meeting, not that the individual was the only member of the ARC.
25 Respondent asserted that the later version of the minutes were reflective of a new
26 secretary taking the minutes.

27 23. Ms. Salazar stated that each homeowner is responsible for ensuring that
28 their project is in compliance with all existing county or municipal zoning regulations
29 applicable and the approval relevant to this matter provided as such. Ms. Salazar denied
30 that the ARC checked municipal codes prior to approving an application.

1 24. Ms. Salazar testified that there were 45 driveway extensions approved in
2 the association and that two of those projects had a fire hydrant on the property.

3 25. Ms. Salazar stated she was not aware of any public utility easement relative
4 to the fire hydrant.

5 26. Respondent argued that it chose not to pursue any enforcement action
6 against Neighbors because the City of Surprise had declined to pursue any further
7 enforcement action against Neighbors.

8 CONCLUSIONS OF LAW

9 1. Arizona statute permits an owner or a planned community organization to
10 file a petition with the Department for a hearing concerning violations of planned
11 community documents or violations of statutes that regulate planned communities.
12 A.R.S. § 41-2198.01. That statute provides that such petitions will be heard before the
13 Office of Administrative Hearings.

14 2. Petitioner bears the burden of proof to establish that Respondent committed
15 the alleged violations by a preponderance of the evidence.³ Respondent bears the burden
16 to establish affirmative defenses by the same evidentiary standard.⁴

17 3. “A preponderance of the evidence is such proof as convinces the trier of fact
18 that the contention is more probably true than not.”⁵ A preponderance of the evidence is
19 “[t]he greater weight of the evidence, not necessarily established by the greater number of
20 witnesses testifying to a fact but by evidence that has the most convincing force; superior
21 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
22 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
23 the other.”⁶

24 Section 8.02 of the CC&Rs

25 4. Section 8.02 of the CC&Rs requires that homeowners in the association
26 ensure that all *structures* be constructed on the property in compliance with county or
27 municipal zoning regulations.

28 ³ See ARIZ. REV. STAT. section 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v.*
29 *Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952).

30 ⁴ See A.A.C. R2-19-119(B)(2).

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

⁶ BLACK’S LAW DICTIONARY 1220 (8th ed. 2004).

1 5. Structure is defined as “[a]ny construction, production, or piece of work
2 artificially built up or composed of parts purposefully joined together.”⁷

3 6. Assuming, *arguendo*, that Respondent had some duty or responsibility
4 under Section 8.02 of the CC&Rs, which it did not, Petitioners failed to establish that the
5 driveway in question was a structure such that it would fall under the purview of Section
6 8.02 of the CC&Rs.

7 7. Accordingly, Petitioners failed to establish a violation of Section 8.02 of the
8 CC&Rs.

9 Section 8.06 of the CC&Rs

10 8. Section 8.06 of the CC&Rs provides that easements are reserved for the
11 installation and maintenance of public service utilities and that “[n]o buildings or other
12 structures shall be placed upon such easements or placed so as to interfere with the free
13 use of the same for the purposes intended.”

14 9. Petitioner presented no evidence to establish that the fire hydrant at issue
15 constituted a public utility easement.

16 10. Assuming, *arguendo*, that the fire hydrant constituted a public utility
17 easement, Petitioners failed to establish how a driveway extension near the fire hydrant
18 constituted a structure that would be an obstruction or interfere with the free use of the
19 easement. As indicated by the photographs submitted, there was a sidewalk in front of
20 the fire hydrant that presumably was authorized by the City of Surprise when the
21 neighborhood was constructed. Further, by Ms. Berent’s own testimony, the fire hydrant
22 was accessible to and was used by fire department personnel during a recent fire in the
23 neighborhood.

24 11. Accordingly, Petitioners failed to establish a violation of Section 8.06 of the
25 CC&Rs.

26 A.R.S. § 33-1803(B)

27 12. The plain language of A.R.S. § 33-1803(B) provides that the association
28 *may* impose reasonable monetary penalties on members for violations of the community’s
29 governing documents.

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⁷ BLACK’S LAW DICTIONARY 1464 (8th ed. 2004).

13. Nothing in the statute required Respondent to seek enforcement action against Neighbors. Respondent argued that because the City of Surprise had not pursued any enforcement action against Neighbors for purported violations of its municipal codes, Respondent determined that it would not pursue enforcement action.

14. Accordingly, Petitioners failed to establish a violation of A.R.S. § 33-1803(B).

Section 6.02 of the CC&Rs

15. Section 6.02 of the CC&Rs requires that three individuals sit on the ARC.

16. Petitioners only evidence that Respondent violated Section 6.02 of the CC&Rs was the meeting minutes that identified who would present the report for the ARC at the meeting. Respondent presented testimony that three individuals sat on the ARC at all times and that the minutes in question reflected only who made the report at the board of directors meeting.

17. Accordingly, Petitioners failed to establish a violation of Section 6.02 of the CC&Rs.

ORDER

In view of the foregoing, IT IS ORDERED that the Petition be dismissed in its entirety.

NOTICE

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

Done this day, September 11, 2018.

/s/ Tammy L. Eigenheer
Administrative Law Judge

Copy mailed/e-mailed/faxed September 11, 2018, to:

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