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No. 23F-H003-REL

ADMINISTRATIVE LAW JUDGE DECISION

VS.

Deer Valley Homeowners Association Inc.,
Respondent.

APPEARANCES: Matthew Thompson (“Petitioner”) appeared on his own behalf. Mulcahy, Esq. and Haidyn Di Lorenzo, Esq. appeared on behalf of Deer Valley owners Association Inc. (“Respondent”) with Charles Dean Otto as a witness.

After review of the hearing record in this matter, the undersigned Administrative Law Judge makes the following Findings of Fact and Conclusions of Law, and issues this FINAL ORDER to the Commissioner of the Arizona Department of Real Estate (“Department”).

BACKGROUND AND PROCEDURE

2. On or about July 14, 2022, Petitioner filed a single-issue petition¹ with the Department which alleged that the Association failed to replace dead trees in the community in violation of the Sun City West Declaration of Annexation and CC&Rs Article 4.2 section F, Deer Valley HOA Amended & Restated CC&Rs Articles 1.16, 6.2, 2.3, 7.1, 7.3, and Deer Valley HOA Rules & Regulations paragraphs 7.1 and 7.2. Petitioner sought

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1 an Order compelling Respondent to “take actions necessary to install at least ten new
2 trees per year until [59] missing trees are replaced.”²

3 a. On July 18, 2022, Petitioner tendered \$500.00 to the Department for the
4 underlying petition.³

5 3. On or about August 08, 2022, Respondent returned its ANSWER to the
6 Department whereby it denied the merits of Petitioner’s allegation(s).⁴

7 4. Per the NOTICE OF HEARING, the Department referred this matter to the
8 Office of Administrative Hearings (“OAH”), an independent state agency, for an
9 evidentiary hearing on December 12, 2022, regarding the following issue:

10 **Whether “Respondent is responsible for replacing dead and/or dying**
11 **trees on all Member Lots” in accordance with Sun City West**
12 **Declaration of Annexation and CC&Rs Article 4.2 section F, Deer**
13 **Valley HOA Amended & Restated CC&Rs Articles 1.16, 6.2, 2.3, 7.1, 7.3,**
14 **and Deer Valley HOA Rules & Regulations paragraphs 7.1 and 7.2.** ⁵

15 THE PARTIES AND GOVERNING DOCUMENTS

16 5. Petitioner is the record owner of Lot 271, of Sun City West Unit 52, located
17 within Deer Valley Homeowners Association Inc. (“Association”).

18 6. The Association, developed by Del E. Webb (“Developer”) within the Master
19 Association of Sun City West, Inc., is directly subject to both the Association’s Declaration
20 of Covenants, Conditions, and Restrictions (“Deer Valley CC&Rs”)⁶ and generally subject
21 to the Sun City West Annexation and Covenants, Conditions, and Restrictions (“Sun City
22 West CC&Rs”).⁷ The Deer Valley CC&Rs empower the Association to control certain
23 aspects of property use within the development. When a party buys a residential unit in
24 the development, the party receives copies of the Deer Valley CC&Rs and Bylaws and
25 agrees to be bound by their terms. Thus, the Deer Valley CC&Rs form an enforceable
26 contract between the Association and each property owner, and the Bylaws outline how
27 the Association is permitted to operate.

28 ² *Id.*

29 ³ See Department’s electronic file at Filing Fee.pdf.

30 ⁴ See Department’s electronic file at Response to ADRE Petition.pdf.

⁵ See Department’s electronic file at 23F-H003-REL NOH.pdf.

⁶ See Department’s electronic file at Response to ADRE Petition.pdf.

⁷ *Id.*; see also See Department’s electronic file at Arizona Corporate Commission.pdf.

1 7. Sun City West CC&Rs 4.2(F), Landscaping and Maintenance of Yards,
2 states, in pertinent part, "Owners of housing product types which include landscaping
3 installed by the Developer shall be required to maintain the landscaping on their Lot.
4 Removal of dead bushes and trees ... is required to be accomplished to this effect."⁸

5 8. Deer Valley CC&Rs Article 1.16 provides that a "landscape and
6 maintenance easement" shall mean and refer to an easement upon the front, side and
7 rear yards of all Lots within the subdivision. Said easement areas are to be maintained by
8 the Homeowners Association as installed.⁹

9 9. Deer Valley CC&Rs Article 6.2 provides that Maintenance Easements
10 levied by the Homeowners Association shall be used exclusively to promote the
11 recreation, health, safety and welfare of its Members and to improve and maintain the
12 landscape of Maintenance Easement areas, and to maintain the interior surfaces of
13 perimeter fences located upon the Lots, if any.¹⁰

14 10. Deer Valley CC&Rs Article 7.1 provides that the Homeowners Association
15 shall provide exterior landscape maintenance upon the front, side and rear yards of each
16 Lot which is subject to assessment hereunder. The Homeowners Association shall
17 provide landscaping debris removal which may include periodic blowing and removal as
18 follows: public sidewalks, private driveways and walkways, private patios, trees, shrubs,
19 ground cover, and all other landscaping located in the yards of each Lot.¹¹

20 11. Deer Valley HOA Rules & Regulations paragraph 7.1 provides, "All
21 landscaping within the Association is maintained by the Association. It is intended to
22 remain substantially the same as initially installed and designed by the developer. No
23 action can be taken that will detrimentally impact the landscaping now in place other than
24 the removal of dead or dying plants or trees and their subsequent replacement. Any
25 proposed change must first be submitted to the Board of Management for review and
26 subsequent approval or rejection. All costs for installing any approved modification will be
27 the sole responsibility of the Owner however the costs for removal of dead or dying plants

28 ⁸ See Department's electronic file at Annexation Area CC_Rs.pdf.

29 ⁹ See Department's electronic file at CC_Rs.pdf.

30 ¹⁰ *Id.*

¹¹ *Id.*

1 will be assumed by the Association. Furthermore, since plants and trees are Owner's
2 property, and not Association property, individual property Owners must be consulted
3 before any changes to landscaping is made by the Association."¹²

4 12. Deer Valley HOA Rules & Regulations paragraph 7.2 provides, "If it
5 becomes necessary to prioritize tree and/or plant replacement due to intermittent budget
6 constraints within the Association, emphasis shall be placed on restoring and maintaining
7 an effective visual buffer between backdoor neighbors, and softening the hard
8 appearance of tall barrier walls."¹³

9 HEARING EVIDENCE

10 13. Petitioner testified on his own behalf and submitted Exhibits B, 20-22, 65,
11 and 76. Respondent called Charles Dean Otto as a witness. The Department's electronic
12 file, NOTICE OF HEARING, and Respondent's REQUEST TO DISMISS PETITION were also
13 admitted into the record. The substantive evidence of record is as follows:

- 14 a. Developer installed 59 trees in the Association's subdivision. None of the
15 trees on Petitioner's lot have died or are dying. Per Petitioner, one tree on
16 his lot suffers from ant infestation but is not in jeopardy of perishing. It is
17 unclear how many trees at issue died or began to die, or which lots have
18 been directly affected.
- 19 b. Petitioner alleges improper pruning by the Association's landscaper ("Verde
20 Valley") sometime in 2019.
- 21 c. Per Petitioner, the dead and/or dying trees on his immediate neighbors' lots
22 have negatively impacted the value of his property to an unknown degree or
23 amount.
- 24 d. Petitioner is a former member of the Association's Board of Directors
25 ("Board"). During his time on the Board, Petitioner urged the Board to accept
26 the responsibility of replacing dead and/or missing trees on Member lots
27 that had originally been installed by the Developer. After consulting in-house
28 counsel, the Board declined Petitioner's request, as it had concluded that

29 ¹² See Department's electronic file at Rules_Regulations.pdf.

30 ¹³ *Id.*

1 the Deer Valley CC&Rs did not require replacement of trees under its
2 maintenance obligations.

3 **CLOSING ARGUMENTS**

4 14. In closing, Respondent argued that Petitioner lacked standing to bring forth
5 the underlying petition that the petition itself had been levied against the incorrect
6 homeowners association, and that Petitioner had substantively failed to sustain his
7 burden of proof in the matter. Respondent argued that the Sun City West CC&Rs explicitly
8 provided that subdivision declarations, like the Deer Valley CC&Rs, control insofar as they
9 pertain to the maintenance, regulation, and administration of subdivision common areas
10 and lots. Respondent also argued that because the replacement of trees pertained to the
11 maintenance, regulation, or administration of lots, that only the Deer Valley CC&Rs had
12 binding authority over the issue. Respondent further argued that while it had the right to
13 replace trees within the Association it had no duty to do so; specifically, that the governing
14 documents noted the distinction between “may” versus “must” regarding replacement of
15 trees. Thus, Respondent opined that because the Deer Valley CC&Rs controlled the
16 Association’s landscaping maintenance responsibilities, which did not require
17 Respondent to replace dead, dying, or missing trees within the Association, that the
18 underlying petition should be dismissed. Respondent also asked that [an unspecified]
19 sanction be levied against Petitioner.

20 15. In closing, Petitioner argued that Respondent failed to adhere to duties and
21 responsibilities outlined in the Sun City West CC&Rs, Deer Valley CC&Rs, and Deer
22 Valley HOA Rules & Regulations, and opined that an Order be issued against
23 Respondent and injunctive relief granted.

24 **CONCLUSIONS OF LAW**

25 1. This matter lies within the Department’s jurisdiction pursuant to ARIZ. REV.
26 STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a
27 condominium and/or planned community association. The owner or association may
28 petition the department for a hearing concerning violations of community documents or
29 violations of the statutes that regulate planned communities as long as the petitioner has
30

1 filed a petition with the department and paid a filing fee as outlined in ARIZ. REV. STAT. §
2 32-2199.05.

3 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
4 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested
5 case at bar. OAH has the authority to interpret the contract between the parties.¹⁴

6 3. In this proceeding, Petitioner bears the burden of proving by a
7 preponderance of the evidence that Respondent violated Sun City West Dec CC&Rs
8 Article 4.2(F), Deer Valley CC&Rs Articles 1.16, 6.2, 2.3, 7.1, 7.3, and Deer Valley HOA
9 Rules & Regulations ¶ 7.1 and 7.2.

10 4. “A preponderance of the evidence is such proof as convinces the trier of fact
11 that the contention is more probably true than not.”¹⁵ A preponderance of the evidence is
12 “[t]he greater weight of the evidence, not necessarily established by the greater number of
13 witnesses testifying to a fact but by evidence that has the most convincing force; superior
14 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
15 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
16 the other.”¹⁶

17 5. Planned Communities are regulated by ARIZ. REV. STAT. Title 33, Chapter
18 16, Article 1.

19 6. Because Petitioner only paid for the adjudication of one (1) issue, this
20 Tribunal may not address all of the tangential issues Petitioner raised in the addendum to
21 his petition. Therefore, the only issue to be addressed in this matter is whether
22 Respondent committed a violation of community documents by failing to replace trees on
23 Member lots within the Association.

24 7. Petitioner has not sustained his burden of proof as to this alleged violations.

25 8. Here, Petitioner is not an aggrieved party. Petitioner admitted that he
26 brought forth his petition “on behalf of all community members” and did not have a dead,
27 dying, or missing tree on his lot. Additionally, Petitioner did not establish causation by

28 ¹⁴ See *Tierra Ranchos Homeowners Ass’n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

29 ¹⁵ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

30 ¹⁶ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

Respondent or duty to act by Respondent. The record reflects that the Deer Valley CC&Rs govern landscaping maintenance for the Association, that trees belong to the homeowners, and that homeowners are responsible to maintain the trees on their lots. The record further reflects that homeowners are required to obtain permission from Respondent prior to replacing trees. There is nothing in the record that establishes Respondent has the authority to remove a tree from a homeowner's lot without permission, or that Respondent has done so in the past.

9. Based on the relevant and credible evidence of record, no injury exists. Violation(s) of Sun City West Dec CC&Rs Article 4.2(F), Deer Valley CC&Rs Articles 1.16, 6.2, 2.3, 7.1, 7.3, and/or Deer Valley HOA Rules & Regulations ¶ 7.1 and 7.2 have not been established by a preponderance of the evidence.

10. Notably, Petitioner's allegation that his lot's value has been diminished by neighboring lots due to their dead, dying, and/or missing trees is irrelevant, not supported by the record, and is not a justiciable issue for this tribunal.

11. Therefore, the undersigned Administrative Law Judge concludes that because Petitioner failed to sustain his burden of proof by a preponderance of the evidence that the Association violated the aforementioned community documents, his petition must be denied.

FINAL ORDER

Based on the foregoing,

IT IS ORDERED that Petitioner's petition be denied.

In the event of certification of the Administrative Law Judge Decision by the Director of the Office of Administrative Hearings, the effective date of the Order will be five days from the date of that certification.

NOTICE

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

1 Done this day, December 20, 2022.

2 **Office of Administrative Hearings**

3
4 /s/ Jenna Clark
5 Administrative Law Judge

6
7 Transmitted electronically to:

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