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No. 23F-H017-REL

ADMINISTRATIVE LAW JUDGE DECISION

VS

Respondent

APPEARANCES: Petitioner Carolyn Wefsenmoe appeared via Google Meet on her own behalf. Respondent Summit View Homeowner's Association was represented by Chad Gallacher, Esq.

FINDINGS OF FACT

2. On or about December 5, 2022, the Department issued a Notice of Hearing in which it set forth the issue for hearing as follows:

The Petitioner states that the '[Respondent] beginning June 24, 2021, has been in violation of the community plat and and declaration Article. Section 1,2,3 (pages 16-17) by not maintaining the subdivisions perimeter walls and charging the homeowners for repairs.'

1 (All errors contained in the original).

2 3. After a continuance the hearing was held on February 21, 2023.

3 4. At hearing, Petitioner testified on her own behalf and Respondent presented
4 the testimony of Bick Smith. Based on the evidence presented at hearing, the following
5 occurred:

- 6 a. On or about June 14, 1996, the final plat for the Summit View
7 neighborhood was filed with the Maricopa County Recorder's Office.¹

8 The "Notes" section read as follows:

9 A HOMEOWNERS ASSOCIATION, INCLUDING ALL
10 PROPERTY OWNERS IN THE DEVELOPMENT WILL BE
11 FORMED AND HAVE RESPONSIBILITY FOR
12 MAINTAINING ALL COMMON AREAS, TO BE NOTED AS
13 TRACTS, EASEMENTS LANDSCAPED AREARS,
14 SUBDIVISION PERIMETER WALLS, AND DRAINAGE
15 FACILITIES IN ACCORDANCE WITH APPROVED PLANS.

16 MAINTENANCE OF THE WALL MAINTENANCE
17 EASEMENT (W.M.E.) SHALL BE THE RESPONSIBILITY OF
18 THE HOMEOWNERS ASSOCIATION.

- 19 b. On or about May 11, 2004, Amended and Restated Declaration of
20 Covenants, Conditions and Restrictions for Summit View were recorded
21 with the Maricopa County Recorder's Office.²
- 22 c. Petitioner testified that she believed that based upon the "Notes" section
23 on the plat map, this created an obligation on the SVHA to pay for any
24 repairs to the walls surrounding the property. Petitioner also testified
25 that Article XI Section 1 and 2, of the CC&R's, placed the responsibility
26 for repairing the walls on the SVHA, as they were considered common
27 areas.
- 28 d. Further, Petitioner argued that on her walls surrounding her lots, there
29 was erosion and other damages which was not caused by her; and
30

¹ See Exhibit 1.

² See Exhibit 2.

1 because where the damage occurred was abutting the Natural Area
2 Open Space (NAOS) and this was designated a Common Area
3 according to the plat; it was SVHA's responsibility to make the necessary
4 repairs. Petitioner testified however, that she received charges for
5 painting made done on her walls, and wanted credit back as she
6 believes all expenses incurred for wall maintenance was SVHA's
7 responsibility.

- 8 e. On cross-examination, Petitioner testified that no survey had been
9 completed to determine whether the walls were in the common area or
10 the resident's individual lots.
- 11 f. Bick Smith testified on behalf of Respondent. Mr. Smith testified that he
12 was an owner of a lot for approximately 10 years, and had been on the
13 Board for 3 years.
- 14 g. Mr. Smith testified that he believed that the walls in question were on
15 each separate lot, as evidenced that they were not all uniformly
16 encroaching on the NAOS. Further, Mr. Smith argued that if there was a
17 wall surrounding the entire subdivision, then this would be a SVHA
18 responsibility to repair and maintain the same.
- 19 h. Mr. Smith also testified that the Board had been requesting that all
20 homeowners repair their walls, as he believed that most lots suffered
21 from drainage issues,³ and while each homeowner may not have
22 intentionally caused the damage, they had nonetheless been damaged
23 and needed repairs.

24 **CONCLUSIONS OF LAW**

- 25 1. Arizona statute permits an owner of a planned community organization to
26 file a petition with the Department for a hearing concerning violations of planned
27 community documents or violations of statutes that regulate planned communities.

28
29

³ See Exhibit A.

1 A.R.S. § 32-2199. That statute provides that such petitions will be heard before the Office
2 of Administrative Hearings.

3 2. Petitioner bears the burden of proof to establish that Respondent committed
4 the alleged violations by a preponderance of the evidence. See ARIZ. REV. STAT. section
5 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazzano v. Superior Court*, 74
6 Ariz. 369, 372, 249 P.2d 837 (1952). Respondent bears the burden to establish affirmative
7 defenses by the same evidentiary standard. See A.A.C. R2-19-119(B)(2).

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

16 4. The CC&R’s provide, in pertinent part, as follows:

17 ARTICLE XI: MAINTENANCE

18 SECTION 1. Maintenance of Common Area by the Association. The
19 Association shall be responsible for the maintenance, repair and
20 replacement of the Common Area and may, without any approval of
21 the Owners being required, do any of the following:

22 (a) Reconstruct, repair, replace or refinish any Improvement
23 or portion thereof upon any such are (to the extent that such work is
24 not done by a governmental entity, if any, responsible for the
25 maintenance and upkeep of such area);

26 (b) Construct, reconstruct, repair, replace or refinish any
27 portion of the Common Area used as a road, street, walk, driveway
28 and parking area (to the extent that such work is not done by a
29 governmental entity, if any, responsible for the maintenance and
30 upkeep of such area);

(c) Replace injured and diseased trees or other vegetation in
any such area, and plant trees, shrubs and ground cover to the

1 extent that the Board deems necessary for the conservation of water
2 and soil and for aesthetic purposes;

3 (d) Place and maintain upon any such area such signs as the
4 Board may deem appropriate for the property identification, use and
5 regulation thereof;

6 (e) Do all such other and further acts which the Board deems
7 necessary to preserve and protect the Common Area and the
8 appearance thereof, in accordance with the general purposes
9 specified in this Declaration.

10 SECTION 2. Exterior Maintenance By Association. In addition to the
11 maintenance, repair and replacement of the Common Area, and the
12 Improvements located thereon, the Association shall maintain, repair
13 and replace the front yards landscaping on the Lots except for such
14 landscaping as is located within a front yard that is enclosed by a
15 fence or wall. In addition, the Association shall maintain, repair the
16 pool, pool area and if present the cabana located thereon. In
17 addition, the Association shall maintain the paint on the exterior walls
18 of the buildings contained in the Project. In the event the need for
19 maintenance, repair or replacement of any portion of the Lots which
20 are to be maintained by the Association pursuant to this Section is
21 caused by the wilful or negligent act of an Owner, his/her family,
22 guests, invitees or animals for whom he is legally responsible under
23 Arizona law, the Association shall cause the maintenance or repair to
24 be performed, and the cost of such maintenance or repair shall be
25 paid by the Owner upon demand, such amount shall be a lien upon
26 any Lots owned by the Owner, and the Association may enforce
27 collection of such amounts in the same manner and to the same
28 extent as provided elsewhere in this Declaration for the collection
29 and enforcement of assessments.

30 SECTION 3. Maintenance by Owners. Each Owner shall be solely
responsible for the maintenance, repair and replacement of the
following portions of his Lot:

(a) The interior of his/her Townhouse including, the interior of
any yard, patio, garage or other area enclosed by fence or wall and
the contents thereof, and any air conditioning unit, heating unit, hot
water heater and other fixtures and equipment which service his
individual Townhouse . This obligation shall include, but not be
limited to, the maintenance, repair, and replacement of windows,
doors and all interior surfaces of Townhouse, including, without

1 limitation, floors, ceilings, interior wall surfaces, sheet rock
2 (plasterboard), or wall covering;

3 (b) The roof of his Townhouse;

4 (c) Any fixtures or pipes within his Townhouse and any utility
5 lines or pipes from the Owner's Lot line to his Townhouse; and

6 (d) Such landscaping as is located in the front yard which is
7 enclosed by a fence or wall and any landscaping contained on any
8 side yard or backyard.

9 No Owner of a Lot shall do any work which will impair the structural
10 integrity of the building in which his/her Townhouse is located or
11 which will adversely affect any other Townhouse or the Common
12 Area. No Owner shall perform any maintenance or repair work which
13 would alter the exterior appearance of his Townhouse without the
14 prior written approval of the Architectural Committee.

15 5. Based upon review of the testimony presented as well as the exhibits
16 presented, Petitioner has failed to prove by a preponderance of the evidence that the
17 walls in questions are in a common area. There was no persuasive evidence presented
18 that simply because on the other side of the wall there was a common area, does not
19 prove that the wall was actually built on the common area. Further, the tribunal notes that
20 the walls were not uniformly even across the individual lots. This was presumably
21 because each lot is a different size, which also would lead to the conclusion that each wall
22 was built on each individual lot. However, again, no evidence was presented to determine
23 exactly where the wall was built. Perhaps if this evidence was presented there may be a
24 different result. Unfortunately, however for Petitioner, she has not proven by a
25 preponderance of the evidence that the walls were built in the common areas, and has
26 such, she has failed to carry her burden of proof that SVHA would be responsible for the
27 maintenance of the same.

28 6. Accordingly, Petitioner has not established Respondent acted in violation of
29 the community documents.

30 7.

ORDER

