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No. 23F-H026-REL

ADMINISTRATIVE LAW JUDGE DECISION

V.

Respondent.

APPEARANCES: Petitioner Elizabeth Flint appeared on her own behalf. Respondent Citation Gardens Cooperative #1 did not appear.

FINDINGS OF FACT

1. Citation Gardens Cooperative #1 ("Respondent") is a non-profit corporation that was formed "for the purpose of acquiring, owning and operating a cooperative housing project" whose members/stockholders "shall have the right to occupy the dwelling units . . ." ¹ A Member is the "owner and holder of one (1) share of common capital stock of the Corporation and has a bona fide intention to reside in the project." ²

3. Petitioner filed a single-issue petition with the Arizona Department of Real Estate (“Department”) alleging that Respondent “. . . informed me that my request to install solar panels on the front of my townhouse had been denied. No reasons or additional details were provided. I feel that this decision by the Co-op is in violation of ARS 33-1816(A).”

² *Id.*

4. Respondent, through Tucson Realty & Trust Co. Management Services, L.L.C. Cooperative HOA Division, filed a written answer to the petition, alleging that the statute referenced by Petitioner in her petition, A.R.S. § 33-1816(A), does not apply to Respondent because it is “governed by the Arizona Non-Profit Corporation Act,” that Petitioner is not a homeowner, but rather a Member of Respondent, and that Respondent is not a planned community, but rather a Cooperative Corporation.

5. The Department referred the petition to the Office of Administrative Hearings, an independent state agency, for an evidentiary hearing.

6. A hearing was held on March 21, 2023. Administrative Notice was taken of the agency record. Petitioner testified on her own behalf. Respondent did not appear. Petitioner informed the Tribunal that Andrew Vizcarra, Respondent's representative, emailed her prior to the hearing, stating that he would not be attending the hearing and did not wish to reschedule it, and requested that the documents Respondent submitted to the Department "stand in his place." Respondent did not notify the Office of Administrative Hearings of any cause for the absence or delay and did not request that the hearing be continued. Consequently, given that Respondent was properly noticed of the hearing, the hearing proceeded in Respondent's absence.

REFERENCED STATUTE

7. A.R.S. § 33-1816 provides as follows:

A. Notwithstanding any provision in the community documents, an association shall not prohibit the installation or use of a solar energy device as defined in section 44-1761.

HEARING EVIDENCE

8. Petitioner testified that she purchased her unit through a real estate agent and paid cash. Petitioner testified that prior to making the purchase, she had to apply to be admitted to Respondent. Petitioner further testified that she does not have a deed to the property, but rather has a Certificate of Membership. Petitioner explained that she can sell her unit if she chooses to do so and owns it outright. Petitioner further explained that she owns 1/44 of the corporation as a shareholder.

1 9. Petitioner addressed Respondent's response to her petition.
2 Petitioner asserted that the Nonprofit Act and a planned community are not mutually
3 exclusive and that a cooperative is not listed in the exclusions under the statutory
4 definition of planned community. Petitioner further asserted that the definition of a
5 planned community includes both owners and members, and that the terms "member"
6 and "shareholder" are used interchangeably in Respondent's rules and regulations.

7 10. Petitioner testified that the buildings and grounds are maintained by
8 Respondent and that the members pay a monthly assessment that pays the property
9 taxes collectively, and also pays for water and trash removal.

10 11. Petitioner asserted that a request for solar panels cannot be denied
11 under A.R.S. § 33-1816, and that Respondent provided no reason for the denial.

12 **CONCLUSIONS OF LAW**

13 1. Pursuant to A.R.S. § 32-2199.01(A), "[f]or a dispute between an owner and
14 a condominium association or planned community association that is regulated pursuant
15 to title 33, chapter 9 or 16, the owner or association may petition the department for a
16 hearing concerning violations of condominium documents or planned community
17 documents or violations of the statutes that regulate condominiums or planned
18 communities." That statute provides that such petitions will be heard before the Office of
19 Administrative Hearings.

20 2. Petitioner bears the burden of proof to establish that Respondent violated
21 applicable statutes, CC&Rs, and/or Bylaws by a preponderance of the evidence.³

22 3. "A preponderance of the evidence is such proof as convinces the trier of fact
23 that the contention is more probably true than not."⁴ A preponderance of the evidence is
24 "[t]he greater weight of the evidence, not necessarily established by the greater number of
25 witnesses testifying to a fact but by evidence that has the most convincing force; superior
26 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
27

28 ³ See A.A.C. R2-19-119(A) and (B)(1); see also *Vazzano v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837
29 (1952).

30 ⁴ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
2 the other.”⁵

3 4. In this case, Petitioner asserts that Respondent is a planned community,
4 and therefore, cannot prohibit her from installing solar panels.

5 5. Planned community is defined in A.R.S. § 33-1802 as follows:

6 "Planned community" means a *real estate development* that includes real
7 estate owned and operated by or real estate on which an easement to
8 maintain roadways or a covenant to maintain roadways is held by a
9 nonprofit corporation or unincorporated association of owners, that is
10 *created for the purpose of managing, maintaining or improving the property*
11 and in which the declaration expressly states both that the owners of
separately owned lots, parcels or units are mandatory members and that the
owners are required to pay assessments to the association for these
purposes. Planned community does not include any of the following:

12 (a) A timeshare plan or a timeshare association that is governed by chapter
13 20 of this title.

14 (b) A condominium that is governed by chapter 9 of this title.

15 (c) A real estate development that is not managed or maintained by an
association.

16 Emphasis added.

17 6. Respondent is a nonprofit corporation that was formed for the purpose of
18 *acquiring, owning and operating a cooperative housing project*. A planned community is a
19 *real estate development* that includes real estate owned and operated by a nonprofit
20 corporation, created for the purpose of *managing, maintaining or improving the property*.
21 Although the definition of a planned community does not expressly exclude a cooperative,
22 the Administrative Law Judge concludes that a cooperative does not fall within the
23 definition of a planned community, as their purposes and functions are separate and
24 distinct.

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29 ⁵ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).
30

1 7. Therefore, because Respondent does not fall within the definition of a
2 planned community, it is held that Petitioner failed to establish by a preponderance of the
3 evidence that Respondent violated A.R.S. § 33-1816.

4 **ORDER**

5 **IT IS ORDERED** that no action is required of Respondent in this matter and that the
6 petition is dismissed.

7 **NOTICE**

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

13 Done this day, April 4, 2023.

14
15 /s/ Sondra J. Vanella
16 Administrative Law Judge

17
18 Transmitted by either mail, e-mail, or facsimile April 4, 2023 to:

19 Susan Nicolson, Commissioner
20 Arizona Department of Real Estate
21 SNicolson@azre.gov
22 AHansen@azre.gov
23 vnunez@azre.gov
24 djones@azre.gov
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26 Elizabeth Flint
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28 Tucson Realty & Trust Co.
29 avizcarra@trtmanagement.com

30 By: OAH Staff