

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of
4 Anthony Payson
5 Petitioner
6 vs
7 The Foothills Homeowners Association #1
8 Respondent

No. 23F-H041-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

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11 **HEARING:** April 13, 2023

12 **APPEARANCES:** Petitioner Anthony Payson appeared on behalf of himself.
13 Sean K. Mohnihan, Esq. appeared on behalf of Respondent The Foothills Homeowners
14 Association #1.

15 **ADMINISTRATIVE LAW JUDGE:** Velva Moses-Thompson

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18 **FINDINGS OF FACT**

19 1. Petitioner Anthony Payson owns property in Respondent The Foothills
20 Homeowners Association #1.

21 2. Respondent's Covenants, Codes, & Restrictions (CC&R) Section 5.4
22 provides, in relevant part, as follows:

23 Nuisances. No lot shall be used in whole or in part for the storage of rubbish
24 of any character, nor for the storage of any property or things which will
25 cause the lot to appear in an unclean or untidy condition or which will be
26 offensive to the eye; nor shall any substance, thing, or material be kept upon
27 an lot that will emit foul or obnoxious odors, or that will cause any noise that
28 will or might disturb the peace, quiet, comfort, or serenity of the occupants of
29 the surrounding property.

30 3. On or about January 23, 2023, the Arizona Department of Real Estate
(Department) received a single-issue petition from Petitioner with the following
allegations:

FHOA #1 is neglecting their duty to enforce the community CC&Rs. Petitioner's neighbors at 6650 N. Sutherland Ridge Pl. have installed and are keeping a very large, outdoor Television in their backyard. Noise from this TV has disturbed Petitioner's peace and quiet and will continue to do so until it is removed. This TV is a nuisance pursuant to Section 5.4 of the CC&Rs which provides that nothing "shall ... be kept upon any lot ... that will

1 cause any noise that will or might disturb the peace, quiet, and comfort, or
2 serenity of the occupants of the surrounding property.”

3 Petitioner has repeatedly requested the HOA to enforce this CC&R. The
4 HOA has refused to do so. Wherefore, the Petitioner hereby seeks an order
5 instructing the HOA to enforce the CC&Rs and seek removal of the
6 nuisance TV.

7 4. Respondent filed a timely response to the petition denying all complaint
8 items.

9 5. The matter was referred to the Office of Administrative Hearings (OAH) for
10 an evidentiary hearing.

11 6. On or about March 15, 2023, the Department issued a Notice of Hearing
12 setting the above-captioned matter for hearing on April 13, 2023, at the OAH in
13 Phoenix, Arizona.

14 7. The Notice of Hearing provided, in relevant part, as follows:

15 Petitioner states, “[n]oise from [a] TV has disturbed Petitioner’s peace and
16 quiet... This TV is a nuisance pursuant to Section 5.4 of the CC&Rs...”
17 Petitioner also states, “[Respondent] is neglecting their duty to enforce the
18 community CC&Rs.

19 8. A hearing was held on April 13, 2023.

20 9. At hearing, Petitioner stated that he has notified Respondent that noise
21 from his neighbor’s television, located in his neighbor’s backyard, has violated his peace
22 and quiet. Petitioner alleged that Respondent has failed to enforce CC&R Section 5.4.

23 10. Respondent contended that the petition should be dismissed because
24 Respondent cannot violate CC&R Section 5.4. Respondent contended that the OAH
25 only has jurisdiction over alleged violations of Respondent’s governing documents or an
26 applicable Arizona statute, under ARIZ. REV. STAT. § 32-2199.01(A).

27 **CONCLUSIONS OF LAW**

28 1. ARIZ. REV. STAT. § 32-2199(B) permits an owner or a planned community
29 organization to file a petition with the Department for a hearing concerning violations of
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1 planned community documents under the authority Title 33, Chapter 16.¹ This matter
2 lies with the Department's jurisdiction.

3 2. Pursuant to Ariz. Rev. Stat. §32- 2199.02(A), Petitioner's relief in this
4 venue is limited to e is limited to a finding that the governing document or statute at
5 issue has been violated by the respondent, an order that Respondent abide by the
6 provision in the future, and to have the filing fee returned to the petitioner and a civil
7 penalty levied against Respondent. The OAH lacks jurisdiction over any other matter.

8 3. Petitioner bears the burden of proof to establish that Respondent violated
9 on its CC&Rs by a preponderance of the evidence.² Respondent bears the burden to
10 establish affirmative defenses by the same evidentiary standard.³

11 4. "A preponderance of the evidence is such proof as convinces the trier of
12 fact that the contention is more probably true than not."⁴ A preponderance of the
13 evidence is "[t]he greater weight of the evidence, not necessarily established by the
14 greater number of witnesses testifying to a fact but by evidence that has the most
15 convincing force; superior evidentiary weight that, though not sufficient to free the mind
16 wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one
17 side of the issue rather than the other."⁵

18 5. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give
19 effect to the intent of the parties.⁶ "Restrictive covenants must be construed as a whole
20 and interpreted in view of their underlying purposes, giving effect to all provisions
21 contained therein."⁷ CC&R Section 5.4 forbids the use of lots for the storage of property
22 that would cause noise that would or might disturb the peace, quiet, comfort, or serenity
23 of occupants of surrounding property. Petitioner did not even contend, nor provide any

24 ¹ See ARIZ. REV. STAT. § 33-1803, which authorizes homeowners associations in planned communities to
25 enforce the development's CC&Rs

26 ² See A.R.S. § 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74
27 Ariz. 369, 372, 249 P.2d 837 (1952).

28 ³ See A.A.C. R2-19-119(B)(2).

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

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

⁶ See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

⁷ *Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. App. 1993) (quoted in *Powell*, 211 Ariz. at 557 ¶ 16, 125 P.3d at 377).

1 facts to establish that that Respondent used a lot for the storage of property that would
2 cause noise or disturb the peace, quiet, comfort, or serenity of occupants of surrounding
3 property.

4 6. CC&R Section 5.4 relates to use restrictions and nuisances within the
5 community. See the Department's Hearing File, FH1 CC&R's.pdf. However, the
6 Respondent cannot violate the use restrictions of its CC&Rs. Article 5 addresses the
7 use restrictions on the Members and Lots within the Association. These provisions refer
8 to what members may and may not do within the Association. Therefore, any breach of
9 this Article would be a breach by a Member, not the Association. Petitioner failed to
10 establish that Respondent violated CC&R Section 5.4.

11 7. To the extent that Petitioner alleged that Respondent may have violated
12 common law, or any other laws, the OAH lacks jurisdiction to make such a
13 determination.

14 8. Upon consideration of all of the evidence presented in this matter, the
15 Administrative Law Judge concludes that Respondent did not violate CC&R section 5.4.

16 **ORDER**

17 **IT IS ORDERED**, the petition is dismissed.

18 **NOTICE**

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

24 Done this day, May 1, 2023.

25 /s/ Velva Moses-Thompson
26 Administrative Law Judge

27 Transmitted by either mail, e-mail, or facsimile May 1, 2023 to:

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14 By: OAH Staff
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