

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of
4 Lisa Kittredge
5 Petitioner
6 vs
7 SunBird Golf Resort Homeowners
8 Association
9 Respondent

No. 23F-H040-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARING: May 1, 2023, and May 15, 2023

APPEARANCES: Petitioner Lisa Kittredge appeared on her own behalf.
Respondent SunBird Golf Resort Homeowners Association was represented by Lori N.
Brown and Ben Bednarek.

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

FINDINGS OF FACT

BACKGROUND AND PROCEDURE

1. The Department is authorized by statute to receive and to decide petitions
for hearings from members of homeowners' associations and from homeowners'
associations in Arizona.

2. On or about January 24, 2023, Petitioner filed a single issue petition with the
Arizona Department of Real Estate (Department) which alleged that the SunBird Golf
Resort Homeowners Association (Association) "accept[ed] responsibility to maintain
drainage feature and accepting financial responsibility for the drainage features on the
privately owned for-profit corporation, SubBird Golf Club" in violation of the following:

- ARIZ. REV. STAT. § 33-1806(A)(2)
- SunBird Golf Resort Homeowners Association Book of Governance
 - o The Duty of Care and The Duty of Loyalty, Page 3
- SunBird Golf Resort Homeowners Association Rules and Regulations
 - o Article 6.2(A)
 - o Article 6.2(B)

- o Article 7(C)
 - o Article 7(E)
- SunBird Golf Resort Homeowners Association Covenants, Conditions, and Restrictions
 - o Section 9.2
 - o Section 6.3(A)
- 1999 Common Areas Lease
 - o Section 5
 - o Section 15
- 1999 Declaration
 - o Section A(5)
 - o Section (14)
- Transition Agreement
 - o Section 6
 - o Section 24

3. On or about February 13, 2023, Respondent returned its ANSWER to the Department whereby it denied Petitioner's claims.

4. On or about February 15 2023, the Department referred this matter to the Office of Administrative Hearings (OAH), an independent state agency, for an evidentiary hearing to address the issue as set forth above.

THE PARTIES AND GOVERNING DOCUMENTS

5. Respondent is a homeowners' association whose members own properties in the SunBird Golf Resort residential real estate development located in Maricopa County, Arizona.

6. Petitioner is a SunBird Golf Resort property owner and a member of the Association.

7. Between 1990 and 1994, the area of SunBird Golf Resort was developed as 17 separate homeowners associations with 17 individual Covenants, Conditions and Restrictions (CC&Rs) and the SunBird Golf Course.

1 8. In 1990, the SunBird Golf Resort adopted a Master Plan (1990 Master
2 Plan).

3 9. In 1999, the 17 individual associations were consolidated into the SunBird
4 Golf Resort Homeowners Association. In connection with the consolidation, various
5 documents were executed including the 1999 Transition Agreement, the 1999 CC&Rs, a
6 Pro Shop Lease, and a Common Area Lease.

7 10. In 2008, the SunBird Golf Resort Homeowners Association adopted
8 Amended, Restated and Consolidated Declaration of Restrictions for SunBird Golf Resort
9 (2008 CC&Rs).

10 11. The 2008 CC&Rs provided, in pertinent part, as follows:

11 This Amended, Restated and Consolidated Declaration amends, deletes
12 and restated the original Declarations of each Unit as described in Exhibit A
13 hereto in their entirety, and the original Declaration of each Unit shall be of
14 no further force or effect, resulting in Sunbird Golf Resort Homeowners
15 Association to be under the same restrictions.

16 12. The units listed in Exhibit A of the 2008 CC&Rs included the entirety of the
17 homes in the SunBird Golf Resort Homeowners Association.

18 13. In 2015, the SunBird Golf Resort Homeowners Association adopted
19 Amended, Restated and Consolidated Declaration of Restrictions for SunBird Golf Resort
20 (2015 CC&Rs).

21 14. The 2015 CC&Rs provided, in pertinent part, as follows:

22 This Amended, Restated and Consolidated Declaration amends, deletes
23 and restated the original Declarations of each Unit as described in Exhibit A
24 hereto in their entirety, and the Amended, Restated and Consolidated
25 Declaration recorded at recording number 2008-0101697, records of
26 Maricopa County, Arizona (collectively "the Prior Declarations"), and the
27 Prior Declarations shall be of no further force or effect.

28 15. The units listed in Exhibit A of the 2015 CC&Rs included the entirety of the
29 homes in the SunBird Golf Resort Homeowners Association.

30 16. Section 6.3(A) of the 2015 CC&Rs, entitled "Purpose of Assessments"
include, in pertinent part, the following provisions:

1 The Association shall apply all funds and property received by it, including
2 the Annual and special Assessments . . . for the common good and benefit
3 of Sunbird and the members of the association . . . to any other expenses
4 incurred in conformance with this Declaration, the Articles, Bylaws or
5 Association rules (which expenses are sometimes referred to herein as
6 "Common Expenses"). Common Expenses include, without limitation,
7 expenses for the acquisition, construction, alteration, maintenance,
8 provision and operation, by any manner or method whatsoever, of any and
9 all land, properties, improvements, recreational facilities (except for the golf
10 course), The following are some, but not all, of the areas that the
11 Association may seek to aid, promote and provide for: social interaction
12 among members of the Association; maintenance of landscaping on
13 Common Areas, public rights-of-way and drainage areas within
14 Sunbird

15 17. The 2015 CC&Rs defined "Sunbird" to mean "all real property now or
16 hereafter served by the Association, and includes the Premises and any real property
17 which is subject to this Declaration."

18 18. In 2021, an Association adopted amendments to the 2015 CC&Rs (2021
19 Amendment) was adopted that amended the above quoted language of Section 6.3 of the
20 2015 CC&Rs, in pertinent part, as follows:

21 Common Expenses include, without limitation, expenses for the acquisition,
22 construction, alteration, maintenance, provision and operation, by any
23 manner or method whatsoever, of any and all land, properties,
24 improvements, recreational facilities (including the golf course, but only
25 from funds collected pursuant to Section 6.7(C) of this Declaration)

26 19. Section 6.7(C) of the 2021 Amendment created a "Capital Improvement
27 Assessment for Golf Course" that was funded by a \$300.00 assessment due upon the
28 close of escrow or upon transfer of ownership of lots in the Association.

29 HEARING EVIDENCE

30 20. Petitioner testified on her own behalf, presented the testimony of Beth
Lockwood, and presented exhibits 1, 3, 4, 5, 6, 7, 10, 11, 14, 18, 22, 23, 24, 36, and 42.
Respondent presented the testimony of Layne Varney, General Manager, and Charles
Heitbrink, Secretary of the Board of Directors, and presented exhibits C, D, and F through
L. Administrative notice was taken was the Department's electronic file and NOTICE OF
HEARING. The substantive evidence of record is as follows:

1 a. At its inception, the lots within the Association and the SunBird Golf Course
2 had the same owner.

3 b. With respect to storm drainage, the 1990 Master Plan included the following
4 statement:

5 Storm water runoff was collected on the residential streets within the
6 project and conveyed to channels for disposal on to the golf course.
7 Stormwater is stored in retention areas on golf course or golf course
8 lakes. Retention areas on golf course dissipate storm water by
9 percolation through existing dry wells or infiltration into ground.
10 The drainage system is maintained by the Homeowners Association
11 and golf course employees employed by the Homeowners
12 Association.

13 c. When the SunBird Golf Course was split from the community lots, the
14 Association had no responsibility to pay for anything on the golf course.

15 d. The Association entered into the Common Area Lease and the Pro Shop
16 Lease with the SunBird Golf Course.

17 e. At some point, standing water began accumulating on the golf course
18 following storms, which resulted in foul odors and mosquito issues.

19 f. The SunBird Golf Course refused to address any issues having to do with
20 the drainage problem.

21 g. The minutes of the December 19, 2022 Board of Directors meeting
22 documented the discussion of the drainage issue as follows:

23 The Board discussed the drainage issue and Layne provided the
24 community a recap of the steps and discussion that has taken place.
25 Several homeowners had comments concerning the project. The
26 following motion was made by Dirk to address the SunBird Gold [sic]
27 Community/Course drainage concerns by conducting and open,
28 inspect and clean out of specific drainage wells. As identified by the
29 SunBird Golf Course Board of Directors this motion is to address
30 prioritized holes #12, #1 and #2. An estimate has been solicited and
provided by Torrent Resources in the amount of \$15,968 of which we
will cap at \$20,000 should any unforeseen items be identified. This
work will open, inspect, and clean out the specified drains. Funding
for this work will be allocated from the HOA Contingency funding
stream. Second by Jim. Motion passed 7/0.

1 h. Petitioner filed the instant petition in this matter alleging that the Association
2 improperly used annual assessments to fund the work on the drainage
3 issues to benefit the SunBird Golf Course.

4 **ARGUMENTS**

5 Petitioner's argument

6 21. Petitioner argued that the 1999 CC&Rs were still in effect because the 2008
7 CC&Rs did not specifically replace them.

8 22. Petitioner indicated at the hearing that, if the Association had proposed
9 paying for the work with the Golf Course Capital Improvement Fund, she would not have
10 filed the petition as that would have been a proper expenditure of monies in that fund.

11 23. Petitioner stated that she was concerned this would set a precedent that the
12 Association would continue to assume responsibility for the drainage on the SunBird Golf
13 Course, which one proposal indicated could cost up to two million dollars.

14 Respondent's argument

15 24. Respondent asserted that the 1999 CC&Rs were no longer in effect and that
16 the provisions of the 2015 CC&Rs and 2021 Amendment permitted the Association to
17 expend the funds at issue to address the drainage system problems.

18 25. Respondent denied that it was assuming all responsibility for the drainage
19 system, but was merely trying to alleviate the immediate problem at a relatively small cost.

20 26. Respondent indicated that it had not proceeded with the proposal pending
21 the outcome of the instant matter.

22 27. Ultimately, Respondent requested that the Tribunal deny Petitioner's
23 appeal.

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 planned community association. The owner or association may petition the department
28 for a hearing concerning violations of community documents or violations of the statutes
29 that regulate planned communities as long as the petitioner has filed a petition with the
30 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

1 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
2 32-2199.02, and 41-1092 *et seq.*, OAH has the authority to hear and decide the contested
3 case at bar. OAH has the authority to interpret the contract between the parties.¹

4 3. In this proceeding, Petitioner bears the burden of proving by a
5 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-33-
6 1804(A), (C) and (E) and the CC&Rs.²

7 4. “A preponderance of the evidence is such proof as convinces the trier of fact
8 that the contention is more probably true than not.”³

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

14 6. Petitioner’s assertion that the 1999 CC&Rs were still in effect was not
15 established by a preponderance of the evidence. While the 2008 CC&Rs could have, and
16 arguably, should have explicitly called out the 1999 CC&Rs as being replaced by the 2008
17 CC&Rs, the intention was clear in both the 2008 CC&Rs and the 2015 CC&Rs that they
18 were to serve as the, then current, CC&Rs applicable to the Association. One would not
19 expect a community to have more than one operative set of CC&Rs at any given time.

20 7. Section 6.3(A) of the 2015 CC&Rs provided that the Association may use
21 assessments for “drainage areas within SunBird” and “SunBird” was defined as “real
22 property now or hereafter served by the Association.”

23 8. The 2021 Amendment allowed the Association to use assessments for the
24 golf course, “but only from funds collected” under the newly created Capital Improvement
25 Assessment for Golf Course.

26 9. No evidence was submitted to establish that the SunBird Golf Course was
27 “served by the Association.”

28 ¹ See *Tierra Ranchos Homeowners Ass’n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

29 ² See ARIZ. ADMIN. CODE R2-19-119.

30 ³ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁴ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

10. Accordingly, the Association was not permitted to expend funds collected as assessments to any drainage issues for the SunBird Golf Course other than those assessments collected pursuant to Section 6.7(C) of the 2021 Amendment.

11. Accordingly, Petitioner established that Respondent acted in violation of the Association's governing documents.

12. The undersigned Administrative Law Judge concludes that, because Petitioner sustained her burden of proof that Respondent committed the alleged violation, her petition must be granted.

ORDER

Based on the foregoing,

IT IS ORDERED that Petitioner's petition be granted.

IT IS FURTHER ORDERED that Respondent reimburse Petitioner's filing fee of \$500.00 in certified funds.

IT IS FURTHER ORDERED that Respondent shall henceforth comply with the provisions of the governing documents.

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, June 13, 2023.

/s/ Tammy L. Eigenheer
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile June 13, 2023 to:

Susan Nicolson
Commissioner
Arizona Department of Real Estate
100 N. 15th Avenue, Suite 201

Phoenix, Arizona 85007

Attn:

SNicolson@azre.gov

AHansen@azre.gov

vnunez@azre.gov

djones@azre.gov

labril@azre.gov

Lori N Brown

Gordon Rees Scully Mansukhani LLP

Two North Central Ave., Ste. 2200

Phoenix, AZ 85004

lbrown@grsm.com

Lisa Kittredge

6601 S Cypress Point Drive

Chandler AZ 85249

mayyoubewell@gmail.com

By: OAH Staff