

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of
4 Richard K. Morris

5 v
6 The Townes at Paradise Valley Landings

No. 23F-H056-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

7 **HEARING:** July 14, 2023

8 **APPEARANCES:** Richard K. Morris appeared on his own behalf. Joelle Lever,
9 represented The Townes at Paradise Valley Landings.

10 **ADMINISTRATIVE LAW JUDGE:** Brian Del Vecchio

11 **FINDINGS OF FACT**

12 **BACKGROUND AND PROCEDURE**

13 1. The Arizona Department of Real Estate (Department) is authorized by
14 statute to receive petitions for hearings from members of homeowners' associations and
15 from homeowners' associations in Arizona.

16 2. On or about May 1, 2023, Richard K. Morris (Petitioner) filed a single issue
17 petition with the Department which alleged that The Townes at Paradise Valley Landings
18 (Respondent or Association) was required to permanently remove a pre-approved
19 security light in violation of Section 9.2 of the Association's covenants, conditions, and
20 restrictions (CC&Rs).

21 3. On or about May 17, 2023, Respondent submitted its ANSWER to the
22 Department whereby it denied Petitioner's claim.

23 4. On or about May 19, 2023, the Department referred this matter to the Office
24 of Administrative Hearings (OAH), an independent state agency, for an evidentiary
25 hearing on July 14, 2023, to determine whether the alleged violation of Section 9.2 of the
26 CC&Rs occurred.

27 **THE PARTIES AND GOVERNING DOCUMENTS**

28 5. Respondent is an association of townhome owners whose members own
29 properties in The Townes at Paradise Valley Landings residential real estate development
30

1 located in Phoenix, Arizona. Membership for the Association is compromised of The
2 Townes at Paradise Valley Landings subdivision.

3 6. Petitioner is a Townes at Paradise Valley Landings Townhome property
4 owner and a member of the Association.

5 **HEARING EVIDENCE**

6 7. Petitioner testified on his own behalf. Petitioner's Exhibits A through E were
7 admitted. Respondent's Exhibits 1 through 10A, 10B, 10C, 10E, 10F, 11B, 11C, 11D,
8 11E, 11F, 11G, and 12 were admitted. The Department's electronic file and NOTICE OF
9 HEARING were also admitted into the record. The substantive evidence of record is as
10 follows:

11 a. On June 1, 2010, Petitioner submitted a Request for Architectural
12 Approval form to install a motion sensing security light to the shed fascia.
13 Petitioner's request was approved by the Architectural Review Committee
14 on June 25, 2010.¹

15 b. On February 7, 2023, Respondent hired a contractor to remove the
16 roofing system, flashings, inspect decking for damaged plywood, remove
17 and replace all fascia and shingle molding, install new peel and stick
18 modified base sheet and drip edge to shed roof, install counterflashing at
19 wall, seal top joint with urethane sealant, and warrantee all of said work for 5
20 years.²

21 c. On April 7, 2023, Respondent emailed a notice to all homeowners,
22 including Petitioner, to remove anything hanging on the fascia including
23 security lights. The letter also stated, "You will not be able to hang anything
24 on the new fascia." Petitioner complied with Respondent's request and
25 removed the security light from the shed fascia.³

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27
28 ¹ See Department electronic file "2023_05_01 AZ Dept of RE HOA_Petition and supporting docs.pdf" at 5-7.

29 ² See Respondent Exhibit 10A.

30 ³ See Department electronic file "2023_05_01 AZ Dept of RE HOA_Petition and supporting docs.pdf" at 8.

1 d. On April 27, 2023, the contracted roofing company submitted a note
2 to Respondent which suggested the best practice was to keep fascia clean
3 and clear of all objects including lights.⁴

4 e. On July 12, 2023, the contracted roofing company emailed
5 Respondent indicating the warranty would be voided if any damage,
6 alterations, or additions are made to the fascia.⁵

7 **ARGUMENTS**

8 Petitioner's argument

9 8. Petitioner testified he followed the appropriate steps to obtain approval from
10 Respondent to install a security light on the fascia of the shed at the front of his property.
11 Petitioner argued the Architectural Review Committee approval letter did not have a
12 sunset provision nor did it grant Respondent the ability to revoke his approval in the future.

13 Respondent's argument

14 9. Respondent argued the Board had a fiduciary duty to all the homeowners,
15 not just Petitioner, to maintain the roofs and fascia. Respondent argued this fiduciary duty
16 ought to extinguish Petitioner's prior approval as it was necessary to preserve the 5 year
17 warranty granted by the roofing contractor.

18 10. Ultimately, Respondent requested that the Tribunal dismiss Petitioner's
19 appeal.

20 **CONCLUSIONS OF LAW**

21 1. This matter lies within the Department's jurisdiction pursuant to ARIZ. REV.
22 STAT. §§ 32-2102 and 32-2199 *et seq.*, regarding a dispute between an owner and a
23 planned community association. The owner or association may petition the department
24 for a hearing concerning violations of community documents or violations of the statutes
25 that regulate planned communities as long as the petitioner has filed a petition with the
26 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

28
29 ⁴ See Respondent Exhibit 10B.

30 ⁵ See Respondent Exhibit 10C.

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.⁶

4 3. In this proceeding, Petitioner bears the burden of proving by a
5 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1804.

6 4. “A preponderance of the evidence is such proof as convinces the trier of fact
7 that the contention is more probably true than not.”⁷ A preponderance of the evidence is
8 “[t]he greater weight of the evidence, not necessarily established by the greater number of
9 witnesses testifying to a fact but by evidence that has the most convincing force; superior
10 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
11 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
12 the other.”⁸

13 5. Section 9.2 of the CC&Rs provides, in pertinent part, as follows:

14 Plans and specifications showing the nature, kind, shape, color, size, materials and
15 location of such improvements or alterations shall be submitted to the Committee
16 for approval as to quality of workmanship, design and harmony of external design
17 with existing structures and as to location in relation to surrounding structures,
18 topography and finished grade elevation. No permission or approval shall be
19 required to rebuild in accordance with plans and specifications previously
20 approved by the Committee.

21 6. In this case, Petitioner met his burden. Section 9.2 of the CC&Rs authorizes
22 homeowners to obtain an exception to the CC&Rs restrictions against improvements or
23 alterations of common areas. The method of obtaining said exception is supplying “plans,
24 specifications, showing the nature, kind, shape, color, size materials, and location of such
25 improvements or alterations to the [Architectural Review] Committee for approval.”⁹
26 Petitioner submitted his request to install a security light on the fascia of the shed located
27 in a common area near his property. The Architectural Review Committee approved
28 Petitioner’s request granting him an exception the CC&Rs restriction against alterations or
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⁶ See *Tierra Ranchos Homeowners Ass’n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

⁷ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

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

⁹ See Respondent Exhibit 12D.

1 improvements of common areas. Thirteen years later Respondent alleged, without
2 providing evidence, the 2010 Architectural Review Committee approval letter was
3 revoked. Respondent mistakenly believed the fiduciary responsibility owed to the
4 homeowners ought to trump Petitioner's prior authorization. Nothing in the CC&Rs, the
5 Architectural Review Committee approval letter, or any other document submitted by
6 Respondent supports Respondent's contention. Furthermore, Respondent admitted no
7 due diligence was performed regarding the existence of Architectural Review Committee
8 approvals which would conflict with potential roof work before a contract was signed.
9 While it may be true Respondent had a fiduciary duty to all the homeowners to protect
10 their investment in maintenance of the common area roofs, this does not entitle
11 Respondent to fail to do their due diligence and disavow prior agreements.

12 7. Based upon a review of the credible and relevant evidence in the record,
13 Petitioner met his burden of proof.

14 8. Therefore, the Administrative Law Judge concludes that Respondent's
15 conduct, as outlined above, was a violation of the Association's Section 9.2 of the CC&Rs.

16 **ORDER**

17 **IT IS ORDERED** that Petitioner's petition in this matter be affirmed. Respondent is
18 directed to comply with the provisions of Section 9.2 of the CC&Rs.

19 **IT IS FURTHER ORDERED** that Petitioner's request to levy a civil penalty against
20 Respondent is denied.

21 **IT IS FURTHER ORDERED** Respondent shall reimburse Petitioner's filing fee of
22 \$500.00 pursuant to ARIZ. REV. STAT. § 32-2199.02(A).

23 **NOTICE**

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

29 Done this day, August 7, 2023.

30 /s/ Brian Del Vecchio

Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile August 7, 2023 to:

Susan Nicolson
Commissioner
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By: OAH Staff