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No. 23F-H043-REL

ADMINISTRATIVE LAW JUDGE DECISION

VS

Respondent

APPEARANCES: Petitioner Jennifer J. Sullivan appeared on her own behalf. Respondent The Village at Elk Run Homeowners Association, Inc. was represented by Daniel McLeran Esq.

After review of the hearing record in this matter, the undersigned Administrative Law Judge makes the following Findings of Fact and Conclusions of Law, and issues this ORDER to the Commissioner of the Arizona Department of Real Estate ("Department").

BACKGROUND AND PROCEDURE

2. On or about February 20, 2023, Petitioner filed a single-issue petition against the Association with the Department. Petitioner tendered \$500.00 to the Department with her petition.

1 3. On or about March 13, 2023, The Village at Elk Run Homeowners
2 Association, Inc. ("Association") filed its ANSWER with the Department whereby it denied
3 all complaint items in the petition.

4 4. Per the NOTICE OF HEARING, the Department referred this matter to the
5 Office of Administrative Hearings ("OAH"), an independent state agency, for an
6 evidentiary hearing on May 8, 2023, regarding the following Dispute based on Petitioner's
7 petition:

8 Petitioner states that the Respondent, 'issued a Courtesy Violation
9 Notice on November 22, 2022 claiming that I was in violation of
10 Article 4, Section 4.1 of the Community's CC&Rs by listing my home
11 on Airbnb with a minimum rental period of 2 days.'

12 **THE PARTIES AND GOVERNING DOCUMENTS**

13 5. Respondent was a homeowners' association whose members own
14 properties in a residential real estate development located in Flagstaff, Arizona.

15 6. Petitioner was a property owner and a member of the Association.

16 7. The Association was governed by its Covenants, Conditions, and
17 Restrictions ("CC&Rs"), and overseen by a Board of Directors ("the Board"). The
18 Association is also regulated by Title 33, Chapter 16, Article 1 of the Arizona Revised
19 Statutes ("ARIZ. REV. STAT.")

20 **HEARING EVIDENCE**

21 8. After a continuance, hearing was held on July 24, 2023.

22 9. Petitioner testified on her own behalf and presented five exhibits.
23 Respondent called John and Teresa Vail as a witness and submitted nine exhibits into
24 evidence. The Agency Record from the Department and NOTICE OF HEARING were also
25 admitted into the evidentiary record.

26 Petitioner's testimony

27 10. Petitioner testified that she and her husband have owned a home within the
28 Association since 2006. She testified that in 2020, she decided start renting the property
29 on a short-term basis through Airbnb. Petitioner registered for a Transaction Privilege tax
30

number through the Department of Revenue and was in the process of registering for a license under the new rules for the city of Flagstaff.

11. Petitioner testified that she believed that section 4.1 of the CCR's did not preclude short term rentals. Petitioner testified that she sought legal consult prior to proceeding, and believed she would not run afoul of the rules.¹

12. Further, Petitioner testified that there was nowhere in the various versions of the Associate's Rules and Regulations that mentioned a ban on short-term rentals.² Petitioner also argued that the newsletters,³ which reminded residents of the rental limits, were not official community documents.

13. Petitioner testified also that she received a courtesy notice⁴ on November 18, 2022, about the violation, but there was no complainant for any noise, trashcan, or parking allegations.

14. In addition, Petitioner testified that even the Association's lawyers have disagreed on the provision and whether it applies to short-term rentals.⁵

15. Finally, Petitioner argued that she was not in violation of Section 4.1., and did not believe that a courtesy notice should have been issued.

John Vail's testimony

16. Mr. Vail testified that he owned a three townhomes within the Association and was one of the original developers of the homes in Association and drafted and signed the CCR's. He testified that section 4.1 was to limit rentals less than 30 days/month-to-month, and that he would not have signed the CCR's if rentals less than that were contemplated.

Teresa Vail's testimony

17. Mrs. Vail was a Board member and rents her three properties for approximately 4-5 months at a time.

¹ See Petitioner's Exhibit A.

² See Petitioner's Exhibit B.

³ See Respondent's Exhibit 2.

⁴ See Petitioner's Exhibit C.

⁵ See Petitioner's Exhibit D and Respondent's Exhibit 9.

18. In addition, Mrs. Vail testified that the issue of short-term rentals has come up twice before, but the previous property owners stopped the practice once they were informed by the Board.

19. Mrs. Vail also testified that this restriction was common amongst the various other associations in the Flagstaff area.⁶

20. Mrs. Vail also testified that there had been no specific complaints about Petitioner's tenants, but she believes that offering longer term rentals helped the property owner get to know the renter better to prevent any problems.

CONCLUSIONS OF LAW

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

2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(D), 32-2199.02, and 41-1092, OAH has the authority to hear and decide the contested case at bar.

3. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1804(D).⁷

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

⁶ See Respondent's Exhibit 8.

⁷ See ARIZ. ADMIN. CODE R2-19-119.

⁸ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁹ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

1 5. Section 4.1 of the CCR's provides as follows:

2 Residential Use. All Lots shall be used, improved and devoted exclusively
3 to Single family Residential Use. No gainful occupation, profession, trade or
4 other nonresidential use shall be conducted on any Lot. This Section shall
5 not preclude the Residential Leasing or Renting of a Lot for Month to Month
6 or Longer Terms.

7 6. After review of the testimony and exhibits in this matter, the tribunal finds
8 that Petitioner has not met her burden. First, Petitioner was clearly running a business out
9 of the home, as she has applied for a business license with Flagstaff, and was remitting
10 Transaction Privilege Tax. Further, tribunal was not convinced that simply because it
11 does not mention the exclusion for short-term rentals that the same was permitted.
12 Rather the tribunal reads the section to mean that nonresidential use is only permitted if
13 the lots were rented or leased for month to month or longer terms. At all other times, the
14 nonresidential use was prohibited. Thus, as currently written, any renting or leasing
15 shorted than a month was prohibited.

16 **ORDER**

17 **IT IS ORDERED** that Petitioner's petition in this matter be denied.

18 **IT IS FURTHER ORDERED** pursuant to ARIZ. REV. STAT. § 32-2199.02(A),
19 Respondent shall not reimburse Petitioner's filing fee as required by ARIZ. REV. STAT. §
20 32-2199.01.

21 **NOTICE**

22 **Pursuant to ARIZ. REV. STAT. §32-2199.02(B), this ORDER is binding on the**
23 **parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. § 32-2199.04.**
24 **Pursuant to ARIZ. REV. STAT. § 41-1092.09, a request for rehearing in this matter**
25 **must be filed with the Commissioner of the Department of Real Estate within thirty**
26 **(30) days of the service of this ORDER upon the parties.**

27 Done this day, August 8, 2023.

28 /s/ Adam D. Stone
29 Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile August 8, 2023 to:

Susan Nicolson
Commissioner
Arizona Department of Real Estate
100 N. 15th Avenue, Suite 201
Phoenix, Arizona 85007

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By: OAH Staff