

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of

No. 23F-H046-REL

4 Brenda Norman,
5 Petitioner,

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 vs.

7 Rancho Del Lago Community Association,
8 Respondent.

9
10 **HEARING:** July 31, 2023 at 9:00 AM.

11 **APPEARANCES:** Brenda Norman (“Petitioner”) appeared on her own behalf.
12 Michael McLeran, Esq. appeared on behalf of Rancho Del Lago Community Association
13 (“Respondent”) with Spencer Brod as a witness.

14 **ADMINISTRATIVE LAW JUDGE:** Jenna Clark.

15
16 After review of the hearing record in this matter, the undersigned Administrative
17 Law Judge makes the following Findings of Fact and Conclusions of Law, and issues this
18 ORDER to the Commissioner of the Arizona Department of Real Estate (“Department”).

19 **FINDINGS OF FACT**

20 **THE PARTIES AND GOVERNING DOCUMENTS**

21 1. Petitioner is a homeowners’ association whose members own properties in
22 the Rancho Del Lago residential real estate development located in Pima County,
23 Arizona.¹ Membership for the Association is comprised of Rancho Del Lago homeowners.
24 The Association is governed by its Covenants, Conditions, and Restrictions (“CC&Rs”)²
25 and overseen by a Board of Directors (“the Board”). The Association is also regulated by
26 Title 33, Chapter 16, Article 1 of the ARIZ. REV. STAT.

27 2. Petitioner is a Rancho Del Lago subdivision property owner and member of
28 the Association.

29 ¹ See Department's electronic file at Arizona Corporations Commission.pdf.

30 ² See Respondent Exhibit 3.

3. On or about September 28, 2001, the Association's CC&Rs were filed with the Pima County Recorder's Office. Article IV Section 2(d) of the CC&Rs provides as follows:

All landscaping will, before installation, be subject to the prior written approval of the Architectural Review Committee. The theme for landscaping shall emphasize plantings and other features which will complement and enhance the native Sonoran Desert and the existing and planned character of [the Association.] Certain plantings will be prohibited as defined by the Architectural Rules and the Design Guidelines ... The Architectural Review Committee will be the sole and final judge as to whether landscaping after installation has met the approved criteria and whether it is, at any given time, maintained properly to the standards established by this Declaration, the Architectural Rules, and/or the Design Guidelines.

4. In December 2003, the Association by and through its Architectural Review Committee and Board of Directors, adopted the Association's Common Project Guidelines ("Design Guidelines"). In pertinent parts, the philosophy of the Association is as follows:

The overall intent for [the Association] is to create a self-sufficient master planned community set respectfully into the natural desert ... [T]he Association is envisioned and planned to respect its natural desert and mountain setting. Development will strive to preserve and enhance the natural setting of this unique location. Design standards and restrictions have been developed to implement this vision ... [T]he purpose of the Design Guidelines is to provide an overall framework for quality development and to create a cohesive overall community appearance.

5. Appendix B of the Design Guidelines, Prohibited Plant List,³ Section 5 provides the following:

All Citrus, Palms, Oleanders, Pines, Cypress, False Cypress, Juniper, and Cedar, whose mature growth height may reasonably be expected to exceed ten feet will be prohibited for aesthetic reasons. Dwarf varieties, and those specimens whose mature growth height may reasonably be expected to be maintained at less than ten feet, may be installed on individual Lots within walled yard areas.

BACKGROUND AND PROCEDURE

³ See Department's electronic file at [Petiton.pdf](#); see also Respondent Exhibit 1.

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

4 7. On or about March 02, 2023, Petitioner filed a single issue petition with the
5 Department which alleged, overall, that Respondent knowingly and intentionally violated
6 Appendix B, Section 5, of the CC&Rs by failing to enforce the Prohibited Plant List and
7 require Petitioner's rear neighbors ("Neighbors")⁴ to remove the oleander and palm trees
8 from their backyard.⁵ Specifically, Petitioner noted as follows, in pertinent parts:

9 Our neighbors are growing oleanders and palm trees in their backyard in violation
10 of the CC&Rs of our HOA. These plants have reached a height that they are now
11 posing a nuisance for us. I am highly allergic to oleanders, as are many people, and
12 they need to be removed. The palm trees shed leaves that are blown into our yard.
13 These leaves clog and jam our pool vacuum cleaner, and they are very difficult to
14 remove from our pool. The HOA has ignored my complaint. They have a legal,
15 contractual obligation to enforce the CC&Rs.

16 The petition also requests, as means of relief, that an Order be entered in Petitioner's
17 favor and that the Department impose a civil penalty against Respondent.⁶

18 8. On March 07, 2023, the Association tendered a \$500.00 filing fee to the
19 Department.⁷

20 9. On March 08, 2023, the Department issued a HOA NOTICE OF PETITION to
21 Respondent.⁸

22 10. On March 21, 2023, an attorney from Halk, Oetinger, and Brown PLC
23 returned an ANSWER to the Department on behalf of Respondent whereby all complaint
24 items in the underlying petition were denied.⁹ The ANSWER also noted that the petition had
25 been forwarded to Respondent's insurance provider, who would provide counsel for the
26 matter, if necessary.¹⁰

27 ⁴ Neighbors' reside at 10793 Bear Table Tank Dr. Vail, AZ 85641.

28 ⁵ See Department's electronic file at Petition.pdf.

29 ⁶ *Id.*

30 ⁷ See Department's electronic file at Receipt.pdf.

⁸ See Department's electronic file at Notice of Petition.pdf.

⁹ See Department's electronic file at Rancho Del Lago Response.pdf.

¹⁰ *Id.*

11. On March 27, 2023, another ANSWER was provided to the Department on behalf of Respondent that reiterated Respondent's prior denials and effectively served as a NOTICE OF SUBSTITUTED COUNSEL.¹¹

12. On March 28, 2023, the Department referred this matter to the Office of Administrative Hearings ("OAH"), an independent state agency, for an evidentiary hearing on May 09, 2023.¹² Per the NOTICE OF HEARING¹³ the issue(s) to be determined at hearing are as follows:

Petitioner states that Respondent violated Appendix B Paragraph 5 of the CC&Rs by not enforcing the CC&R previously mentioned despite receiving a complaint from the Petitioner.

HEARING EVIDENCE

13. Petitioner testified on her own behalf. Respondent called Spencer Brod as a witness and submitted Exhibits 1 & 3. The Department's electronic file, including the NOTICE OF HEARING, was also admitted into the hearing record. The substantive evidence of record is as follows:

- a. Petitioner owns residential property located within the Association at 10814 S. Distillery Canyon Springs Dr. Vail, AZ 85641.
- b. Petitioner and Neighbors' property is separated by a 6ft retaining wall in both of their backyards.
- c. Neighbors have an unknown amount of Oleanders and Palm Trees in their backyard, near or directly abutting the retaining wall that separates their property from Petitioner's. Debris from Neighbors' Oleanders and Palm Trees fall directly into Petitioner's pool, causing her pool equipment to clog and render her unable to use it. No component parts of Petitioner's pool have had to be repaired or replaced due to the aforementioned debris, nor

¹¹ See Department's electronic file at Response to Petition – Signed.pdf.

¹² On May 09, 2023, Petitioner failed to appear at the scheduled time for hearing. The undersigned found Petitioner to be in default and thusly dismissed the underlying petition. Later that same date Petitioner submitted a MOTION FOR RECONSIDERATION, which was granted over Respondent's objection(s) May 22, 2023. On May 18, 2023, a MINUTE ENTRY – GRANTING CONTINUANCE was issued which reset the matter for hearing at 9:00 a.m. on July 31, 2023.

¹³ See Department's electronic file at Notice of Hearing.pdf.

has Petitioner incurred any additional pool maintenance related expenses due to said debris.

- d. On July 30, 2022, Petitioner submitted an Association MEMBER COMPLAINT DECLARATION ("COMPLAINT") which alleged, in pertinent part, that Neighbors' backyard oleanders and palm trees, both of which were on the Association's Prohibited Plant List, were causing damage in her pool due to their debris.¹⁴ Five photos were attached.¹⁵
- e. On July 31, 2022, Petitioner emailed a copy of her COMPLAINT to the Association's legal counsel, and sent an additional copy via certified mail on August 22, 2022.¹⁶
- f. On unknown dates, Neighbors voluntarily trimmed the Oleanders and Palm Trees in their backyard, and also had some of their Oleanders removed. The remaining Oleanders are at or under 8ft.

ADDITIONAL EVIDENCE

- g. The CC&Rs have never been amended or otherwise modified since Petitioner became a member of the Association.
- h. The Association has never enforced Appendix B, Section 5, of the CC&Rs. Superficially, neither the Association's Architectural Review Committee nor has the Board of Directors ever imposed a fine on a Member for being in violation of the provision.
- i. There are a multiple residences within the association that have mature Oleanders and Palm Trees as a part of their landscaping.
- j. The Association did not plant, nor has it ever maintained, any of the foliage in Neighbors' backyard, including the Oleanders and Palm Trees.
- k. It is unknown if Neighbors own the property on Bear Table Tank Dr. that abuts Petitioner's backyard.

¹⁴ See Department's electronic file at Petition.pdf.

¹⁵ See Department's electronic file at 1_40CB1151-9CFB-4B50-ACA6-544C9D545891.jpeg; 2_54CA1875-0AC7-4714-90C3-B9926692087E.jpeg; 3_9E1D5CB8-EE45-4129-8BE2-B8C27D486089.jpeg; 4_BDCCCAC5-8D08-497B-8789-B97E9D4C6F1B.jpeg; and 5_F65104F0-3228-47FE-A7B6-C3706136BA81.jpeg.

¹⁶ *Id.*

CLOSING ARGUMENTS

14. In closing, Petitioner argued that her petition should be granted by the Department and that Respondent should be compelled to remove, or have removed, the Oleanders and Palm Trees at issue in Neighbors' backyard.

15. In closing, Respondent argued that the underlying petition failed to state a claim for which relief could be granted, as the Department could not compel it to remove shrubs and/or trees from private property. Respondent also argued that because it did not plant the items at issue in Neighbors' yard, it did not have an ownership interest in them, nor an obligation to maintain them. Respondent further opined that because it has discretion under its CC&Rs and applicable ARIZ. REV. STAT. to enforce height restrictions for aesthetic reasons, that it is within its rights to reserve enforcement of the provisions at issue. Per Respondent, it was a disinterested party to a dispute between Petitioner and Neighbors, and the underlying petition is a thinly veiled attempt to circumvent Neighbors of their due process rights.

CONCLUSIONS OF LAW

1. This matter lies within the Department's jurisdiction pursuant to ARIZ. REV. STAT. §§ 32-2102 and 32-2199 et seq., 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(A), 32-2199.01(D), 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested case at bar. OAH has the authority to interpret the contract between the parties.¹⁷

3. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated one or more provisions of the

¹⁷ See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

Association's Design Guidelines.¹⁸ Respondents bear the burden of establishing any affirmative defenses by the same evidentiary burden.¹⁹

4. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."²⁰ 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."²¹

5. In Arizona, when construing statutes, we look first to a statute's language as the best and most reliable index of its meaning. If the statute's language is clear and unambiguous, we give effect to that language and apply it without using other means of statutory construction, unless applying the literal language would lead to an absurd result. Words should be given "their natural, obvious, and ordinary meaning."²²

6. Statutes should be interpreted to provide a fair and sensible result. *Gutierrez v. Industrial Commission of Arizona*; see also *State v. McFall*, 103 Ariz. 234, 238, 439 P.2d 805, 809 (1968) ("Courts will not place an absurd and unreasonable construction on statutes.").

7. When the legislature uses a word or words in one section of a statute, but not another, the tribunal may not read those words into the section where the legislature did not include them.²³ Unless defined by the legislature, words in statutes are given their ordinary meanings.²⁴

8. Each word, phrase, clause, and sentence of a statute or rule must be given meaning so that no part will be void, inert, redundant, or trivial.²⁵

¹⁸ See Arizona Administrative Code ("ARIZ. ADMIN. CODE") R2-19-119.

¹⁹ *Id.*

²⁰ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

²¹ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

²² *Arpaio v. Steinle*, 201 Ariz. 353, 355 ¶ 5, 35 P.3d 114, 116 (App. 2001) (footnotes and citations omitted).

²³ See *U.S. Parking v. City of Phoenix*, 160 Ariz. 210, 772 P.2d 33 (App. 1989).

²⁴ *Id.*

²⁵ See *Deer Valley, v. Houser*, 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007).

9. ARIZ. REV. STAT. § 32-2199.01(A)(1) provides that “[t]he department does not have jurisdiction to hear [a]ny dispute among or between owners to which the association is not a party.”

10. The material facts in this matter are clear.

11. It is clear that plant debris from Neighbors' backyard is causing Petitioner subjective hardship(s) and inconveniences, which amount to a perceived nuisance. It is also clear that the plant life at issue was not planted or maintained by Respondent, and that while said plant life is in clear violation of at least one of the Association's guidelines, the Association has never taken any affirmative steps to enforce it. Because the Design Guideline(s) at issue are discretionary, Respondent is not required to enforce a flora/height restriction in this instance. Enforcement, in the face of decades of intentional inaction, would be an unreasonable exercise of authority and a likely deprivation of Neighbors' due process rights. Regardless, there is no legal avenue by which Respondent could legally remove Neighbors' backyard Oleanders and/or Palm Trees, or have them removed.

12. Petitioner's concession that Neighbors' remediations have, at least temporarily, alleviated the debris issues at bar render the underlying petition moot. Moreover, neither the CC&Rs nor the Design Guidelines require Respondent to mediate or resolve a dispute between neighbors by taking one side or the other.

13. Therefore, because Petitioner has failed to establish a community document violation by a preponderance of the evidence, the underlying petition must be denied, as Petitioner did not sustain her burden of proof.

ORDER

Based on the foregoing,

IT IS ORDERED that Petitioner's petition be dismissed with prejudice.

In the event of certification of the Administrative Law Judge Decision by the Director of the Office of Administrative Hearings, the effective date of the ORDER will be five days from the date of that certification.

NOTICE

1 Pursuant to ARIZ. REV. STAT. §32-2199.02(B), this ORDER is binding on the parties
2 unless a rehearing is granted pursuant to ARIZ. REV. STAT. § 32-2199.04. Pursuant
3 to ARIZ. REV. STAT. § 41-1092.09, a request for rehearing in this matter must be filed
4 with the Commissioner of the Arizona Department of Real Estate within 30 days of
5 the service of this ORDER upon the parties.

6 Done this day, August 11, 2023.

7 Office of Administrative Hearings

8 /s/ Jenna Clark
9 Administrative Law Judge

10 Transmitted by either mail, e-mail, or facsimile to:

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