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No. 23F-H045-REL

ADMINISTRATIVE LAW JUDGE DECISION

Respondent

APPEARANCES: Harry Turner, Petitioner, appeared on his own behalf. Michael [REDACTED], appeared on behalf of Mountain Gate Home Owners Association, Inc., Respondent. Brenda Anderson was a witness on behalf of Respondent [REDACTED].

FINDINGS OF FACT

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

2. On or about March 2, 2023, Harry Turner (Petitioner) filed a single issue petition with the Department which alleged that the Mountain Gate Home Owners Association, Inc. (Respondent or Association) failed to hold an open meeting prior to the March 2, 2023, special meeting as required by ARIZ. REV. STAT. § 33-1804.

3. On or about March 10, 2023, Respondent submitted its ANSWER to the Department whereby it denied Petitioner's claim.

4. On or about March 29, 2023, the Department referred this matter to the Office of Administrative Hearings (OAH), an independent state agency, for an evidentiary hearing on May 10, 2023, which was continued to July 24, 2023, to determine whether the

Board violated Article 10 Section 4 of the Declaration of Covenants, Conditions, Restrictions and Easements for Mountain Gate Homes, a Townhouse Project (CC&Rs).

THE PARTIES AND GOVERNING DOCUMENTS

5. Respondent is an association of townhome owners whose members own properties in the Mountain Gate Homes residential real estate development located in Lakeside, Arizona. Membership for the Association is comprised of the Mountain Gate Homes subdivision.

6. Petitioner is a Mountain Gate Homes property owner and a member of the Association.

HEARING EVIDENCE

7. Petitioner testified on his own behalf. Petitioner's Exhibits 1 through 20 were admitted. Respondent's Exhibits A through G were admitted. Respondent called Brenda Anderson as a witness. The Department's electronic file and NOTICE OF HEARING were also admitted into the record. The substantive evidence of record is as follows:

a. On November 14, 2022, Respondent announced its plan to dig a drainage ditch to address flooding occurring on the northern edge of the property in "Tract H" according to the plat map.¹

b. The plat map describes "Tract H" in two different areas. First, the "Conveyance and Dedication" portion states, "Tracts B, C, D, E, F, H, and I are hereby dedicated as common area to be used for open space, landscaping, and drainage." Second, the "Tract Data" describes Tract H as "Preserved/Active Open Space" while notably tracts C, F, G, and I explicitly characterize these areas as "Drainage".²

ARGUMENTS

Petitioner's argument

8. Petitioner argued the Board violated Article 10 Section 4 of the CC&Rs because every plat map since the creation of the community lists "Tract H" as "Preserved/Active Open Space" according to the "Tract Data" portion of the plat map.

¹ See Department electronic file "Final MG Plat 01_11_2010.pdf".

² *Id.*

1
2
3 Respondent's argument

4 9. Respondent's representative and its witness argued Article 10 Section 4 of
5 the CC&Rs does not apply because "Tract H" has always been dedicated as a common
6 area to be used for drainage. Respondent argued it did not violate the CC&Rs because it
7 did not change the characteristic of the common area and therefore no change protocols
8 needed to be observed.

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

11 **CONCLUSIONS OF LAW**

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

18 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
19 32-2199.02, and 41-1092 *et seq.* OAH has the authority to hear and decide the contested
20 case at bar. OAH has the authority to interpret the contract between the parties.³

21 3. In this proceeding, Petitioner bears the burden of proving by a
22 preponderance of the evidence that Respondent violated Article 10 Section 4 of the
23 CC&Rs.

24 4. "A preponderance of the evidence is such proof as convinces the trier of fact
25 that the contention is more probably true than not."⁴ A preponderance of the evidence is
26 "[t]he greater weight of the evidence, not necessarily established by the greater number of
27 witnesses testifying to a fact but by evidence that has the most convincing force; superior
28 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable

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

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

doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”⁵

5. Article 10 Section 4 of the CC&Rs states in pertinent part:

Upon adoption of a resolution by the Board stating that the then current use of a specified part of the Common Areas is no longer in the best interest of the Owners and Occupants, the approval of such resolution by not less than two-thirds (2/3rds) of the votes of all Members entitled to vote and voting in person or by proxy at a meeting duly called for such purpose, the Board shall have the power and right to change the use thereof (and in connection therewith to take whatever actions are required to accommodate the new use)

6. In this case, Petitioner failed to meet his burden. The sole issue is whether Tract “H” was classified as drainage. While Petitioner argued the “Tract Data” description of Tract “H” on the plat map controlled the designation. Respondent argued the “Conveyance and Dedication” portion of the plat map controlled the designation. Neither party presented sufficient evidence to determine why their characterization of Tract “H” controlled. Petitioner bears the burden of proof and has failed to provide sufficient evidence to meet his burden.

7. Based upon a review of the credible and relevant evidence in the record, Petitioner failed to meet his burden of proof.

8. Therefore, the Administrative Law Judge concludes that Respondent did not violate Article 10 Section 4 of the CC&Rs.

ORDER

IT IS ORDERED that Petitioner’s petition in this matter be dismissed.

IT IS FURTHER ORDERED that Petitioner’s request to levy a civil penalty against Respondent is denied.

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.

⁵ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

1 Done this day, August 14, 2023.
2

3 /s/ Brian Del Vecchio
4 Administrative Law Judge
5

6 Transmitted by either mail, e-mail, or facsimile August 14, 2023 to:

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8 Commissioner
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