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No. 23F-H055-REL

ADMINISTRATIVE LAW JUDGE DECISION

Rovey Farm Estates Homeowners Association

HEARING: August 2, 2023

APPEARANCES: Rosalie Lynne Emmons appeared on her own behalf. Mike McCleran appeared on behalf of Rovey Farm Estates Homeowners Association. Matt Johnson appeared as a witness on behalf of Rovey Farm Estates Homeowners Association.

ADMINISTRATIVE LAW JUDGE: Brian Del Vecchio

FINDINGS OF FACT

BACKGROUND AND PROCEDURE

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 April 11, 2023, Rosalie Lynne Emmons (Petitioner) filed a single issue petition with the Department which alleged that the Rovey Farm Estates Homeowners Association (Respondent or Association) enforcement of the Covenants, Conditions and Restrictions for Rovey Farm Estates (CC&Rs) selectively, arbitrarily, and capriciously, specifically CC&Rs Article 2 §§ 3.2, 3.3, and 3.11.

3. On or about May 1, 2023, Respondent submitted its ANSWER to the Department whereby it denied Petitioner's claim.

4. On or about May 19, 2023, the Department referred this matter to the Office of Administrative Hearings (OAH), an independent state agency, for an evidentiary

1 hearing on June 22, 2023, which was continued until August 2, 2023, to determine
2 whether the Board violated Article 2 Sections 3.2, 3.3, and 3.11 of the CC&Rs.

3 **THE PARTIES AND GOVERNING DOCUMENTS**

4 5. Respondent is an association of townhome owners whose members own
5 properties in the Rovey Farm Estates residential real estate development located in
6 Lakeside, Arizona. Membership for the Association is comprised of the Rovey Farm
7 Estates subdivision.

8 6. Petitioner is a Rovey Farm Estates property owner and a member of the
9 Association.

10 **HEARING EVIDENCE**

11 7. Petitioner testified on her own behalf. Petitioner's Exhibits A through N were
12 admitted. Respondent's Exhibits 1 through 12 were admitted; exhibit 12 was confidential,
13 admitted under seal, and reviewed in camera. Respondent called Matt Johnson as a
14 witness. The Department's electronic file and NOTICE OF HEARING were also admitted into
15 the record. The substantive evidence of record is as follows:

16 a. In May of 2020, when Petitioner purchased her home she received a
17 copy of the CC&Rs.

18 b. In the fall of 2021, Petitioner built a shed on her property which was
19 taller than her fence line, visible from the street, and without prior approval
20 from the Design Review Committee.

21 c. In December of 2021, Petitioner submitted a request for approval
22 from the Design Review Committee of the already completed shed.

23 d. On or about February 7, 2022, Respondent denied Petitioner's
24 application to build her shed.¹

25 **ARGUMENTS**

26 Petitioner's argument

27 8. Petitioner argued Respondent engaged in selective enforcement regarding
28 their shed policy. Petitioner claimed there were several houses in plain view from the

29 ¹ See Respondent Exhibit 5.

1 street which were not in compliance with CC&Rs §§3.2, 3.3, and 3.11. Petitioner testified
2 she spoke with several other home owners within the community which allegedly admitted
3 they were not in compliance with CC&Rs §§3.2, 3.3, and 3.11 and were not given similar
4 compliance notifications and fines.

5 Respondent's argument

6 9. Respondent's representative and its witness argued enforcement of the
7 CC&Rs was uniform and neither arbitrary nor capricious. Respondent's witness testified
8 during COVID enforcement was reduced, however, following the reopening of the
9 economy post-COVID, enforcement was resumed. Respondent's witness testified during
10 the height of COVID the Design Review Committee rules were enforced, applications for
11 variances were required, but overall compliance violations and fines were minimized.

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

14 **CONCLUSIONS OF LAW**

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

21 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
22 32-2199.02, and 41-1092 *et seq.* OAH has the authority to hear and decide the contested
23 case at bar. OAH has the authority to interpret the contract between the parties.²

24 3. In this proceeding, Petitioner bears the burden of proving by a
25 preponderance of the evidence that Respondent violated CC&Rs §§3.2, 3.3, and 3.11.

26 4. "A preponderance of the evidence is such proof as convinces the trier of fact
27 that the contention is more probably true than not."³ A preponderance of the evidence is
28 "[t]he greater weight of the evidence, not necessarily established by the greater number of

29 ² See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

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

1 witnesses testifying to a fact but by evidence that has the most convincing force; superior
2 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
3 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
4 the other.”⁴

5 5. The pertinent sections of the CC&Rs state in pertinent part:

6 §3.1 Approval Required

7 . . .No Construction or Modification shall be made or done without prior
8 written approval of the Design Review Committee.

9 Any Owner desiring approval of the Design Review Committee for
10 any Construction or Modification shall submit to the Design Review
11 Committee a written request for approval specifying in detail the nature and
12 extent of the Construction or Modification which Owner desires to perform

13 §3.3 Variances

14 The Design Review committee may authorize variances from compliance
15 with any provision of the Design Guidelines

16 . . .

17 No variance shall be effective unless in writing and signed by an authorized
18 representative of the Design Review Committee.

19 §3.11 Design Review Committee

20 . . . The Design Review Committee may adopt, amend and repeal
21 architectural guidelines, standards and procedures to be used in rendering
22 its decisions. . .⁵

23 All errors in original.

24 6. In this case, Petitioner failed to meet her burden. The sole issue is whether
25 Petitioner’s failure to obtain prior authorization by the Design Review Committee to build
26 her shed ought to be excused because of alleged selective enforcement. Here, Petitioner
27 admitted she built her shed without prior approval from the Design Review Committee,
28 she never subsequently received approval for her shed, her shed is taller than the current
29 fence line, and the shed can be seen from the street; all of which are violations of the
30 CC&Rs. Petitioner alleged but failed to provide sufficient evidence of Respondent’s
supposed selective enforcement. Respondent, through its witness testimony and exhibits

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

⁵ See Respondent Exhibit 5.

1 evidenced a multitude of compliance letters, violations, fines, and approved and rejected
2 shed applications associated with the enforcement of CC&Rs §§3.2, 3.3, and 3.11.

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

5 8. Therefore, the Administrative Law Judge concludes that Respondent did
6 not violate CC&Rs §§3.2, 3.3, and 3.11.

7
8 **ORDER**

9 **IT IS ORDERED** that Petitioner's petition in this matter be dismissed.

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

12 **NOTICE**

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

18 Done this day, August 22, 2023.

19 /s/ Brian Del Vecchio
20 Administrative Law Judge

21 Transmitted by either mail, e-mail, or facsimile August 22, 2023 to:

22 Susan Nicolson
23 Commissioner
24 Arizona Department of Real Estate
25 100 N. 15th Avenue, Suite 201
26 Phoenix, Arizona 85007
27 Attn:
28 SNicolson@azre.gov
29 AHansen@azre.gov
30 vnunez@azre.gov
djones@azre.gov
labril@azre.gov

1 Rosalie Lynne Emmons
2 RlynnEmmons@gmail.com

3 Michael S. McLeran
4 Childers Hanlon & Hudson, PLC
5 msmcleran@chhazlaw.com

6 By: OAH Staff