

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Debbie Westerman,

4 Petitioner,

5 Bridgewood Nine 30 Property Owners
6 Association, Inc. aka Bridgewood
7 Townhomes,

8 Respondent.

No. 18F-H1818028-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

9
10 **HEARING:** April 18, 2018, at 9:00 a.m.

11 **APPEARANCES:** Debbie Westerman ("Petitioner") appeared on her own behalf;
12 Bridgewood Nine 30 Property Owners Association, Inc. aka Bridgewood Townhomes
13 ("Respondent") was represented by Mark E. Lines, Esq., and R. Patrick Whelan, Esq.,
14 Shaw & Lines, LLC.

15 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

16
17 **FINDINGS OF FACT**

18 **BACKGROUND AND PROCEDURE**

19 1. The Arizona Department of Real Estate ("the Department") is authorized by
20 statute to receive and to decide Petitions for Hearings from members of homeowners'
21 associations and from homeowners' associations in Arizona.

22 2. Respondent is a homeowners' association whose members own
23 condominiums in the Bridgewood Townhomes development.

24 3. Petitioner owns condominium unit 31 in Bridgewood Townhomes and is a
25 member of Respondent.

26 4. On or about January 23, 2018, Petitioner filed a single-issue petition with the
27 Department that alleged that Respondent had violated its Covenants, Conditions, and
28 Restriction ("CC&R") § 5(G) by unreasonably denying her request to build a wall using
29 8" x 8" x 16" concrete masonry unit ("CMU") block around the courtyard or patio¹
30 adjacent to her unit 31.

¹ The terms are used interchangeably and refer to the same area.

5. Respondent filed a written answer to the petition, denying that it had violated any CC&Rs in denying Petitioner's request to build a wall. The Department referred the petition to the Office of Administrative Hearings, an independent state agency, for an evidentiary hearing.

6. A hearing was held on April 18, 2018. Petitioner submitted three exhibits, including one exhibit that included 11 photographs, testified on her own behalf, and presented the testimony of Kelly Zernich, her realtor, and Richard Ross, her contractor's subcontractor. Respondent submitted 20 exhibits and presented the testimony of its Board's president, Michael Brubaker.

HEARING EVIDENCE

7. Respondent's Declaration of CC&Rs was recorded at the Maricopa County Recorder on or about June 30, 1972.² The patios adjacent to the individual units are considered limited common elements.³ Owners agree to be bound by the CC&Rs.⁴

8. Section (I)(B) of the CC&Rs concerns Ownership. Sections (I)(B) provides, in relevant part, as follows:

The areas designated on the plat of record of the subject property (Tract A as depicted on said plat) shall be considered common area and shall be owned by the Greenlaw Townhouses Unit Two Homeowners Association, an Arizona corporation (here-after "Association".) in trust for the benefit of the lot owners pursuant to the terms of the bylaws of the Association. Said By-laws and Articles of Incorporation are fully incorporated herein. Each lot owner shall be a beneficiary of an equal undivided interest in said trust. Its maintenance and use shall be controlled by the Association but the Association shall not allow any structure to be erected in such open space except as necessary for maintenance activity or playground and sports activities (excluding bleachers, restrooms, snack bars or any structure not required for the activity itself).

9.

■ ■ ■ ■

² Respondent's Exhibit 1 at 1.

³ See Respondent's Exhibit 1 at 2 (§ 2(B)) and 3 (§3(D)).

⁴ See Respondent's Exhibit 4 at 4 (§ 4).

1 10. Pursuant to the authority granted by CC&R § 5(J), Respondent's Board
2 promulgated Rules and Regulations, including Rule 7(a), that provides that "[t]he Board
3 must approve any alternations [*sic*] or additions made to the exterior of any unit. This
4 includes, but is not limited to, wiring, antennas, fences, walls, or any fixture visible from
5 the outside."⁵

6 11. Petitioner purchased her condominium in the Bridgewood Townhomes
7 development in October 2017.⁶

8 12. On October 25, 2017, at 8:01 a.m., Mr. Brubaker sent an email to Petitioner,
9 in relevant part as follows:

10 For the majority of Bridgewood's forty-three year history
11 courtyard walls were NOT permitted.

12 About fifteen years ago the Board of Directors recognized an
13 opportunity for enhancing the value of our properties with our
14 spacious common areas homeowners were permitted, within
15 limits, to construct walled courtyard spaces around their
16 homes without detrimentally reducing the common areas.

17 A courtyard wall allowed homeowners to expand their homes
18 with an exclusive-use courtyard space, enhance privacy, and
19 improve security, which resulted in an increased individual
20 property value that subsequently raised all property values.
21 Additionally, the Association reduced costs by reducing the
22 common area to be maintained. This is a win win program.

23 The attached Wall Construction Specifications & Conditions
24 were developed to provide architectural continuity and
25 standards (*4/8/16 CMU block*) that conform to the original Al
26 Beadle design represented by the property's perimeter wall,
27 the original block buildings, the pool area enclosure and
28 buildings, the parking structures, and the walls around the
29 parking areas.

30 Since the Board of Directors adopted this program twenty-
 nine homeowners have had applications approved and
 constructed courtyard walls to specification.⁷

⁵ Respondent's Exhibit 2 at 3.

⁶ See Respondent's Exhibit 5.

⁷ Respondent's Exhibit 7.

1 13. Mr. Brubaker testified that on March 22, 2005, Respondent's Board adopted
2 the Wall Construction Specifications & Conditions to ensure that the patio walls that unit
3 owners constructed were uniform. Among other requirements, the Wall Construction
4 Specifications & Conditions required owners to use 4" x 8" x 16" CMU block on their
5 courtyard walls, to make the walls up to 5'6", and for the finish to be "[l]ight' mortar
6 wash to match existing block walls surrounding the pool complex (*no stucco*).” The Wall
7 Construction Specifications & Conditions required owners to use a licensed contractor
8 to construct patio walls and provided that, “[b]ecause the Association assumes
9 responsibility for maintaining wall additions subsequent to their initial construction the
10 following specifications provide continuity with property standards.”⁸

11 14. On October 25, 2017, Petitioner submitted an Architectural Request to
12 construct a CMU block wall around her patio, explaining that it complied with
13 Respondent's wall specifications “with the exception to brick size. A licensed contractor
14 recommended using a larger brick since it's stronger, less expensive, and looks the
15 same.”⁹ Petitioner attached to her Architectural Request a copy of a proposal from
16 Desert Living General Contracting LLC, Registrar of Contractors' License No. 178030,
17 to construct the wall. The proposal that Petitioner submitted did not show any amounts
18 for the cost of construction.

19 15. On October 25, 2017, at 10:41 a.m., Mr. Brubaker on behalf of Respondent
20 sent Petitioner an email cautioning her that the Board had not yet approved her
21 Architectural Request and that she should not pre-order materials that did not conform
22 to the Wall Construction Specifications & Conditions that Mr. Brubaker again attached.¹⁰

23 16. On November 29, 2017, Mr. Brubaker sent an email to Petitioner
24 acknowledging receipt of her Courtyard Wall Architectural Request. Mr. Brubaker
25 informed Petitioner that because her Architectural Request was extraordinary in that it
26 was contrary to Respondent's long-standing specification of 4" x 8" x 16" CMU block,
27 the Board would have to consider the request and informed Petitioner that he would
28 organize a meeting of the Board as soon as possible to consider her request.¹¹

29 ⁸ Respondent's Exhibit 3 at 1-2.

30 ⁹ Respondent's Exhibit 6.

¹⁰ See Respondent's Exhibit 8.

¹¹ See Respondent's Exhibit 9.

1 17. On December 28, 2017, Mr. Brubaker sent an email to Petitioner informing
2 her that the Board would meet on January 2, 2018, to consider her Courtyard Wall
3 Architectural Request.¹² Petitioner's request was on the agenda for the Board's January
4 2, 2018 meeting.¹³ Petitioner attended the January 2, 2018 meeting and addressed the
5 Board.

6 18. At the January 2, 2018 meeting, the Board unanimously rejected Petitioner's
7 Architectural Request to build a courtyard wall using 8" x 8" x 16" CMU block because it
8 was contrary to Respondent's Wall Construction Specifications and Conditions and "the
9 historical aspects of our compliance structure." The Board indicated that it was willing
10 to approve Petitioner's wall "provided the construction complies with the specifications
11 set forth in our CC&R," but that Petitioner "stated that she [was] unwilling to comply with
12 our community standards."¹⁴

13 19. On January 8, 2018, Respondent's attorney sent a letter to Petitioner,
14 summarizing the legal bases of its Board's refusal to approve her Architectural Request
15 to build a courtyard wall using 8" x 8" x 16" CMU block.¹⁵ As noted above, on January
16 23, 2018, Petitioner filed the petition at issue with the Department.

17 20. Petitioner testified that she was concerned about a 13-year-old document
18 that contained the caveat that Respondent took no responsibility for the wall. Petitioner
19 did not point out where Respondent's Wall Construction Specifications & Conditions
20 contained this caveat and her concern seemed to be contrary to the express terms of
21 the document that Respondent submitted that stated Respondent would be responsible
22 for maintaining the wall, quoted above at Finding of Fact No. 13.

23 21. Although Petitioner's Architectural Request acknowledged that
24 Respondent's Wall Construction Specifications & Conditions required that she use 4" x
25 8" x 16" CMU block to build her wall, she challenged the authenticity of the Wall
26 Construction Specifications & Conditions at the hearing because Respondent did not
27 bring the Board meeting minutes that adopted them. The first time Petitioner
28 challenged the Wall Construction Specifications & Conditions was at the hearing.

29 ¹² See Respondent's Exhibit 10.

30 ¹³ See Respondent's Exhibit 12 at 1.

¹⁴ Respondent's Exhibit 12 at 2.

¹⁵ See Respondent's Exhibit 13

1 Before the hearing, Petitioner did not request that a subpoena duces tecum be issued to
2 Respondent for the Board meeting minutes adopting the Wall Construction
3 Specifications & Conditions, even though they were cited in the Board's denial of her
4 permit application.

5 22. Petitioner testified that three different contractors told her that if the wall
6 was constructed with 8" x 8" x 16" CMU block, it would be cheaper because fewer
7 blocks and less mortar would be needed.

8 23. Respondent submitted a bid from J E Bowen Construction LLC, ROC
9 License No. 248121, in the amount of \$6,165.00 to construct a wall using 4" x 8" x 16"
10 CMU block around Complainant's unit 31.¹⁶ Mr. Brubaker testified that he believed that
11 the bid was reasonable.

12 24. Petitioner also testified that her contractors told her a wall constructed of 8"
13 x 8" x 16" CMU block would be sturdier because it would have fewer parts. Mr. Ross,
14 who testified that he was an unlicensed subcontractor of Desert Living General
15 Contracting LLC, stated that using twice as many blocks doubles the chance of the wall
16 failing.

17 25. Respondent submitted TEK 5-15, entitled "Details for Half-High Concrete
18 Masonry Units," published by the National Concrete Masonry Association that stated in
19 relevant part as follows:

20 Structural design considerations for half-high
21 construction are virtually the same as those for
22 conventional concrete masonry units. One aspect
23 that may be different for half-high units is the unit
24 strength. . . . Half-high and other architectural units,
25 however, are typically manufactured to a higher unit
26 strength.¹⁷

27 26. Respondent submitted TEK 2-2B, entitled "Considerations for Using
28 Specialty Concrete Masonry Units," also published by the National Concrete Masonry
29 Association, that stated in relevant part as follows for 4" high, or "half-high," units:

30 As long as the unit cross-section (i.e., face shell and
web thicknesses) is the same as the corresponding 8-

¹⁶ See Respondent's Exhibit 17.

¹⁷ Respondent's Exhibit 19 at 1.

in. (203-mm) high unit, these specialty height units can be considered to be structurally equivalent to their corresponding 8-in. (203-mm) high unit.¹⁸

27. Petitioner testified that walls in the community were not consistent and submitted photographs that she testified showed that unit nos. 34 and 38, which Mr. Brubaker owned, had larger blocks visible through stucco.¹⁹

28. Mr. Brubaker testified that the courtyard walls for Bridgewood Townhomes units 34 and 38 were constructed before 1980, when the developer turned the development over to Respondent.²⁰

29. Mr. Brubaker testified that in the time since Petitioner submitted the Architectural Request, Respondent's Board had approved four applications that conformed to the Wall Construction Specifications & Conditions, including an application submitted by Barb Warren. Mr. Brubaker pointed out that the amount of the contractor's bid that Ms. Warren submitted with her application was for only \$4,268.23, which Mr. Brubaker considered very reasonable, especially in light of J E Bowen Contracting LLC's bid.²¹ Respondent submitted a photograph of Ms. Warren's wall, which complied with Respondent's Wall Construction Specifications & Conditions and appeared to be sturdy. In addition, the 4" x 8" x 16" CMU block construction is very visible.²²

30. Petitioner submitted photographs of courtyard walls that appeared to be of different heights.²³ As noted above, Respondent's Wall Construction Specifications & Conditions does not require courtyard walls to be the same height, only that they be less than 5'6". Petitioner's dispute with Respondent does not involve the height of the wall.

CONCLUSIONS OF LAW

1. A.R.S. § 32-2199(B) permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of planned

¹⁸ Respondent's Exhibit 20 at 2.

¹⁹ See Petitioner's Exhibit A5, A6.

²⁰ See Respondent's Exhibit 14.

²¹ See Respondent's Exhibit 15.

²² See Respondent's Exhibit 16.

²³ See Petitioner's Exhibit A11.

community documents under the authority Title 33, Chapter 16.²⁴ This matter lies with the Department's jurisdiction.

2. Petitioner bears the burden of proof to establish that Respondent violated CC&R § 5(G) by a preponderance of the evidence.²⁵ Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.²⁶

3. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."²⁷ 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."²⁸

4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give effect to the intent of the parties.²⁹ "Restrictive covenants must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein."³⁰ CC&R § 5(G) prohibited courtyard fences except those constructed by the developer, but allowed the Board to approve other walls "from time to time." CC&R § 7(B) and Rule and Regulation 7(a) require owners to obtain Board approval before constructing a wall on a common or limited common element. CC&R § 5(J) allowed the Board to adopt reasonable rules and regulations concerning the use of common elements and limited common elements like courtyards or patios.

5. Respondent submitted its Wall Construction Specifications & Conditions, which Mr. Brubaker credibly testified the Board adopted on March 22, 2005, after complying with CC&R 5(J). Petitioner did not establish that Respondent's Wall Construction Specifications & Conditions was fraudulent or improperly adopted.

²⁴ See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce the development's CC&Rs

²⁵ See A.R.S. § 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952).

²⁶ See A.A.C. R2-19-119(B)(2).

²⁷ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

²⁸ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

²⁹ See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

³⁰ *Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. App. 1993) (quoted in *Powell*, 211 Ariz. at 557 ¶ 16, 125 P.3d at 377).

6. In addition, as noted above, Petitioner bears the burden of proof to establish that Respondent did not comply with CC&R § 5(G). She cannot amend her petition at the hearing based on speculation that Respondent may have violated another CC&R in adopting the Wall Construction Specifications & Conditions without violating Respondent's right to due process.

7. Petitioner did not establish that walls constructed with 4" x 8" x 16" CMU block are inferior to walls constructed with 8" x 8" x 16" CMU block in any material or significant respect.

8. Respondent's decision to adopt the Wall Construction Specifications & Conditions to require construction of block walls to be consistent with the original Al Beadle design of significant elements of Bridgewood Townhomes was reasonable. Therefore, Petitioner did not establish that Respondent's Board unreasonably denied her Architectural Request to construct a block wall that did not comply with Respondent's Wall Construction Specifications & Conditions, especially since a wall constructed using 8" x 8" x 16" CMU block would be noticeably different from walls that were constructed in compliance with the Wall Construction Specifications & Conditions and other Al Beadle design elements of Bridgewood Townhomes.

ORDER

IT IS ORDERED that Petitioners' petition is denied because she has not established that CC&R § 5(G) required the Respondent to approve her Architectural Request to build a block wall around her patio that did not comply with Respondent's Wall Construction Specifications & Conditions.

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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.

Done this day, April 26, 2018.

/s/ Diane Mihalsky
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate

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