IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Travis Prall Petitioner, vs. Villas at Tierra Buena HOA Respondent	**No. 18F-H1818053-REL** **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: September 4, 2018

APPEARANCES: Petitioner Travis Prall appeared on his own behalf. Respondent Villas at Tierra Buena HOA was represented by

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

FINDINGS OF FACT

1. On or about June 4, 2108, Petitioner Travis Prall filed a Homeowners Association (HOA) Dispute Process Petition (Petition) with the Arizona Department of Real Estate (Department). Petitioner asserted a violation of Section 7.1.4 of the Declaration of Covenants, Conditions, Restrictions and Easements (CC&Rs).

2. On or about July 16, 2018, the Department issued a Notice of Hearing in which it set forth the issue for hearing as follows:

> The Petitioner alleges that the Villas at Tierra Buena Homeowner's Association (Respondent) violated the Association's CC&R's Article 7.1 by neglecting yard maintenance in visible public yards.

3. At hearing, Petitioner testified on his own behalf. Respondent presented the testimony of Maureen Karpinski, President of the Board; Frank Peake, Owner of Pride Community Management; and Rebecca Stowers, Community Manager. Based on the evidence presented at hearing, the following occurred:

a. Respondent is a gated community with 43 homes along the outside perimeter of the community and 19 homes on the interior of the community. The exterior homes have six to seven foot tall block wall fences enclosing the back yards. The interior homes have a walkway that runs along the back yards. The back walls of the interior homes have a two foot tall block wall with a two foot tall aluminum fence on top

of that. All told, the back walls of the interior homes are approximately four feet tall.

b. At least one witness purchased their home from the developer in 2000.

c. Respondent provides landscaping maintenance to all front yards and common areas throughout the community.

d. Petitioner purchased his home, one of the interior homes, in Respondent's community in 2010. When Petitioner moved in, he believed, based on his reading of the CC&Rs that Respondent was responsible for maintenance of his front yard and his back yard. Also, there was a large tree in the back yard of the home.

e. On or about July 26, 2014, a storm knocked over a tree in Petitioner's back yard. Petitioner arranged for and paid to have the tree removed although he asserted at the time that Respondent had that responsibility under the CC&Rs.

f. At some point, the tree regrew from the remaining trunk of the cut down tree.

g. In 2018, Respondent noted that the block wall near the tree was buckling and had Sun King Fencing & Gates repair the wall. After the repair was effectuated, the company contacted Respondent and reported that "the reason the pony wall buckled was the tree roots in the area." It was recommended that "you have the landscapers remove the tree in question and dig out the roots so that the same problem does not recur."

h. On or about May 3, 2018, Respondent issued a Courtesy Letter to Complainant that provided, "Please trim or remove the tree in the back yard causing damage to the pony wall."

i. Complainant responded to the Courtesy Letter arguing again that Respondent had the responsibility under the CC&Rs to maintain his back yard.

4. Petitioner testified that from 2010 when he bought the home to 2013, Respondent provided landscaping maintenance to his front and back yard.

5. Respondent denied that it had ever provided any landscaping maintenance to any back yards in the community. Respondent controls the irrigation and sprinkler systems for the front yards in the community, but does not have any access to control the irrigation or sprinkler systems for any back yards in the community. Respondent also argued that entering into residents' back yards poses a liability issue in the event small pets were able to escape the enclosed yard when yard maintenance workers entered the property.

CONCLUSIONS OF LAW

1. Arizona statute permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of planned community documents or violations of statutes that regulate planned communities. A.R.S. § 41-2198.01. That statute provides that such petitions will be heard before the Office of Administrative Hearings.

2. Petitioner bears the burden of proof to establish that Respondent committed the alleged violations by a preponderance of the evidence.[1] Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.[2]

3. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."[3] 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."[4]

4. Section 7.1.4 of the CC&Rs provides that Respondent must

> Replace and maintain all landscaping and other Improvements *as originally installed by Declarant* on the Public Yards of Lots in accordance with the standards for Common Area landscape maintenance set forth in Section 7.1.3 above.

Emphasis added.

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[1] *See* ARIZ. REV. STAT. section 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).
[2] *See* A.A.C. R2-19-119(B)(2).
[3] MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).
[4] BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

5. Section 7.1.3 of the CC&Rs provides that Respondent must

> Maintain and replace all landscaping and plantings in the Common Area and in public right-of-way and public utility easement areas to the extent the Board deems reasonably necessary for the conservation of water and soil, to replace damaged or injured trees, and for aesthetic purposes; provided, however, that the Board shall not vary the landscape plan installed by the Declarant and approved by the City of Phoenix without the prior written approval of the City of Phoenix.

6. Section 1.38 of the CC&Rs defines "Yard" as follows:

> **"*Yard*"** means the portion of the Lot devoted to Improvements other than the Residential Dwelling. **"*Private Yard*"** means that portion of a Yard which is enclosed or shielded from view by walls, fences, hedges or the like so that it is not generally Visible from Neighboring Property. **"*Public Yard*"** means that portion of a Yard which is generally visible from Neighboring Property, whether or not it is located in front of, beside, or behind the Residential Dwelling.

7. Section 1.37 of the CC&Rs defines "Visible from Neighboring Property" as follows:

> "Visible from Neighboring Property" means, with respect to any given object, that such object is or would be visible to a person six feet tall standing on any part of such neighboring property at an elevation no greater than the elevation of the base of the object being viewed; provided, however, that an object shall not be considered as being Visible From Neighboring Property if the object is visible only through a wrought iron fence and would not be Visible From Neighboring Property if the wrought iron fence were a solid fence.

8. The parties argued as to their opposing interpretations of Private Yard in the CC&Rs. Respondent argued that the definition should be read as that portion of a Yard which is 1) shielded from view by walls, fences, hedges or the like so that it is not generally Visible from Neighboring Property ***or*** 2) enclosed. Petitioner argued that the definition should be read as that portion of a Yard which is 1) enclosed so that it is not generally Visible from Neighboring Property or 2) shielded from view by walls, fences, hedges or the like so that it is not generally Visible from Neighboring Property.

9. Under Respondent's interpretation, Petitioner's backyard is enclosed, and therefore, is a private yard. As a private yard, Respondent is not responsible for yard maintenance

10. Under Petitioner's interpretation, his back yard, which is enclosed but is generally visible from neighboring property, would be a public yard that Respondent would be responsible to maintain. As further support for Petitioner's interpretation is that the definition of Public Yard includes that it may be behind the residential dwelling and all the back yards in the community are enclosed.

11. While the language of the CC&Rs may lend itself to a reading that Respondent is responsible for the maintenance of the enclosed back yards of the interior homes even if that is contrary to the intention of the drafters of the CC&Rs, the tribunal is not required to reach that issue in this matter.

12. Petitioner failed to present any evidence that the tree at issue was originally installed by the Declarant when the home was built such that Respondent would be required to replace and maintain it under the terms of Section 7.1.4 of the CC&Rs.

13. While the tree in the photo from 2010 appeared relatively large and full, the tree in the photo from 2018 is similarly tall, but not as full. Given that the present tree apparently grew from the stump of the tree in the photo from 2010 that was removed in 2013, the present tree grew to its height and size in approximately five years. Therefore, it cannot be concluded that the tree in the photograph from 2010 was planted as part of the original landscape plan around 2000.

14. Thus, Petitioner failed to establish by a preponderance of the evidence that Respondent violated Section 7.1.4 of the CC&Rs.

ORDER

In view of the foregoing, IT IS ORDERED that the Petition be dismissed.

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, September 24, 2018

/s/ Tammy L. Eigenheer
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
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