

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

John W. Gray,
Petitioner,

v.

Mesa Coronado III Condominium
Association,
Respondent.

No. 19F-H1918004-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARING: October 29, 2018.

APPEARANCES: John W. Gray (Petitioner) appeared on his own behalf; Mesa Coronado III Condominium Association (Respondent) was represented by Austin Baillio, Esq., Maxwell & Morgan PC.

ADMINISTRATIVE LAW JUDGE: Kay Abramsohn

FINDINGS OF FACT

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

2. Respondent is a condominium unit owners' association whose members own condominiums in the Mesa Coronado III Condominium Association (MCIII) development. There are 33 units in MCIII.

3. Petitioner owns condominium unit 122 in MCIII and, therefore, is a member of Respondent.¹

4. According to the plat, there are 36 parking spaces in the parking lot within MCIII; however, a few have been designated for no parking with white cross-hatch lines and one is designated as handicapped.² The parking lot parking spaces are "open" in the sense that the units are not assigned any particular parking space.

5. According to MCIII rules in existence at the time of the instant complaint, Owners are allowed only two cars per unit and are "assigned" their garage as the parking for their first car.³ The MCIII rules define and ban "inoperable" vehicles on the

¹ It is presumed that only owners are members and that a person who is renting a unit is not a member.

² See Petitioner's Exhibit 3. Spaces #105 and 126 (and possibly 125) are lined out for no parking.

³ See Exhibit 2 at 4 (Rule 3). One unit is assigned a parking space due to the possibility of other cars blocking that garage; all other parking spaces are on a "first come first serve" basis.

property. MCIII rules allowed for warnings and fines beginning with a second notice for violations of the rules.

6. On or about July 30, 2018, Petitioner filed a two-issue petition with the Department. Petitioner alleged that he had requested a copy of the agreement between MCIII and the management company and had not received it, having been told that he is not entitled to a copy.⁴ Additionally, Petitioner alleged that multiple units were in violation of the parking rules, that he had made written complaints to MCIII about these violations, and that MCIII refused to enforce the parking rules. Petitioner included copies of his requests and complaints to MCIII.⁵ Petitioner asserted that MCIII had violated: Rules and Regulations #2 and #3;⁶ Covenants, Conditions, and Restrictions (Cars) 4.12, 4.13 and 4.14; and A.R.S. § 33-1258.⁷

7. The Department referred the petition to the Office of Administrative Hearings, an independent state agency, for an evidentiary hearing.

8. At the hearing, Petitioner submitted twenty-three exhibits and testified on his own behalf.⁸

9. At the hearing, Respondent submitted four exhibits and presented testimony of the MCIII "Community Manager" Andrea Lacombe, an employee of Curtiss Management.⁹

10. On or about May 17, 2018, Petitioner notified MCIII that there were at least eight (8) units in violation of the rules both as to the number of vehicles and parking spaces.¹⁰ Based on his personal observations, Petitioner was able to specify the particular units as to the number of vehicles from/of those particular units and how many vehicles were parked in the lot versus in their garages; he was able to specify that many units with residents having three cars were not using their garages for parking but were using their garages for storage. Further, Petitioner noted that one red truck, which had

⁴ This allegation did not proceed to hearing.

⁵ At hearing, Petitioner presented Exhibit 4 (dated May 17, 2018) regarding parking and Exhibit 5 (dated July 17, 2018) regarding a follow-up on parking.

⁶ MCIII Rules and Regulations can be found in Exhibit B. The rules were adopted in January 2002.

⁷ MCIII CC&Rs can be found in Exhibit A. MCIII CC&Rs were effective January 12, 1999.

⁸ One exhibit, #19, contains photographs taken only days before the hearing; this exhibit was not admitted to the hearing record.

⁹ All four exhibits were admitted to the hearing record.

¹⁰ See Exhibit 4. The alleged violations regarding fencing were not a part of the instant petition.

1 been in the same parking spot for over a year, was inoperable, and he also noted that
2 one commercial truck contained hazardous pool chemicals.

3 11. MCIII responded to Petitioner that there was a history (not indicated as to
4 when) regarding the parking situation, to wit, that the Board recognized that there were
5 no assigned spaces and that the Board had previously determined to give a written
6 notice to a unit, if it was found to be in violation, for the unit to use the overflow parking
7 area in Mesa Coronado II. In its response to Petitioner's complaint, MCIII stated that
8 the Board would be reviewing existing rules for possible revisions. The Board further
9 indicated that the premises were built in a time when, typically, owners did not have
10 more than one vehicle. Specifically, MCIII noted that it would review the red truck
11 situation and take appropriate action. MCIII asked for more information on the alleged
12 hazardous chemicals. Finally, MCIII noted that Petitioner himself had regularly parked
13 his truck in the fire lane in front of his garage/unit.¹¹

14 12. On or about July 16, 2018, Petitioner again notified MCIII of his concerns
15 about the continuing violations.¹²

16 13. MCIII responded to Petitioner, informing him that the complaint and issues
17 with parking were being placed on the July 24, 2018 Board meeting agenda. MCIII also
18 reminded Petitioner that his own vehicle was often seen parked along the fire lane in
19 front of his own garage in violation of the rules, and specified to him that he was not
20 allowed to block off a parking space with cones.

21 14. Generally, regarding parking and parking spaces, MCIII CC&R 4.12 provides
22 as follows:

23 Other than the temporary parking of any Commercial Vehicle
24 on the Common Elements for loading and unloading in a
25 manner that does not block other Owners from access to
26 their Units, no truck (other than a Family Vehicle truck
27 described below), mobile home, mini or standard size motor
28 home, travel trailer, tent trailer, trailer, all-terrain vehicle, bus,
29 camper shell, detached camper, recreational vehicle, boat,
30 boat trailer, or other similar equipment or vehicle (hereinafter

¹¹ MCIII also noted that this had triggered the towing of Petitioner's own vehicle on one occasion.

¹² See Exhibit 5. He also mentioned the "unsafe" situation of a truck and trailer continuously being parked on the sidewalk (with a request to inform that unit to remove the hazard) and a request to paint additional red lines to signify no parking.

1 in this Article 4 referred to as “**Commercial Vehicles**”) may
2 be parked, kept, or maintained on any part of the
3 Condominium other than in a garage space comprising part
4 of a Unit. ...

5 15. Generally, regarding parking spaces, MCIII CC&R 4.13 provides as follows:

6 The Board shall have the right, but not the obligation to
7 assign covered parking spaces to the Units from time to
8 time, provided in the exercise of its reasonable discretion to
9 accommodate handicapped residents or those residents
10 requiring special accommodations. No parking space in the
11 Condominium may be used for storage or for any purpose
12 other than parking of Family Vehicles.

13 16. Generally, regarding vehicle repairs and towing, MCIII CC&R 4.14 provides
14 as follows:

15 Other than temporary emergency repairs, no Vehicle shall
16 be constructed, reconstructed serviced or repaired, and no
17 inoperable Vehicle may be stored on any portion of the
18 Condominium, other than within enclosed garages ... The
19 Board of Directors shall have the right to have any Vehicle
20 parked, kept, maintained, constructed, reconstructed or
21 repaired in violation of the Condominium Documents towed
22 away at the sole cost and expense of the owner of the
23 Vehicle. ...

24 17. On July 23, 2018, MCIII notified the owner of the unit, in which the tenant
25 owning the red truck resides, of the rules violation as to inoperable vehicles and of the
26 requirement for the vehicle to be removed from the property. Additionally, MCIII
27 requested confirmation of the number of vehicles owned by that tenant.

28 18. The MCIII rules and regulations were reviewed for amendment.¹³ At the
29 October 23, 2018 Board meeting, new rules were adopted for MCIII.¹⁴ Recognizing that
30 the prior rules regarding the limit on the number of cars permitted per unit were
restrictive and likely unenforceable, the new rules no longer limit the number of cars per

¹³ Testimony of Community Manager. Based on the MCIII response to Petitioner's complaint in May 2018, the rules were apparently under review since the July 24, 2018 Board meeting.

¹⁴ See Exhibit C.

unit; however, the new rules keep the same prohibition as to inoperable vehicles and commercial vehicles. Regarding parking, new rule 2.C indicates:

Unit owners or other lawful residents of a Unit must park their vehicles in their respective garages before parking any excess or extra vehicles in any common area parking space. All parking lot spaces are not assigned and are on a first come first served basis. However, the Board of Directors shall have the right, but not the obligation to assign covered parking spaces to the units from time to time to accommodate handicapped residents or those residents requiring special accommodations. Anyone blocking residents' garages or parked in fire lanes are subject to immediate towing at the owner's expense. Illegally parked vehicles shall include those parked in fire zones, handicapped parking space, at the mailboxes, occupying more than one space, parked sideways or other inappropriate parking of vehicles. No vehicle may be constructed, reconstructed serviced or repaired, and no inoperable vehicle may be stored on any portion of the property other than within enclosed garages.

19. At hearing, Petitioner presented credible and convincing evidence that there were multiple units with two or more vehicles and that some units/residents with three cars were all parked in the common lot.¹⁵ Respondent noted that, recently, the overflow parking lot at Mesa Coronado I had been restricted to their residents (with permits) and that the management was enforcing towing for violations; he indicated that particular lot was to be used as overflow parking for MCIII.¹⁶

20. At hearing, Respondent noted that it had recently contracted for towing services from Shaffer Towing.¹⁷ Respondent indicated that, with respect to the parking rules, it had taken action to enforce parking rules (1) against Petitioner in towing Petitioner's truck that one time and (2) as to the one letter recently written about the red truck.

¹⁵ See photographs in Exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16. Petitioner has been taking pictures of the various vehicles and observing to which units they belong; he obtained the registration information, to assist in attributing ownership of the vehicles through a private investigator. See Exhibit 17. According to Petitioner's calculations, there were 12 units using 27 parking spaces, which left few spaces for the remaining 21 unit/residents.

¹⁶ See Exhibit 21.

¹⁷ See Exhibit E.

21. Respondent asserted that it had received no prior complaints about parking and that it would have been “almost impossible” to have enforced the existing more restrictive parking rules because someone would have needed to be there 24/7 or be taking constant pictures. Respondent asserted that there had been a prior contract with a towing company to come through and tow any cars in violation of rules.

22. “Community Manager” indicated that she drove through MCIII about two times a month looking for violations and, if she had seen parking violations, she would have called for towing. Respondent argued that the recent revision of the rules makes Petitioner’s issues moot.

23. The hearing record contains no indication that MCIII enforced the rules in existence at the time of Petitioner's complaints to MCIII or the Petition herein, as to numbers of vehicles, parking one car in garages, or inoperable vehicles. The then-existing rules provided for notification of violations, and for fines after the second notification. The hearing record contains no indication that MCIII enforced the parking rules as to fire lanes except the acknowledged towing of Petitioner's car.

CONCLUSIONS OF LAW

1. A.R.S. § 32-2199(1) permits a condominium unit owner to file a petition with the Department for a hearing concerning the condominium association's alleged violations of the Condominium Act set forth in Title 33, Chapter 9. This matter lies within the Department's jurisdiction.

2. Petitioner bears the burden of proof to establish that Respondent violated the CC&Rs, rules, or statutes cited on his petition by a preponderance of the evidence.¹⁸ Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.¹⁹

3. “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

¹⁸ See 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).

¹⁹ See A.A.C. R2-19-119(B)(2).

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

1 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
2 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather
3 than the other.”²¹

4 4. The hearing record demonstrates that MCIII failed to enforce CC&Rs and
5 rules and regulations regarding parking. MCIII’s argument that the rules were
6 unenforceable is not a viable defense in this instance, as the rules contained many
7 provisions that could have been noticed to the units regarding parking rules and their
8 enforcement. The evidence was undisputed that the red truck was inoperable and
9 parked in the one space for over one year; therefore, based on its presentation that the
10 recent letter was its only notification for any violation of the parking rules, Respondent
11 gave no notices to the unit owner until long after the truck was in violation of the rules.
12 Respondent could have taken action with notification and fines. Even the clearing of
13 just one more space would have made the tenuous parking situation better. MCIII gave
14 no indication that at any time did it give even general notices to the MCIII units
15 regarding parking rules, regarding the need to park in unit garages, and regarding
16 parking multiple vehicles in overflow lots.

17 ORDER

18 IT IS ORDERED that Petitioner be deemed the prevailing party with regard to
19 MCIII’s violations of the CC&Rs and the MCIII rules and regulations as to parking.

20 IT IS FURTHER ORDERED that MCIII pay Petitioner his filing fee of \$500.00, to
21 be paid directly to Petitioner within thirty (30) days of this Order.

22 NOTICE

23 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties**
24 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S.**
25 **§ 41-1092.09, a request for rehearing in this matter must be filed with the**
26 **Commissioner of the Department of Real Estate within 30 days of the service of**
27 **this Order upon the parties.**

28 Done this day, November 30, 2018.

29 /s/ Kay Abramsohn

30 ²¹ BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate

John W. Gray
1406 W Emerald Ave, #122
Mesa, AZ 85202

B. Austin Baillio, Esq.
Maxwell & Morgan PC
4854 E Baseline Rd, Ste 104
Mesa, AZ 85206

By Felicia Del Sol