

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 John A. Sellers,
4 Petitioner,

No. 19F-H1918010-REL-RHG

5 vs.

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 Rancho Madera Condominium Association,
7 Respondent.

8 **HEARING:** April 15, 2019, with the record closed on May 7, 2019 due to post-
9 hearing filings

10 **APPEARANCES:** Petitioner John A. Sellers appeared on his own behalf.
11 Respondent Rancho Madera Condominium Association was represented by Edward D.
12 O'Brian and Edith I. Rudder, Carpenter, Hazlewood, Delgado & Bolen, LLP.

13 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer
14

15 **FINDINGS OF FACT**

16 **PETITIONER'S CLAIM**

17 1. Respondent is a condominium unit owners' association whose members
18 own the 46 condominiums in the Rancho Madera condominium development in Cave
19 Creek, Arizona.

20 2. Petitioner owned condominium unit 12 in Rancho Madera and was a
21 member of Respondent.

22 3. On August 23, 2018, Petitioner filed a single-issue petition with the
23 Department alleging that Respondent had violated its Covenants, Conditions, and
24 Restrictions (CC&Rs) § 3.10 by failing to require condominium owners to remove
25 vegetation and fencing materials from the stormwater channel behind their homes.

26 4. Respondent filed a written answer to the petition, denying that it had
27 violated any CC&Rs by failing to clean out the drainage channel behind Petitioner's unit
28 12. The Department referred the petition to the Office of Administrative Hearings, an
29 independent state agency, for an evidentiary hearing.
30

5. A hearing was held on November 5, 2018, and December 12, 2018. Petitioner submitted 25 exhibits and testified on his own behalf. Respondent submitted twelve exhibits and presented the testimony of its President, Jeffrey Kaplan.

6. Following the hearing, the Administrative Law Judge issued an Administrative Law Judge Decision finding that Petitioner had failed to sustain his burden of proof and denying the Petition.

7. On or about February 1, 2019, Petitioner filed a Homeowner's Association (HOA) Dispute Rehearing Request (Rehearing Request) with the Commissioner of the Department of Real Estate alleging irregularity in the proceedings; newly discovered evidence; error in the admission or rejection of evidence; and findings of fact or decision that was arbitrary, capricious, or an abuse of discretion, not supported by the evidence, or contrary to law.

8. On or about February 22, 2019, the Commissioner granted the Rehearing Request “for the reasons outlined in the Petitioners’ Rehearing Request” without further explanation, and a rehearing was held on April 15, 2019.

9. Prior to and during the hearing, the Administrative Law Judge clarified that the single issue presented in the Petition was whether Respondent had a duty to require condominium owners to remove vegetation and fencing materials from the stormwater channel behind their homes, and if it did, whether it failed to fulfill that duty under Section 3.10.

REFERENCED CC&Rs

10. Sections 3.10 of the CC&Rs provides in relevant part as follows:

3.10 Easement for Stormwater Drainage. Stormwater may enter the Condominium from the property adjacent to the eastern boundary of the Condominium. Perpetual non-exclusive drainage easements (each a “**Drainage Easement**”) are hereby created over, under, upon and across the eastern five (5) feet of Units 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 (the “**Drainage Easement Units**”) for the purpose of constructing, maintaining, repairing and replacing a drainage channel, which may consist entirely or partially of decomposed granite, rip rap (large stones) or concrete (the “**Drainage Improvements**”) as originally constructed by Declarant. The Drainage Improvements will carry the stormwater entering the Condominium from the Drainage Easement Units to Common Elements designed for stormwater conveyance. The portion of each Drainage Easement Unit encumbered by a Drainage Easement (i.e., the

1 eastern five (5) feet) is hereinafter referred to as the “**Drainage Easement**
2 **Area.**” The rights and duties of Declarant, the Association and the Unit
3 Owners of Drainage Easement Units with respect to the Drainage
4 Easement Areas shall be as provided in this Section 3.10.

5
6 **3.10.2** The Unit Owners of the Drainage Easement Units shall retain all
7 rights and privileges in their respective Drainage Easement Areas as may
8 be used without interfering with the operation of the Drainage
9 Improvements. *Each Unit Owner* of a Drainage Easement Unit shall keep
10 his Drainage Easement Area free of weeds and other debris so that the
11 stormwater can flow freely through the Drainage Easement Area. No
12 Improvement, including plant materials, shall be constructed, installed or
13 allowed to grow on, over or within the Drainage Easement Area that may
14 disturb or damage the Drainage Improvements or impede the flow of water
15 over, under or through the Drainage Easement Areas.

16
17 **3.10.4** If any portion of the Drainage Improvements are damaged or
18 destroyed through the act of a Unit Owner, Lessee or Resident, or their
19 Invitees, or if the failure of one Unit Owner to maintain his Drainage
20 Easement Area free of weeds and other debris results in damage to
21 another Drainage Easement Unit, the Association shall repair or replace
22 such damage or destruction and the cost to the Association of any such
23 repair or replacement shall be paid by the Unit Owner that caused the
24 damage or destruction, upon demand, to the Association.

25 Italics added.

26 11. Section 13.1.1 of the CC&Rs provides, in pertinent part, as follows:

27 The Association *shall have the right* to enforce, by any proceeding at law
28 or in equity, all restrictions, conditions, covenants, reservations, liens and
29 charges now or hereafter imposed by the provisions of the Condominium
30 Documents

Italics added.

HEARING EVIDENCE

12. During the hearing, Petitioner acknowledged that, under Section 3.10.2 of
the CC&Rs, *Unit Owners* of the Drainage Easement Units were required to keep the
Drainage Easement Area free of weeds and other debris so that the stormwater could
flow freely through the Drainage Easement Area. Petitioner also admitted that under
Section 13.1.1 of the CC&Rs, Respondent had the *right* to enforce the requirement that
Unit Owners of the Drainage Easement Units keep the Drainage Easement Areas free
of weeds and other debris. Petitioner asserted, however, that at a certain point

1 exercising a right becomes an obligation. Petitioner argued that when the issue affects
2 property values and safety, Respondent then had an obligation to enforce those
3 requirements. Petitioner maintained that Respondent did not investigate the tenant
4 living in the unit next to his property to determine whether the tenant had items in the
5 Drainage Easement Area that impeded the flow of stormwater. Petitioner stated that in
6 his discussions with the tenant, if someone had asked him to move his plant, he would
7 have done so.

8 13. Petitioner provided photographs showing some large succulents, shrubs,
9 and cacti growing in the rip rap in the Drainage Easement Area behind the Drainage
10 Easement Units and at least one place in which the Unit Owner had placed chicken wire
11 across the channel to keep a pet contained in the area behind his unit. Petitioner
12 testified that the plants and chicken wire could catch storm debris and cause the
13 drainage channel to become clogged.

14 14. Mr. Kaplan testified that on April 18, 2018, Respondent's management
15 company sent letters to the Unit Owners of the Drainage Easement Units informing
16 them that they were responsible for keeping the Drainage Easement Area "clear of any
17 obstructions." Mr. Kaplan stated that on July 19, 2018, Respondent's management
18 company sent follow-up letters to the Unit Owners of the Drainage Easement Units
19 reminding them that they were responsible for keeping the Drainage Easement Area
20 "free of weeds and other debris so that the storm water can flow freely through the
21 Drainage Easement Area" and that "if you have placed lattice or chicken wire over the
22 weep holes, make sure they are always cleared of debris so that water flows without
23 restriction as it is intended to do."

24 **CONCLUSIONS OF LAW**

25 1. A.R.S. § 32-2199.01 permits a condominium unit owner to file a petition
26 with the Department for a hearing concerning the condominium association's alleged
27 violations of the Condominium Act set forth in Title 33, Chapter 9. This matter lies
28 within the Department's jurisdiction. That statute provides that such petitions will be
29 heard before the Office of Administrative Hearings.

30 2. Petitioner bears the burden of proof to establish that Respondent violated
applicable statutes or CC&Rs by a preponderance of the evidence. 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). Respondent bears the burden to establish affirmative defenses by the same evidentiary standard. See A.A.C. R2-19-119(B)(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.” MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960). 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.” BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give effect to the intent of the parties. See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006). “Restrictive covenants must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein.” *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).

5. Section 3.10 of the CC&Rs creates the Drainage Easement Area as it relates to the Drainage Easement Units.

6. Section 3.10.2 of the CC&Rs provides that *Unit Owners* are required to keep the Drainage Easement Area free of weeds and other debris that may impede the flow of water through the Drainage Easement Area.

7. Section 3.10.4 of the CC&Rs provides that Respondent is required to repair any damage that occurs as a result of a *Unit Owner’s* failure to keep the Drainage Easement Area free of weeds and other debris that may impede the flow of water through the Drainage Easement Area, but provides that the responsible Unit Owner shall reimburse Respondent for the cost of those repairs.

8. From those separate provisions, the CC&Rs intend that the Unit Owners bear the responsibility of keeping the Drainage Easement Area clear and that Respondent’s only responsibility is in the event of damage resulting from a Unit Owner’s

1 failure to do so. And even then, Respondent must repair the damage, but the Unit
2 Owner is responsible for the cost of the damage.

3 9. While Respondent has the *right* to enforce the requirements that the Unit
4 Owners keep the Drainage Easement Area clear, nothing in the CC&Rs provides that
5 Respondent has an *obligation* to do so.

6 10. Therefore, based on a review of the credible and relevant evidence on the
7 record, it is held that Petitioner failed to establish by a preponderance of the evidence
8 that Respondent violated the provisions of Section 3.10 of the CC&Rs.

9 **RECOMMENDED ORDER**

10 **IT IS ORDERED** that no action is required of Respondent in this matter and that
11 the petition is dismissed.

12 Done this day, May 10, 2019.

13 /s/ Tammy L. Eigenheer
14 Administrative Law Judge

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16
17 **NOTICE**

18 This administrative law judge order, having been issued as a result of a
19 rehearing, is binding on the parties. A.R.S. § 32-2199.02(B). A party
20 wishing to appeal this order must seek judicial review as prescribed by
21 A.R.S. § 41-1092.08(H) and title 12, chapter 7, article 6. Any such appeal
22 must be filed with the superior court within thirty-five days from the date
23 when a copy of this order was served upon the parties. A.R.S. § 12-
24 904(A).

25 Transmitted by either mail, e-mail, or facsimile May 10, 2019 to:

26 Judy Lowe, Commissioner
27 Arizona Department of Real Estate
28 100 N. 15th Avenue, Suite 201
29 Phoenix, Arizona 85007

30 John Sellers

1 PO Box 3431
2 Carefree, AZ 85377

3 Edward D. O'Brien
4 CARPENTER, HAZLEWOOD, DELGADO & BOLEN LLP
5 Rancho Madera Condominium Association
6 c/o Edith L Rudder, Esq.
7 1400 E Southern Ave., Suite 400
8 Tempe, AZ 85282-5691

9 By F. Del Sol
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