

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 David and Brenda Norman,

4 Petitioners,

5 vs.

6
7 Rancho Del Lago Community Association,

8 Respondent
9

No. 19F-H1919051-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

10
11 **HEARING:** May 8, 2019, at 8:30 a.m.

12 **APPEARANCES:** David and Brenda Norman ("Petitioners") appeared
13 telephonically on their own behalf; Rancho Del Lago Community Association
14 ("Respondent") was represented by Ashley N. Moscarello, Esq., Goodman Law Group.

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 single-family
23 houses on lots in the Rancho Del Lago Community in Vail, Arizona.

24 3. Petitioners own a house in and are members of Respondent.

25 4. On or about February 28, 2019, Petitioners filed a single-issue petition with
26 the Department that alleged that Respondent had violated Covenants, Conditions, and
27 Restrictions ("CC&Rs") § 3.11(D)(1) by approving a block wall built by their next-door
28 neighbors, the Hendersons. Petitioners requested that the Department require
29 Respondent to require the Hendersons to permit Petitioners to connect to their wall or,
30 in the alternative, that Respondent require the Hendersons to tear their wall down.

1 5. Respondent filed a written answer to the petition, denying that it had violated
2 any CC&Rs or duly promulgated rules. The Department referred the petition to the
3 Office of Administrative Hearings, an independent state agency, for an evidentiary
4 hearing.

5 6. A hearing was held on May 8, 2019. Brenda Norman testified on Petitioners'
6 behalf and submitted seven exhibits. Respondent submitted fifteen exhibits and
7 presented the testimony of Spencer Brod, an employee of Respondent's management
8 company, Management Solutions.

9 **RELEVANT CC&Rs**

10 7. Respondent's CC&Rs Article II § 2(a) requires that no improvements that alter
11 the exterior appearance of properties on Respondent subdivision may be built without
12 Respondent's Architectural Review Committee's ("ARC's") prior written approval.¹

13 8. Respondent's CC&Rs Article V § 4 gives Respondent's Board broad
14 discretion over its adoption of rules and management of Respondent's affairs:

15 By a majority vote of the Board, the Association may, from
16 time to time and subject to the provisions of this Declaration,
17 adopt, amend and repeal rules and regulations to be known
18 as the Rancho del Lago Rules. The Rancho del Lago Rules
19 may restrict and govern the use of any area by any Member
20 or Resident, by the family and designees of such Member or
21 Resident and others; provided, however, that the Rancho del
22 Lago Rules shall not discriminate among Members or
23 Residents and shall not be inconsistent with this Declaration,
24 or the Articles or Bylaws of the Association. Upon adoption,
25 the Rancho del Lago Rules will have the same force and
26 effect as if they were set forth in and were a part of this
27 Declaration.²

28 9. Respondent's CC&Rs Article XII concerns the ARC. Article XII, § 1 provides
29 in relevant part as follows:

30 The Declarant shall establish an [ARC] to perform the
functions of the [ARC] set forth in this Declaration and the
Design Guidelines. The [ARC] shall adopt the procedural
rules and regulations for the performance of such duties by
the [ARC], including procedures for the preparation,

¹ See Respondent's Exhibit 1 at 12.

² *Id.* at 28-29.

1 submission and determination of the application for any
2 approvals required by this Declaration or any Tract
3 Declaration. The [ARC] shall consist of such number of
4 regular members and alternate members as the Declarant
5 may designate and such members shall be appointed by the
6 Declarant. The appointees need not be architects, Owners
7 or Residents and do not need to possess any special
8 qualifications of any type except such as the Declarant may,
9 in its discretion, require. . . . The [ARC] shall follow the
10 Design Guidelines as the standard to be used in rendering
11 its decisions and developing its rules. . . . [T]he decision of
12 the [ARC] shall be sole, absolute and final on all matters
13 submitted to it pursuant to this Declaration and/or the Design
14 Guidelines.³

15 10. Respondent's CC&Rs Article I sets forth definitions, including the definition
16 of party walls at § (p), which provides in relevant part as follows:

17 Party Walls. Except as herein provided, the rights and
18 duties of Owners and Residents with respect to Party Walls
19 between any Lot(s) and/or Parcel(s) shall be as follows:

20 (i) The Owners and Residents of contiguous Lot(s) or
21 Parcel(s) who have a Party Wall shall both equally have the
22 right to use such Party Wall, provided that such use by one
23 Owner or Resident does not interfere with the use and
24 enjoyment of same by the other Owner or Resident.

25

26 (iii) In the event any Party Wall is destroyed or damaged
27 (including deterioration from ordinary wear and tear and
28 lapse of time), other than by the act of an adjoining Owner or
29 Resident, his agents or guests, it shall be the obligation of all
30 Owners whose Lot(s) or Parcel(s) adjoin such Party Wall to
rebuild and repair such Party Wall at their joint expense,
such expense to be allocated among the Owners in
accordance with the frontage of their Lot(s) or Parcel(s) on
the Party Wall.

. . . .

(v) In the event of a dispute between Owners or Residents
with respect to the construction, repair or rebuilding of a
Party Wall, or with respect to the sharing of the cost thereof,
such adjoining Owners and/or Residents shall submit the

³ *Id.* at 41-42.

dispute to the Board, the decision of which shall be final and binding.⁴

11. Respondent's ARC adopted the Common Project Guidelines in December 2003. The Common Project Guidelines govern all exterior improvements. Section 3.11 of the Common Project Guidelines concerns Enclosure Projects (Walls, Gates, Wrought Iron, Railings). Section 3.11(B) provides submittal requirements, including that an applicant who plans to build a wall must submit to the ARC the layout of existing enclosures on the property and the proposed location of the wall. Section 3.11(D)(1) of the Common Project Guidelines provides that "[c]losely parallel walls shall be disapproved."⁵ The Common Project Guidelines do not define what is meant by "closely parallel walls."

12. Section 4 of the Common Project Guidelines concerns the Design Review Process and Submittal Requirements. Although § 4.20 provides that submittals shall be made at least seven calendar days before a scheduled ARC meeting, the requirements do not set a deadline for the ARC to approve or deny a submittal. Section 4.21 concerns Enforcement and provides as follows:

These Design Guidelines shall be enforced by the ARC or the Association as provided herein or in the Declaration. The ARC reserves the right to waive, vary, or otherwise modify any of the standards or procedures set forth herein at its discretion, for good cause shown. Notwithstanding this, the Design Guidelines may not conflict with the provisions of the Declaration.⁶

HEARING EVIDENCE

13. Respondent is still under the control of the Declarant on the CC&Rs, or the developer that built the subdivision. Mr. Brod testified that Respondent has been managing the subdivision since April 2007, and he has been overseeing Respondent's affairs since July 2018. His predecessor was Mabel Gummere. Mr. Brod testified that Respondent's board presently has three directors who were appointed by Declarant. The Declarant is also a member of the ARC.

⁴ *Id.* at 17.

⁵ Respondent's Exhibit B at 13.

⁶ *Id.* at 18.

1 14. On March 8, 2017, Petitioners' next-door neighbor, Anthony Henderson,
2 submitted an Architectural Variance Request ("AVR") to extend the common wall
3 between his and Petitioners' properties to 10' from the edge of his house. Petitioner
4 Mrs. Norman signed to give her consent for a common wall alteration.⁷

5 15. Mr. Brod explained that the adjoining neighbor's consent is required to
6 extend a common wall because both neighbors will be responsible for maintenance of
7 the common wall under the CC&Rs. Respondent's ARC approved Mr. Henderson's
8 AVR to extend the common wall.⁸

9 16. Mr. Brod testified that Respondent never gets involved in disputes between
10 neighbors. It is the responsibility of the homeowner who is submitting an AVR to reach
11 out to his neighbor and obtain his neighbor's consent to extend a common wall.

12 17. On April 27, 2017, Mr. Henderson submitted an AVR to build a wall
13 extension 6" inside the property line. The wall would be 10' high but would "tier down
14 on the east side of the wall for better esthetics."⁹ Mr. Brod testified that he did not know
15 why the Henderson did not extend the common wall, as the ARC had previously
16 approved based on Mrs. Norman's consent. Possibly Mrs. Norman had rescinded her
17 approval.

18 18. On May 10, 2017, the ARC approved the Henderson's AVR to build a wall
19 6" inside the property line.¹⁰ Mr. Brod testified that it looked like the wall had been built
20 by November 2017. Mr. Brod noted that the wall tiers downward and appears to have
21 built per the plans that Mr. Henderson submitted.¹¹ Mr. Brod also noted that the
22 Henderson's wall appears to angle away from the property line in the front, being closer
23 to the property line near the back of the wall, next to the wall around the backyard.¹²

24 19. On September 5, 2017, Petitioners filed an AVR to build an 11' wide
25 concrete driveway on the opposite side of the house from the garage and existing
26 driveway to provide a solid walking surface because Mrs. Norman was disabled and
27 had difficulty walking. The AVR did not mention a wall also being installed on that side

28 ⁷ See Respondent's Exhibit D.

29 ⁸ See Respondent's Exhibit E.

30 ⁹ See Respondent's Exhibit F.

¹⁰ See Respondent's Exhibit G.

¹¹ See Respondent's Exhibit K (photograph taken November 3, 2017).

¹² See Respondent's Exhibits O and P.

1 of the property. According to the plans attached to the AVR, the driveway would run 45'
2 along the house and would end 16' away from the gate to the existing perimeter wall.¹³

3 20. The ARC denied Petitioner's September 5, 2017 AVR to build an 11' wide
4 driveway because there was already a driveway on the opposite side of the house,
5 where the garage was located.¹⁴

6 21. Nonetheless, Petitioners built the 11' wide driveway all the way back to the
7 existing perimeter wall.¹⁵ Mr. Brod testified that Respondent had sent Petitioners a
8 Notice of Violation for building the driveway.

9 22. On September 7, 2017, Petitioners submitted an AVR to build a wall
10 extension from the existing wall end pillar, at least 3' from the Hendersons' wall
11 extension, with a 4' wide metal gate. The drawing did not show a driveway; it just
12 showed a wall. On October 13, 2017, Respondent's ARC approved the wall
13 extension.¹⁶

14 23. Petitioners never built the approved wall extension. Mrs. Norman
15 explained that their contractor had told them they were crazy to give up the 3' of
16 property that would be outside the wall, between the wall and the Henderson's wall.

17 24. On March 27, 2019, Petitioners filed an AVR to build a wall along the
18 property line with the Hendersons to enclose their side yard. The drawing shows the
19 driveway and a double steel gate mounted on block pillars in the driveway. The AVR
20 did not contain any consent by the Hendersons.¹⁷

21 25. Mrs. Norman testified that, because Petitioners do not get along very well
22 with the Hendersons, Petitioners never requested the Hendersons' approval to extend
23 the wall on the property line between the two properties.

24 26. Mr. Brod called the absence of the Henderson's consent to the wall on the
25 property line problematic. Mr. Brod testified that Respondent could not compel the
26 Hendersons to consent to Petitioners' plan to construct a wall on the property line.

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28 ¹³ See Respondent's Exhibit H.

29 ¹⁴ See *id.*

30 ¹⁵ See Respondent's Exhibit K.

¹⁶ See Respondent's Exhibit I.

¹⁷ See Respondent's Exhibit J.

1 27. Mr. Brod also noted that, although the March 27, 2019 AVR from
2 Petitioners shows the driveway, the drawing does not mention the possible effect of the
3 block pillars on the driveway. Mr. Brod testified that the March 27, 2019 AVR was
4 pending and that, as of the date of the hearing, the ARC had neither approved nor
5 denied it.

6 28. Mr. Brod testified that no one from Respondent has ever measured the
7 wall or determined exactly how far away it is from the property line because Respondent
8 does not have anyone to perform a thorough inspection. Mr. Brod testified that
9 Respondent had not sent the Hendersons a violation letter, even though the wall does
10 not appear to be uniformly 6" inside the property line.

11 29. Mr. Brod testified that Respondent has never received a request for a
12 partition from Petitioners.

13 30. Mrs. Norman testified that both she and her husband are in law
14 enforcement. They want to enclose their side yard because the utility meters are on
15 that side of the house and they are concerned about vandalism. Mrs. Norman testified
16 that Petitioners do not plan to park on the driveway that they constructed, but only to
17 drive up and deliver groceries or other purchases. Mrs. Norman opined that
18 Respondent should require the Hendersons to tear down the last 10' of their wall past
19 the front of their house because it is not uniformly 6" from the property line.

20 31. Mrs. Norman testified that she remains unwilling to give up 3' of her property
21 to enclose her side yard. She believes that, if she submitted an AVR to build a wall just
22 inside the property line, it would be denied under § 3.11(D)(1) of Respondent's
23 Common Project Guidelines because it would be a "close parallel wall."

24 32. Mr. Brod testified that he does not know the limit for a wall to be a "closely
25 spaced parallel wall." It was less than 3', since the ARC had approved Petitioners'
26 September 7, 2017 AVR.

CONCLUSIONS OF LAW

27 1. A.R.S. § 32-2199(B) permits an owner or a planned community organization
28 to file a petition with the Department for a hearing concerning violations of planned
29
30

community documents under the authority Title 33, Chapter 16.¹⁸ Such petitions will be heard before the Office of Administrative Hearings, an independent state agency.

2. Petitioners bear the burden of proof to establish that Respondent violated § 3.11(D)(1) of the Common Project Guidelines by a preponderance of the evidence.¹⁹ Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.²⁰

3. “A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not.”²¹ 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.”²²

4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give effect to the intent of the parties.²³ “Restrictive covenants must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein.”²⁴

5. Respondent’s CC&Rs Article 1 § (p) provides owners of adjacent properties that have a party wall on the property line have a mutual shared responsibility to repair and maintain the property wall. For this reason, ARC requires a property owner who submits an AVR for a wall to be built on the property line to provide the neighboring property owner’s consent before the ARC will approve construction of an extension of a party wall on the property line. Although Petitioners initially consented in early March 2017, to the Hendersons’ extension of the party wall between their properties, the

¹⁸ See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce the development’s CC&Rs.

¹⁹ 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).

²⁰ See A.A.C. R2-19-119(B)(2).

²¹ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

²² BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

²³ *See Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

²⁴ *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).

1 Hendersons never built the party wall extension. Although the record does not indicate
2 why the part wall extension was never built, Mrs. Norman acknowledged that Petitioners
3 and the Hendersons presently do not get along.

4 6. A month and a half later, the Hendersons submitted an AVR and the ARC
5 approved a wall that would be 6" inside the property line because the wall was not on
6 the property line and, therefore, was not a party wall. The wall was subsequently built.
7 Evidence suggests that the wall is less than 6" inside the property line near the wall
8 around the Hendersons' backyard, but Petitioners demand that Respondent require the
9 Hendersons to tear down the first 10' of the wall, which is at least 6" inside the property
10 line.

11 7. Respondent's ARC approved Petitioners' AVR to build another wall 3' on their
12 side of the property line because it would not be a party wall that would require the
13 Hendersons' consent, but Petitioners are not willing to fence out any part of their
14 property. Instead, they demand that Respondent force the Hendersons to tear down
15 the portion of their wall that is most compliant with the AVR or force the Hendersons to
16 consent to Petitioners building the wall along the property line, even though Petitioners
17 may have withdrawn their consent for the Hendersons to build the same wall in 2017.

18 8. The wall that Petitioners testified that they must build to protect their property
19 appears to be an archetypical spite fence between neighbors who cannot agree to
20 mutually work for the improvement of their adjacent properties. Neither the CC&Rs nor
21 the Common Project Guidelines require Respondent to mediate or resolve a dispute
22 between neighbors by taking one side or the other. A.R.S. § 32-2199.01(A)(1) provides
23 that "[t]he department does not have jurisdiction to hear [a]ny dispute among or
24 between owners to which the association is not a party." Therefore, Petitioner's petition
25 must be dismissed.

26 **RECOMMENDED ORDER**

27 IT IS ORDERED that Petitioners David and Brenda Norman's petition against
28 Respondent Rancho Del Lago Community Association is dismissed because t the
29 Department has jurisdiction to hear their dispute with the Hendersons.²⁵

30 ²⁵ Even if the Department had jurisdiction, Petitioners have not established that that Common Project
Guideline 3.11(D)(1) requires or even authorizes Respondent to give them the relief they have requested

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, May 23, 2019.

/s/ Diane Mihalsky
Administrative Law Judge

Transmitted electronically to:

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in their Petition.