

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Joyce H Monsanto,

4 Petitioner,

5 vs.

6
7 Four Seasons at the Manor Homeowners
8 Association,

9 Respondent.

No. 19F-H1919053-REL-RHG

**AMENDED ADMINISTRATIVE LAW
JUDGE DECISION**

10
11 **REHEARING:** October 21, 2019, at 1:00 p.m.

12 **APPEARANCES:** Joyce H. Monsanto ("Petitioner") appeared on her own behalf;
13 Four Seasons at the Manor Homeowners Association ("Respondent") was represented
14 by Mark K. Sahl, Esq., Carpenter, Hazlewood, Delgado & Bolen, LLP.

15 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

16
17 The Arizona Department of Real Estate ("the Department") called the
18 Administrative Law Judge's ("ALJ's") attention to a typographical error in Finding of
19 Fact ¶ 14 in her original decision in this matter. To resolve the ambiguity that was
20 inadvertently created and to give the parties notice of their appeal rights, the ALJ issues
21 this amended decision.

22 **FINDINGS OF FACT**

23 **BACKGROUND AND PROCEDURE**

24 1. The Department is authorized by statute to receive and to decide Petitions for
25 Hearings from members of homeowners' associations ("HOAs") and from HOAs in
26 Arizona.

27 2. Respondent is an HOA whose members own single-family houses on lots in
28 the Four Seasons at the Manor in Sun City, Arizona.

29 3. Petitioner owns a house in Four Seasons at the Manor and is a member of
30 Respondent.

1 4. On or about March 6, 2019, Petitioner filed a single-issue petition with the
2 Department that alleged that Respondent had violated A.R.S. § 33-1803 and several of
3 Respondent's Covenants, Conditions, and Restrictions ("CC&Rs"), including CC&R §
4 7.9, by refusing to allow her to affix two flagpoles to her house to fly the United States of
5 America's flag and the United States Marine Corps' flag.

6 5. Respondent filed a written answer to the petition, denying any violation of
7 applicable statute, bylaw, or CC&Rs by refusing to approve Petitioner's request to install
8 two flagpoles at her house.

9 6. The Department referred the petition to the Office of Administrative Hearings
10 ("OAH"), an independent state agency, for an evidentiary hearing.

11 7. A hearing was held on May 30, 2019. After the hearing, the Administrative
12 Law Judge ("ALJ") found that Petitioner had not established that Respondent had
13 violated any statute or CC&R by denying Petitioner's request to affix two flagpoles to
14 her house.

15 8. On or about August 22, 2019, the Commissioner of the Department granted
16 Petitioner's request for rehearing "for the reason[s] outlined in the Respondent's [sic]
17 Rehearing Request" The Commission's order did not specify exactly what the ALJ
18 did that supported Petitioner's request for rehearing.

19 9. The Department referred the petition to OAH for a rehearing. A rehearing
20 was held on October 21, 2019. Petitioner testified on her own behalf, cross-examined
21 Anthony ("Tony") Nunziato, the President of Respondent's Board of Directors, and and
22 submitted the same 20 exhibits that she had submitted at the original hearing, plus an
23 additional exhibit.¹ Respondent submitted the same 10 exhibits that it had submitted at
24 the initial hearing and presented Mr. Nunziato's direct testimony.

25 **RELEVANT CC&R AND STATUTE**

26 10. A.R.S. § 33-1808 provides as follows:
27

28 ¹ Petitioner attempted to submit a purported transcript of the first hearing that she alleged showed Mr.
29 Nunziato's conflicting statements or statements that contradicted the CC&Rs or Arizona statute. Because
30 the purported transcript was not prepared by a certified court reporter, lacked any other indicia of its
reliability, and did not include any corresponding notations to the digital audio recording of the first
hearing, the ALJ did not consider the purported transcript.

1 A. Notwithstanding any provision in the community
2 documents, an association shall not prohibit the outdoor
3 front yard or backyard display of any of the following:

4 1. The American flag or an official or replica of a flag of the
5 United States army, navy, air force, marine corps or coast
6 guard by an association member on that member's property
7 if the American flag or military flag is displayed in a manner
8 consistent with the federal flag code (P.L. 94-344; 90 Stat.
9 810; 4 United States Code sections 4 through 10).

10 2. The POW/MIA flag.

11 3. The Arizona state flag.

12 4. An Arizona Indian nations flag.

13 5. The Gadsden flag.

14 B. The association shall adopt reasonable rules and
15 regulations regarding the placement and manner of display
16 of the American flag, the military flag, the POW/MIA flag, the
17 Arizona state flag or an Arizona Indian nations flag. The
18 association rules may regulate the location and size of
19 flagpoles, may limit the member to displaying no more than
20 two flags at once and may limit the height of the flagpole to
21 no more than the height of the rooftop of the member's home
22 but shall not prohibit the installation of a flagpole in the front
23 yard or backyard of the member's property.

24 11. On or about June 23, 2015, K. Hovnanian, the developer of the Four
25 Seasons at the Manor, as Declarant recorded with the Maricopa County recorder an
26 amended and restated declaration of CC&Rs. Section 7 of the CC&Rs established an
27 architectural committee and charged it with reviewing landscape proposals submitted by
28 members of Respondent. Sections 7.8 and 7.9 of the CC&Rs provide in relevant part
29 as follows:

30 7.6 Waiver. The approval by the Architectural
Committee, or a third party hired by the Architectural
Committee, of any plans, drawings or specifications
for any work done or proposed, or for any other
matter requiring the approval of the Architectural
Committee, shall not be deemed to constitute a
waiver of any right to withhold approval of any similar

plan, drawing, specification or matter subsequently submitted for approval.

. . . .

7.8 Board Approval. All decisions of the Architectural Committee shall be subject to final approval by the Board of Directors. Upon rendering a decision with regards to an architectural and/or landscape submission, the Architectural Committee shall submit its decision to the Board of Directors for approval. The Board shall then inform the submitting party of the final decision. If the Board does not provide the Owner with a written response within sixty (60) days from the Association's receipt of a complete submittal, which includes all costs owed by the Owner to the Association relating to such submittal, the request will be deemed approved. . . .

7.9 Appeal. In the event plans and specifications submitted to the Architectural Committee are disapproved, the party or parties making such submission may appeal in writing to the Board within thirty (30) days following the issuance of the notice sent to the Owner of the final decision. The Board shall consult with the Architectural Committee regarding its decision, whose recommendations shall be submitted to the Board. Within forty-five (45) days following the Board's receipt of the request for Appeal, the Board shall render its written decision, which decision shall be final. Failure of the Board to render a decision within said forth-five (45) day period shall be deemed approval of the submission.²

12. On or about May 24, 2016, K. Hovnanian adopted architectural guidelines. The architectural guidelines set forth Respondent's requirements for installation of flagpoles, in relevant part as follows:

1. No flagpole shall be installed without the prior written approval of the Architectural Committee.
2. Poles must not exceed 12' in height, and only one flagpole is permitted per Lot.³

² Petitioner's Exhibit 1 at 19-20; Respondent's Exhibit 1 at 19.

³ Respondent's Exhibit 2 at 5.

13. On or about August 3, 2018, after the Declarant conveyed its authority to Respondent, Respondent's board adopted revised Architectural Guidelines. However, the provisions governing flagpoles were not changed.⁴

14. On or about November 8, 2018, Respondent's Board amended the architectural guidelines concerning flag displays as follows: (1) Poles could not exceed 20'; (2) If the flag were left out at night, the flag must be illuminated; and (3) If flags were not weatherproof, they must be brought in during inclement weather. The Board did not **change** the limit of one flagpole per lot.

ADDITIONAL HEARING AND REHEARING EVIDENCE

15. Petitioner purchased her home in Four Seasons at the Manor in February 2017 and, on October 28, 2017, moved into her home. Petitioner's husband spent 25 years in the Marines, including Korea. One of her sons has spent 25 years in the Marines and another son has spent 30 years in the Coast Guard. Petitioner and her family are very patriotic.

16. When Petitioner first moved into Four Seasons at the Manor, she hung two 4' x 6" windsocks, one with the Marine insignia and the other with a U.S. flag insignia. In July 2018, she received a notice from Community Manager Annette McCraw that the windsocks would have to be taken down because they had not been approved.

17. On or about August 31, 2018, Petitioner submitted a Design Review Application to Respondent's Architectural Committee to install two 6' long flagpoles on the exterior wall of her house, one on the right side of her front door, on which she would hang the United States flag, and one on the left side of her front door, on which she would hang the Marine flag.⁵

18. Petitioner acknowledged at the hearing that she could hang the two flags from a single flagpole under the Architectural Guidelines. Petitioner explained she did not want to do that because she felt the flagpole would have to be installed in the middle of the front of her lot and that it would block the view from her front window. Petitioner

⁴ See Respondent's Exhibit 3 at 6; Petitioner's Exhibit 3 at 6.

⁵ See Petitioner's Exhibit 4; Respondent's Exhibit 5.

acknowledged at the rehearing that she wanted to install two flagpoles for aesthetic reasons in that she thought the display of two flags would look better on two flagpoles.

19. On or about September 22, 2018, Ms. McCraw on behalf of Respondent sent a written Notice of Disapproval to Petitioner, informing her that the Architectural Committee had reviewed and denied her application to install two flagpoles because the Architectural Guidelines only permitted one flagpole.

20. On or about October 1, 2018, Petitioner sent Respondent a written appeal. Petitioner argued Respondent's denial of her application to install two flagpoles was unreasonable because it did not uniformly enforce the Architectural Guidelines and that, under § 7.6 of the CC&Rs, it could waive compliance with the Architectural guidelines.⁶

21. Mr. Nunziato testified at the original hearing that many of Respondent's members are retired military and/or patriotic. Approximately ten percent of the 140 homes in Respondent's development have flagpoles. All of the homes but Petitioner's have only one flagpole.⁷ Mr. Nunziato testified that on Memorial Day, he placed 140 small flags on his property, but took them down afterwards.

22. Mr. Nunziato testified that the Board has never allowed a waiver, although there were some open violations when he took over as president of Respondent's board. Mr. Nunziato testified that he asked Respondent's management company, Trestle, to do a better job.

23. An open board meeting and a general membership meeting to elect new officers were scheduled on November 8, 2018. On October 15, 2018, Ms. McCraw notified Petitioner by email that the Board would consider her appeal at its November 8, 2018 meeting.⁸ The board's meeting agenda did not include Petitioner's appeal of Respondent's denial of her application to install two flagpoles.⁹

24. Petitioner testified at the hearing and the rehearing that she attended the November 8, 2018 board meeting and that Respondent's board did not consult the Architectural Committee or consider her appeal. Petitioner acknowledged that Mr.

⁶ See Petitioner's Exhibit 6, Respondent's Exhibit 7.

⁷ See Respondent's Exhibit 4 at 2, 3, 4, 5, and 6.

⁸ See Petitioner's Exhibit 8, Respondent's Exhibit 8 at 1.

⁹ See Petitioner's Exhibit 9.

1 Nunziato got up and said that Petitioner wanted to address the board, but that by that
2 time, most of the people had left to attend the general membership meeting. Petitioner
3 denied that Mr. Nunziato or anyone else told her that her appeal was denied at the
4 board meeting.

5 25. Mr. Nunziato testified that the Respondent's board consulted with the
6 Architectural Committee after it heard that Petitioner wanted to address the Board about
7 her appeal. The person who was elected vice president at the general membership
8 meeting was on the Architectural Committee.

9 26. Mr. Nunziato testified that he was certain that the Board considered
10 Petitioner's appeal at the November 8, 2018 meeting and verbally informed Petitioner
11 that it would not issue a waiver to allow her to install two flagpoles. Mr. Nunziato
12 testified that he had no doubt whatsoever that the Board verbally informed Petitioner at
13 the November 8, 2018 meeting that it denied her appeal.

14 27. On or about December 4, 2018, Respondent's board's draft meeting
15 minutes were posted at the Board's website. The draft meeting minutes provided under
16 the title "Membership's Addressing of the Board" in relevant part as follows:

17 [Petitioner] wished to address the Board regarding a
18 Certified Letter she had sent to Tony Nunziato dated
19 October 31, 2018 and denied Architectural Request. Her
20 first claim was that all violation letters issued by Trestle
21 Management were not in compliance with Title 33, Chapter
22 16 (Planned Communities Act). Marc Vasquez addressed
23 this issue and [assured] her that the Arizona Statutes are
24 being followed and that all pertinent information is provided
25 in each letter. Her second request was for a hard copy of
26 the Agreement between Trestle Management and the HOA.
27 Per State law she may receive this document, however the
28 HOA is allowed to charge a fee of \$0.15/page for it, which is
29 the case. Her last request was for a waiver that would allow
30 her to have two flagpoles on her property (one to fly the
American flag and the other to fly the Marine flag). The
Board rejected this request since our CC&Rs allow for the
flying of both flags on a single flagpole.¹⁰

¹⁰ Petitioner's Exhibit 10; Respondent's Exhibit 9.

1 28. Petitioner acknowledged that she saw the draft meeting minutes shortly
2 after they were posted on Respondent's website. Petitioner testified that because the
3 draft minutes were not sent directly to her, did not mention her appeal or state that her
4 appeal was denied, and were not approved until the board's April 11, 2019 board
5 meeting,¹¹ she did not consider the draft meeting minutes to be a written denial by the
6 board of her appeal.

7 29. Petitioner testified that the only writing that she ever received from
8 Respondent about her appeal was its attorney's letter dated January 16, 2019.¹²
9 Complainant again argued that the draft minutes were legally ineffective, but presented
10 no authority in support of her argument. Petitioner also argued that because she could
11 not hang two flags from either of the flagpoles that she had installed on her house,
12 Respondent's denial of her request to approve two flagpoles effectively denied her the
13 ability to fly a U.S. Marine and United States flag.

14 **CONCLUSIONS OF LAW**

15 1. A.R.S. § 32-2199(B) permits an owner or a planned community organization
16 to file a petition with the Department for a hearing concerning violations of planned
17 community documents under the authority Title 33, Chapter 16.¹³ Such petitions will be
18 heard before the Office of Administrative Hearings, an independent state agency.

19 2. Petitioner bears the burden of proof to establish that Respondent violated
20 CC&R § 7.9 by a preponderance of the evidence.¹⁴ Respondent bears the burden to
21 establish affirmative defenses by the same evidentiary standard.¹⁵

22 3. "A preponderance of the evidence is such proof as convinces the trier of fact
23 that the contention is more probably true than not."¹⁶ A preponderance of the evidence is
24 "[t]he greater weight of the evidence, not necessarily established by the greater number of
25 witnesses testifying to a fact but by evidence that has the most convincing force; superior
26 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable

27 ¹¹ See Petitioner's Exhibit 16.

28 ¹² See Petitioner's Exhibit 12.

29 ¹³ See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce
the development's CC&Rs.

30 ¹⁴ 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).

¹⁵ See A.A.C. R2-19-119(B)(2).

¹⁶ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”¹⁷

4. Because Respondent’s Architectural Guidelines allow Petitioner to fly both the American and Marine flags from a single flagpole that is up to 20’ long, she did not establish that Respondent violated A.R.S. § 33-1808(A). The Architectural Guidelines that allow on a single flagpole are reasonable rules or regulations under A.R.S. § 33-1808(B). Petitioner’s petition is about her choice not to install a single flagpole for her own aesthetic reasons, not Respondent’s unreasonableness or lack of patriotism.

5. “A cardinal rule of statutory interpretation is to give full effect to each statutory word or phrase so that no part is rendered void, superfluous, contradictory or insignificant.”¹⁸ Similarly, if a restrictive covenant is unambiguous, it is enforced to give effect to the intent of the parties.¹⁹ “Restrictive covenants must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein.”²⁰

6. CC&R § 7.9 only required Respondent’s board to consult with its Architectural Committee before rendering a decision. Mr. Nunziato credibly testified that, before the November 8, 2018 board meeting, the board consulted with the Architectural Committee. Therefore, Petitioner did not establish that Respondent’s board violated CC&R § 7.9 by failing to consult the Architectural Committee before rendering a decision on her appeal.

7. Petitioner’s testimony that the Board did not make any decision on her appeal at the November 8, 2018 board meeting is incredible. In contrast, Mr. Nunziato’s testimony that the board did make a decision and informed Petitioner of the decision is credible and supported by the minutes of the meeting. Petitioner’s main argument at the hearing appears to be that the board violated CC&R § 7.9 because it failed to issue a written decision addressed only to her, like the September 22, 2018 Notice of Disapproval.

¹⁷ BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

¹⁸ *Westburne Supply, Inc. v. Diversified Design and Construction, Inc.*, 170 Ariz. 598, 600, 826 P.2d 1224, 1226 (Ct. App. 1992).

¹⁹ *See Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

²⁰ *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 8. Contrary to Petitioner's testimony and implied argument, the board rendered
2 a decision on her appeal at the November 8, 2018 board meeting, as required by CC&R
3 § 7.9, because it orally reached a decision.²¹ Because written minutes were made of
4 the board's decision, as required by the CC&Rs, the board made a writing
5 memorializing its decision, which Petitioner acknowledged she actually saw on or about
6 December 4, 2018, within 45 days of Petitioner's October 1, 2018 appeal.²²

7 9. CC&R § 7.9 only requires that the board's decision be reduced to writing
8 within 45 days of receipt of an appeal, not that the written summary of the decision must
9 be provided to the owner, in contrast to the plain requirements of § 7.8 for making and
10 communicating a decision on the original application. The negative implication cannon
11 of contract construction precludes the reading into CC&R § 7.9 the requirements of §
12 7.8.²³ Because Petitioner failed to establish that Respondent's board failed to render a
13 decision or to issue a writing memorializing the decision within 45 days of her appeal,
14 under CC&R § 7.9 Petitioner did not establish that the board is deemed to have
15 approved her submission. Therefore, the Board can properly find her in violation of the
16 Architectural Guidelines and order her to remove one of her two flagpoles.

17 **ORDER**

18 **IT IS ORDERED** that Petitioners' petition is denied because she has not
19 established that Respondent's Board should not have denied her application to install
20 two flagpoles on her property under A.R.S. § 33-1808 or CC&R § 7.

21 **NOTICE**

22 This administrative law judge order, having been issued as a result of a
23 rehearing, is binding on the parties. A.R.S. § 32-2199.02(B). A party wishing to
24 appeal this order must seek judicial review as prescribed by A.R.S. § 41-
25 1092.08(H) and title 12, chapter 7, article 6. Any such appeal must be filed with
26

27 ²¹ See *American Surety Co. of N.Y. v. Mosher*, 48 Ariz. 552, 562-63, 64 P.2d 1025, 1029-30 (1936); see
28 also *Fridena v. Maricopa County*, 18 Ariz. App. 527, 531 (1972).

²² See *American Surety Co. of N.Y.*, 48 Ariz. at 561-63, 64 P.2d at 1029-30.

29 ²³ See *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940, 197 L.3d. 2d 263 (2017); see also *Piper v. Bear*
30 *Medical Systems, Inc.*, 180 Ariz. 170, 176, 883 P.2d 407, 413 (App. 1994) ("In a statute, 'the expression of
one or more items of a class indicates an intent to exclude all items of the same class which are not
expressed'" (quoting *Pima County v. Heinfeld*, 134 Ariz. 133, 134, 654 P.2d 281, 282 (1982))).

1 the superior court within thirty-five days from the date when a copy of this order
2 was served upon the parties. A.R.S. § 12-904(A).

3 Done this day, November 18, 2019.

4 /s/ Diane Mihalsky
5 Administrative Law Judge

6 Transmitted electronically or by U.S. Mail to:

7 Judy Lowe, Commissioner
8 Arizona Department of Real Estate

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