

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Werner A. Reis
4 Petitioner,

No. 20F-H2019026-REL-RHG

5 vs.

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 Canyon Mesa Townhouse Association,
7 Respondent.

8 **HEARING:** June 24, 2020.

9 **APPEARANCES:** Werner A. Reis ("Petitioner") appeared on his own behalf.
10 Edward O'Brien, Esq. and Mark Sall, Esq. appeared on behalf of Canyon Mesa
11 Townhouse Association ("Association" or "Respondent").

12 **ADMINISTRATIVE LAW JUDGE:** Jenna Clark.

13
14 After review of the hearing record in this matter, the undersigned Administrative
15 Law Judge makes the following Findings of Fact and Conclusions of Law, and issues this
16 ORDER to the Commissioner of the Arizona Department of Real Estate ("Department").

17 **FINDINGS OF FACT**

18 **PROCEDURE AND BACKGROUND**

19 1. The Department is authorized by statute to receive and to decide petitions
20 for hearings from members of homeowners' associations and from homeowners'
21 associations in Arizona.

22 2. On or about November 18, 2019, Petitioner filed a single-issue petition with
23 the Department which alleged that the Association violated Covenants, Conditions, and
24 Restrictions ("CC&Rs"), Article III section 1, by modifying one of two existing tennis courts
25 for use as a pickleball court.¹

26 3. On or about December 04, 2019, the Association returned its ANSWER to the
27 Department whereby it denied all of the complaint items in the petition.² Specifically, the

28 ¹ See Department's electronic file at HO20-19026_Notice_Petition.pdf.

29 ² See Department's electronic file at HO20-19026_Respondent_Petition_WithForm.pdf.

1 Association noted that the Board of Directors ("Board") made the decision to offer
2 pickleball as an additional recreation feature, to satisfy growing interests by its owners,
3 renters, and guests.³ In June 2019, the Association added pickleball stripes on one of the
4 two tennis courts to support pickleball play. The Association argued that the underlying
5 improvement was done on the tennis courts, a Common Area, for the benefit of the
6 Association as permitted by Article II section 1 of the CC&Rs. Tennis play was not
7 restricted, as both courts remained available for reservation seven days a week on a first
8 come first served basis. Tennis remained available on one court at all times, while tennis
9 and pickleball required competing reservations on the other court. The Association
10 affirmed that no changes were made to the reservation system.

11 4. Per the NOTICE OF HEARING, the Department referred this matter to the
12 Office of Administrative Hearings ("OAH"), an independent state agency, for an
13 evidentiary hearing on January 31, 2020, regarding the following issue:

14 **Whether Canyon Mesa Townhouse Association violated community**
15 **documents CC&Rs Article III, sec. 1.**⁴

16 5. On February 24, 2020, the Office of Administrative Hearings issued a
17 resulting ALJ DECISION in Respondent's favor, which was transmitted to the parties by the
18 Department on February 25, 2020.

19 6. On or about March 26, 2020, Petitioner submitted a REQUEST FOR
20 REHEARING to Department.

21 7. On April 22, 2020, the Department granted Petitioner's request.

22 8. On April 22, 2020, the Department referred the above-captioned matter
23 back to the Office of Administrative Hearings. A NOTICE OF REHEARING was issued to the
24 parties, for hearing on June 10, 2019, at 8:30 a.m.

25 9. On May 20, 2020, during a prehearing conference, the parties stipulated to
26 the Tribunal that no factual dispute existed. The parties proposed that the rehearing be
27 vacated, the hearing record from 20F-H2019026-REL be adopted without any new

28 ³ *Id.*

29 ⁴ See Department's electronic file at HO20-19026_Notice_Hearing.pdf.

evidence being presented, and that the parties be permitted to submit written closing arguments in lieu of appearing for the scheduled hearing.

10. On May 21, 2020, the Tribunal granted the parties' stipulated request and issued an ORDER VACATING HEARING AND HOLDING RECORD OPEN FOR CLOSING ARGUMENTS ("ORDER"), which stated the following:

The hearing in the above-captioned matter is **vacated**. As both parties have agreed that no additional evidence shall be offered or admitted into the evidentiary record, the hearing record for 20F-H2019026-REL shall be adopted for this matter. The parties will have until **5:00 p.m. on Wednesday, June 24, 2020**, to submit written Closing Arguments on the issue "that the findings of fact or decision is not supported by the evidence or is contrary to law."⁵ No rebuttal arguments shall be accepted from either party.

The ORDER was sent to the parties' mailing and electronic addresses of record. None of the correspondence was returned to OAH as undeliverable.

11. On June 24, 2020, OAH received a 17-page closing argument from Respondent.

12. OAH did not receive a closing argument from Petitioner.

THE PARTIES AND GOVERNING DOCUMENTS

13. The Association is a townhouse association whose members own properties in the Canyon Mesa residential real estate development located in Sedona, Arizona. Membership for the Association is comprised of the Canyon Mesa townhouse owners.

14. Petitioner is a Canyon Mesa townhouse owner and a member of the Association.

15. The Association is governed by its CC&Rs⁶ and overseen by the Board. The CC&Rs empower the Association to control certain aspects of property use within the development. When a party buys a residential unit in the development, the party receives

⁵ The following rules and restrictions were specifically noted as applicable to the parties' underlying closing statements: 10pg maximum, 1" margins, 1.5x space, 12pt Times New Roman or Arial font, and no attachments.

⁶ See Department's electronic file at HO20-19026_CanyonMesa_CCR.pdf.

1 a copy of the CC&Rs and agrees to be bound by their terms. Thus, the CC&Rs form an
2 enforceable contract between the Association and each property owner.

3 16. The Association is also regulated by Title 33, Chapter 16, Article 1 of the
4 Arizona Revised Statutes ("ARIZ. REV. STAT.")

5 17. The Association's Restated Declaration of CC&Rs were recorded with the
6 Yavapai County Recorder's Office on June 08, 2015.

7 18. The Association's Bylaws were adopted by the Board on July 23, 1985.⁷ On
8 January 15, 2002, the Bylaws were officially amended.⁸

9 19. CC&Rs Article III, section 1, states as follows:

10 Declarant hereby grants to Association, and to each and every Member
11 thereof, a nonexclusive perpetual easement of use and enjoyment in and to
12 the Common Areas which easement is appurtenant to and shall run with the
13 title to each and every Townhouse, for the mutual benefit and protection of
14 all Owners of the Townhouses. Such right and easement of use and
15 enjoyment shall be subject to reasonable rules and regulations as may be
16 promulgated from time to time by the Board, including but not being limited
17 to (a) the right of the Association to limit the number of guests of Members,
18 and (b) the right of the Association to charge reasonable admission or other
19 fees for the use of any recreational or other common facilities situated upon
20 the Common Areas.

21 **HEARING EVIDENCE**

22 20. Petitioner testified on his own behalf. The Association called Charles
23 Mitchell and Arland Averell as a witness, and submitted 2 exhibits into the record. The
24 Department's electronic file and NOTICE OF HEARING were also admitted into the record.

25 Charles Mitchell's testimony

26 21. Charles Mitchell ("Director Mitchell") is the current Director of the
27 Association's Board.

28 22. CC&Rs Article II, section 1, grants the Board authorization to maintain
29 Common Areas, including the tennis courts, and does not require a Member vote.⁹

30 ⁷ See Department's electronic file at HO20-19026_CanyonMesa_Bylaws.pdf.

⁸ *Id.*

⁹ CC&Rs Article II, section 1, states "Canyon Mesa Townhouse Association, a non-profit Arizona corporation, is a property owner's association for the general welfare and benefit of the Owners. The

1 23. CC&Rs Article III, section 1, states that all members have an easement and
2 keys to access Common Areas. Common Areas, including the tennis courts are
3 accessible at any time.

4 24. CC&Rs Article VI requires the Board to maintain, manage, and otherwise be
5 responsible for the Common Areas, including the recreational facilities. The tennis courts
6 are recreational facilities that the Board maintains and has authorization to paint. The
7 Board was authorized to paint pickleball lines on one of the tennis courts and is required to
8 provide proper care and maintenance for those painted lines.

9 25. The Association's Articles of Incorporation also authorize the Board to
10 manage and improve Common Areas.¹⁰

11 26. The CC&Rs speak to the Common Areas, and do not specifically address
12 tennis or pickleball courts.

13 27. Both tennis courts have fixed tennis nets.¹¹ The pickleball court has portable
14 nets which must be attached for use and detached at the end of play.¹²

15 28. There is no pickleball at night because there are no lights on the court.

16 29. Tennis is still played on both courts.

17 30. Petitioner has never been denied access to the tennis courts at issue at any
18 time.

19 31. If and when a tennis court is occupied and Petitioner desires to play two
20 singles matches on both courts, Petitioner will either have to wait his turn to use both
21 courts or play a game of doubles on one court, just like any other player.

22 Arland Averell's testimony

23 32. Arland Averell has been an Owner and Association Member of Canyon
24 Mesa for thirty-one years. Mr. Averell has served on the Board for the past twenty years.

25 Association, through its Board of Directors and Officers, shall take the appropriate action to manage,
26 maintain, repair, replace and improve the Common Areas, together with all improvements located thereon, to
27 perform related activities, and to perform all other functions and duties assigned to the Association by this
28 Declaration or properly delegated to it by its Members."

29 ¹⁰ See Respondent Exhibit 3.

30 ¹¹ See Respondent Exhibit 4.

¹² *Id.*

1 33. The tennis court have white lines painted on them to denote game boundary
2 lines.¹³ One of the tennis courts also has blue lines painted on it to denote game boundary
3 lines for pickleball.¹⁴

4 34. In 2015, the Association had a pickleball court that was damaged
5 approximately 4 months after the lines were taped.

6 35. In April 2019, the Board decided to reestablish the pickleball court with
7 painted lines after several families requested they do so. The Board determined that
8 restoration of the pickleball court could also be used as a means to generate additional
9 revenue. By June 05, 2019, the pickleball lines were painted.

10 36. Pickleball is generally only played by the previously referenced families, and
11 they typically play on Saturday mornings.

12 37. When pickleball is in play, the other tennis court is always available for first
13 come first served play.

14 Petitioner's testimony

15 38. Petitioner is a self-described "snowbird," otherwise known as an out-of-state
16 retiree who resides in Arizona during winter months.

17 39. In November 2019, Petitioner purchased his Canyon Mesa townhouse.

18 40. The crux of Petitioner's complaint is the possible conflict between his
19 personal interest of wanting to play two singles matches on both tennis courts, and up to
20 sixteen "outsiders" playing a raucous game of pickleball on the other designated tennis
21 court.

22 41. Petitioner has not played tennis in "years." As such, Petitioner has not yet
23 found himself facing any such actual conflict.

24 42. Petitioner has not observed contemporaneous tennis and pickleball games
25 being played. However, Petitioner argued that during contemporaneous play, tennis balls
26 could inadvertently run across the adjacent tennis court, resulting in inconvenience or
27 injury.

28 ¹³ *Id.*

29 ¹⁴ *Id.*

1 43. Petitioner accused the Association of “creating a new class of people” who
2 could access the pickleball court, creating competition on a first come first served basis
3 against would-be tennis players.

4 44. Petitioner argued that the Association created a situation where “Members
5 have the right to play tennis unless pickleball is in play” which “constitutes an infringement
6 of tennis players’ right of use and enjoyment.” Petitioner also argued that pickleball play
7 resulted in only one tennis court being available for use which amounts to “an impediment
8 of enjoyment rights.”

9 45. Petitioner beseeched the tribunal to find the Association in violation of
10 Article III section 1 of the CC&Rs and issue an order requiring the Association to
11 designate the tennis courts for tennis playing only.

12 **CONCLUSIONS OF LAW**

13 1. This matter lies within the Department’s jurisdiction pursuant to ARIZ. REV.
14 STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a
15 planned community association. The owner or association may petition the department
16 for a hearing concerning violations of community documents or violations of the statutes
17 that regulate planned communities as long as the petitioner has filed a petition with the
18 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

19 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
20 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested
21 case at bar. OAH has the authority to interpret the contract between the parties. See
22 *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App.
23 2007).

24 3. The ORDER regarding written closing arguments OAH issued on May 21,
25 2020, to Petitioner’s addresses of record is sufficient, and Petitioner is deemed to have
26 received it.¹⁵ Because the Department issued all correspondence to Petitioner in the same
27

28 ¹⁵ See ARIZ. REV. STAT. §§ 41-1092.04, 41-1092.05(D), and 41-1061(A).

manner and failed to receive any mail returned as undeliverable, Petitioner is deemed to have received all correspondence regarding this matter from the Department as well.

4. In the proceeding at bar, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1243.¹⁶

5. “A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not.”¹⁷ 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.”¹⁸

6. “In applying a statute . . . its words are to be given their ordinary meaning unless the legislature has offered its own definition of the words or it appears from the context that a special meaning was intended.”¹⁹ Each word, phrase, clause, and sentence must be given meaning so that no part of the legislation will be void, inert, or trivial.²⁰ Legislation must also be given a sensible construction that avoids absurd results.²¹ If the words do not disclose the legislative intent, the court will scrutinize the statute as a whole and give it a fair and sensible meaning.²²

7. Here, the material facts are not in dispute.

8. It is undisputed that the Association’s governing documents authorize the Board to maintain, manage, and otherwise be responsible for the Common Areas, including the tennis courts which are recreational facilities. It is also undisputed that the Association had the authority to paint pickleball lines on one of the tennis courts without voter input from Members. Moreover, it is undisputed that all members, including

¹⁶ See ARIZ. ADMIN. CODE R2-19-119.

¹⁷ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

¹⁸ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

¹⁹ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

²⁰ *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 204, ¶ 17 (App. 2007).

²¹ *State v. Gonzales*, 206 Ariz. 469, 471, ¶ 12 (App. 2003).

²² *Luchanski v. Congrove*, 193 Ariz. 176, 178, ¶ 9.

Petitioner, have an easement and keys to access Common Areas, including the tennis courts, which are accessible at any time. Additionally, it is undisputed that Petitioner did not provide OAH with a closing argument in support of his request for rehearing and/or to rebut or refute any of the aforementioned facts in this matter.

9. What the evidence of record reflects is that Petitioner's easement rights have not been violated by the Association because the Board painted blue pickleball lines on one of two tennis courts. The pickleball nets are detachable and one tennis court remains available for use at all times.

10. Petitioner's argument regarding the reality that "Members have the right to play tennis unless pickleball is in play constitutes an infringement of tennis players' right of use and enjoyment" is unfounded. Petitioner's additional argument that the availability of only one court amounting to an impediment of enjoyment rights is also without merit.

11. Based upon a review of the credible and relevant evidence in the record, Petitioner has failed to sustain his burden of proof. The Tribunal concludes that no violation of Article III section 1 of the CC&Rs exists.

12. Therefore, the undersigned Administrative Law Judge concludes that because Petitioner failed to sustain his burden of proof that the Association violated Article III section 1 of the CC&Rs, his petition must again be denied.

ORDER

Based on the foregoing,

IT IS ORDERED that Petitioner's petition is denied.

IT IS ORDERED that the February 24, 2020, ALJ Decision, and restated herein, be the FINAL ORDER in this matter.

NOTICE

This Administrative Law Judge ORDER, having been issued as a result of a rehearing, is binding on the parties. ARIZ. REV. STAT. § 32-2199.02(B). A party wishing to appeal this order must seek judicial review as prescribed by ARIZ. REV. STAT. § 41-1092.08(H) and title 12,

chapter 7, article 6. Any such appeal must be filed with the superior court within thirty-five days from the date when a copy of this order was served upon the parties. ARIZ. REV. STAT. § 12-904(A).

Done this day, July 14, 2020.

/s/ Jenna Clark
Administrative Law Judge

Transmitted electronically to:

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