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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Magnus L.D. MacLeod,
Petitioner,

v.

Mogollon Airpark, Inc.,
Respondent.

and

Mogollon Airpark, Inc.,
Petitioner,

v.

Magnus L.D. MacLeod,
Respondent.

No. 20F-H2019019-REL (Root)

No. 20F-H2019034-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARING: June 19, 2020.

APPEARANCES: Jeffrey M. Proper, Esq. represented Magnus L.D. MacLeod (Petitioner). Gregory A. Stein, Esq., represented Mogollon Airpark, Inc. (MAP).

ADMINISTRATIVE LAW JUDGE: Kay Abramsohn

FINDINGS OF FACT

1. Pursuant to Arizona Revised Statutes (A.R.S.) 33-1801 et seq., the Arizona Department of Real Estate (Department) is authorized by statute to receive and to decide Petitions for Hearings from members of planned community associations in Arizona.

THE PETITIONS

2. On or about October 15, 2019, Petitioner filed a single-issue petition (Petition #19) with the Department alleging MAP violation of A.R.S. § 33-1817(A)(1), (A)(2)(a), and (A)(2)(b). Petition #19 alleges that the MAP cannot enforce an Amendment to Unit 4B because “3 of 9 Real Property Tracts by signature or vote of their Entity Lot Owners did not provide an affirmative vote and did not provide written consent of all the

owners of the lots or property to which the amendment applies.” Petitioner specified that he did not sign the Amendment to the CCR.¹

3. The single issue raised in Petition #19 is whether MAP violated A.R.S. § 33-1817(A)(1), (A)(2)(a), and (A)(2)(b) in the adoption of the Amendment. The Amendment at issue is MAP’s October 18, 2018 “Amendment to Declaration of Establishment of Conditions, Reservations and Restrictions and Mutual and Reciprocal Covenants and Liens Running with the Land.”²

4. On or about December 16, 2019, MAP filed a two-issue petition (Petition #34) with the Department.³ First, MAP alleged that Petitioner is in continued violation of the properly adopted Amendment by living full-time in the Tract G aircraft storage hangar. MAP noted that the Amendment had been properly adopted pursuant to the Declaration and to A.R.S. § 33-1817(A). MAP further alleged that, upon information and belief, the Tract G aircraft storage hangar contains “only 549 square feet of living space,” and that Petitioner’s actions in residing full-time within such living space were also a violation of the Declaration and the Amendment.⁴ Second, MAP requested enforcement of the Declaration and Amendment in the form of injunctive relief ordering Petitioner to comply with the Declaration, the Amendment, and Governing documents, arguing that Petitioner has failed and refused to comply with the Declaration and Amendment and that MAP has been irreparably injured. Further, in this vein, MAP requested that it be awarded its attorney’s fees, expenses and costs associated with these enforcement actions.

DISCUSSION

5. The Declaration provides that any costs, including costs of legal counsel, to enforce the Declaration, are required to be paid by the owner who, through his/her

¹ The acronym “CCR” used herein by Petitioner is a colloquial reference to the original MAP “Declaration of Establishment of Conditions, Reservations and Restrictions and Mutual and Reciprocal Covenants and Liens Running with the Land” (Declaration). See MAP Exhibit B.

² See MAP Exhibit C. The hearing record does not contain a copy of a first amendment to the Declaration, recorded on October 31, 1994.

³ MAP attached a narrative to its Petition to the Department setting out some background, the allegations, and the requested relief.

⁴ The Declaration required that structures (residential and hangars) have no less than 1,200 square feet of space for living purposes. See MAP Exhibit B (Land Use, Para 2); see also MAP Exhibit C (Land Use, Para 2).

1 breach, makes it necessary to enforce the Declaration; such costs become a lien on the
2 owner's lot.⁵

3 6. The Declaration provides that the Association's primary purpose is the
4 administration of the Declaration and to maintain and operate the "improvements"
5 referenced in the Declaration, that is to say, the "improvement and development of" the
6 Mogollon plat property which is specifically designated therein as: "Lots 178 through 213,
7 inclusive, and Tracts B, E, F, G, H, I, J, K, L, and M Mogollon Airpark Unit Four B, recorded
8 in Book 18 of Plats, page 9-10, records of Navajo County, Arizona."⁶

9 7. The Declaration provides that Tract B "shall not be subject to the
10 conditions, reservations and restrictions" set forth in the Declaration but shall be reserved
11 as a common area owned by the Association upon the sale of the last lot in Unit 4 and Unit
12 5 of the Mogollon Airpark master plan.⁷

13 8. The Amendment creates two categories of lots: Residential lots (lots
14 numbered #178 through #213, inclusive) and Hangar Tracts (tracts E through M,
15 inclusive).⁸ The Amendment indicates that any single family structure or combination
16 hangar/house is required to have "an area devoted to living purposes ... of not less than
17 1,200 square feet." The Amendment designates Tracts E through M for purposes of
18 aircraft storage only, while allowing that guest quarters may be constructed as a part of an
19 aircraft storage hangar on Tracts E through M. The Amendment specifies that guest
20 houses on residential lots and guest quarters in aircraft storage hangars are for
21 "temporary living only and in no case will be used as a permanent residence."
22 "Temporary" is defined as "not longer than four months per calendar year." The
23 Amendment indicates that, in the event of special circumstances, an owner can request
24 an extension of the four-month limit. Finally, the Amendment adds Lot 213 to the list of
25 lots that are authorized to use the aircraft taxiway.⁹

26 ⁵ See MAP Exhibit B at Para 31 and 34.

27 ⁶ See MAP Exhibit B, Para 34 and Opening.

28 ⁷ See MAP Exhibit B (at page 20 of 21). The Tribunal presumes that such was the case at the time of the
29 Amendment.

30 ⁸ At hearing, Craig Albright, then President of the MAP Board of Directors, indicated that the Board had not
drafted the language of the Amendment.

⁹ Petitioner's Exhibit 18 notes the reason for this particular change was that Petitioner had erected a fence,
despite disapproval to do so from the Architectural Committee, that prevented the owner of Lot 213 from

1 9. Petitioner's 12-page statement (Statement) attached to Petition #19
2 details an array of background information some of which is unrelated to the single issue
3 raised; regarding the Amendment and single issue, Petitioner's statement includes the
4 following assertions:

- 5 a. There are 9 tracts directly impacted by the Amendment.¹⁰
6 b. Six of the Unit 4B tracts were represented within the recorded
7 Amendment approvals - Tracts E and F, Tract I, Tract J, Tract K, and
8 Tract L.¹¹
9 c. Three of the Unit 4B tracts were not represented within the recorded
10 Amendment approvals - Tract G, Tract H, and Tract M.

11 10. In Petition #19, Petitioner indicated that the October 18, 2018
12 Amendment does two things: (a) the Amendment "substantially alters" the Tract
13 Hangar/Home property covenants by creating the new criteria of a limited 4-month
14 temporary living period in a Tract Hangar/Home versus the previously unrestricted living
15 usage in the original CCRs, and (b), as to Unit 4B Tract Hangar/Homes, the Amendment
16 removed "Guest *Homes* with Kitchens" and replaced it with "Guest *Quarters* without
17 Kitchens."¹² Petitioner noted that, prior to the Amendment, Tract G within Unit 4B was
18 previously allowed to have a "Guest House with a Kitchen."

19 11. Petitioner purchased Tract G in February 2017 from his brother, Pat
20 MacLeod, with the expectation of living in the Tract Hangar/Home as he understood other
21 such property owners (*i.e.*, other Tract Hangar/Home owners) had done since 1996
22 pursuant to the original CCRs which did not contain any time-period limitation on
23 residential usage.¹³ In Petition #19, Petitioner argued that the Amendment unreasonably

24 taxiing his aircraft to his hangar.

25 ¹⁰ Tract B is not impacted by the Amendment; Tract B is not subject to the conditions, reservations and
26 restrictions set forth in the Declaration.

27 ¹¹ MAP Exhibit C contains copies of 30 Unit 4B lot owner "Acknowledgments" in agreement with the
28 Amendment.

29 ¹² Whether the Amendment is reasonable or unreasonable (or unlawful), and/or its impact, is not an issue for
30 consideration in Petitioners' single issue Petition.

¹³ In his Statement, Petitioner referenced one particular other long-time such usage (the Driver home on
Lots N and O) and maintained that the Navajo County Assessor listed 12 lots with Hangar/Homes as either
primary residential or non-primary residential rental properties as far back as 1996. See Petitioner's Exhibit
15 (Bates 93-96).

1 altered the CCRs “creating a large burden upon me to buy or build an additional home that
2 I do not want and do not need.”¹⁴

3 12. A.R.S. § 33-1817(A)(1) provides certain parameters for an amendment to
4 a Declaration. A Declaration may be amended by the Association by an affirmative vote
5 or written consent of the number of owners or eligible voters specified in the Declaration,
6 including the assent of any individuals or entities that are specified in the Declaration.

7 13. The Declaration indicates that the Declaration could be amended “by an
8 instrument in writing, executed and acknowledged by the owners of not less than three-
9 fourths of the lots in said subdivision ...”¹⁵

10 14. A.R.S. § 33-1817(A)(2) provides that a Declaration amendment “may
11 apply to fewer than all of the lots or less than all of the property that is bound by the
12 Declaration” and that an amendment is “deemed to conform to the general design and
13 plan of the community” when both of the following criteria apply:

- 14 a. The amendment receives the affirmative vote or written
15 consent of the number of owners or eligible voters
16 specified in the declaration, including the assent of any
17 individuals or entities that are specified in the declaration.
18 b. The amendment receives the affirmative vote or written
19 consent of all of the owners of the lots or property to which
20 the amendment applies.

21 15. Petitioner had been living with his brother, Pat MacLeod, in MAP since
22 approximately April 2016. After he acquired Tract G in February or March of 2017 from his
23 brother, Petitioner made interior living improvements and began living full time in the
24 aircraft storage hangar.¹⁶

25 16. Petitioner maintains that the Tract G Hangar Home contained 1,656
26 square feet of living space, citing to the November 14, 2007 MAP architectural committee
27 sign-offs on the Building Plans CheckList.¹⁷ However, in April 2017, he and his brother

28 ¹⁴ Petitioner's Petition.

29 ¹⁵ See MAP Exhibit B at Paragraph 27.

30 ¹⁶ See Petitioner's Statement; see *also* Petitioner's Exhibits 8, 9, and 13 (Bates 90).

¹⁷ See Petitioner's Exhibit 9 (Bates 85).

1 had indicated to MAP that they had a permit “to finish Tract-G 206-29-511 with a usable
2 living space.”¹⁸

3 17. It is not clear whether, at the time he acquired Tract G from his brother,
4 that Petitioner owned any residential lot.¹⁹ The Declaration required that a resale of Tract
5 G only be made to “owners of lots within Mogollon Airpark and who are members of the
6 Mogollon Airpark Homeowner’s Association.”²⁰ In December 2017, Petitioner purchased
7 Lot 19 in Unit 1.

8 18. Based on Petitioner’s Statement, it appears that the issue of Petitioner
9 living full-time in the Hangar arose in May of 2017 when Petitioner requested of MAP to be
10 able to build a group home for disabled veterans, which request was challenged by other
11 lot owners who (a) did not want a group home in MAP, (b) indicated that Petitioner was not
12 able to “live” in a Tract Hangar, and (c) that he “cannot own a tract hangar.”²¹

13 19. On or about September 18, 2017, MAP’s Architectural Committee wrote
14 a letter to Petitioner notifying him of a violation of the Unit 4B Declaration regarding Tract
15 G.²² MAP noted that aircraft storage hangar lots were permitted to have a guest house
16 without kitchen for use as temporary guest quarters, but specified that Petitioner did not fit
17 the definition of either “temporary” or “guest” and, therefore, was not permitted to live full
18 time in a hangar intended for aircraft storage. MAP requested that Petitioner vacate the
19 hangar premises within 60 days.

20 20. On or about December 29, 2018, MAP issued its “First Notice of Non-
21 Compliance” regarding Petitioner’s violation of Declaration Land Use provisions, Para 2,
22 by living full time in the Tract G Hangar.²³ MAP noted that the violation was brought to the
23 MAP Board through a letter signed by more than 25 HOA members. MAP imposed a

24 ¹⁸ See Petitioner’s Exhibit 8 (Bates 83). In this notification, they indicate to MAP that the property parcel is
25 “zoned as a primary residence.” The subject permit was not requested to be admitted to the hearing record.

26 ¹⁹ It appears that, at that time, Pat MacLeod was the President of the HOA. See Exhibit E. Annual meetings,
27 at which officers are elected, take place in August. *Id.*

28 ²⁰ See Exhibit B (Land Use, para 2).

29 ²¹ The Statement indicates that the group home and “ownership” issues were resolved between the parties
30 through a stipulation. See Petitioner’s Exhibit 106.

²² See MAP Exhibit D. MAP raised three violations; however, two of the alleged violations are not relevant to
Petition #19.

²³ See MAP Exhibit E. This letter was signed by the then President, Craig Albright.

1 \$100.00 fine. MAP provided information regarding possible appeals of the violation
2 notice.

3 21. On or about April 29, 2019, MAP issued its "Second Notice: Non-
4 Compliance" regarding the violation of the Unit 4B Declaration regarding Tract G.²⁴ MAP
5 further imposed an additional \$200.00 fine in the event the violation was not remedied
6 within ten (10) calendar days. MAP requested that Petitioner notify MAP as soon as
7 possible if the violation had already been corrected. MAP provided information regarding
8 a possible petition with the Department.

9 22. Following a pre-hearing conference at which the Tribunal reminded the
10 parties that the Tribunal's authority and considerations, and they themselves, were limited
11 to the issues stated in the two Petitions, the parties were able file a set of stipulated facts,
12 which are incorporated herein. Leading up to that point, however, the parties were taking
13 multiple opposing positions as to the issues and as to possible and/or disclosed
14 documents.²⁵

15 23. Importantly, the parties' Stipulated Fact #11 states as follows:

16 The AMENDMENT contains at least the required minimum
17 signatures and authorizations from the Lot Owners in *Unit IVB*
18 to adopt the AMENDMENT, provided that unanimous
19 approval of all affected property owners was not required.

20 Further, at hearing, the parties stipulated that the "dispute" remaining on this point was
21 whether the Amendment was required to obtain 75% approval (pursuant to the
22 Declaration) or whether the Amendment was required to obtain unanimous approval
(pursuant to A.R.S. § 33-1817(A)(2)).

23 24. At the hearing, the only documents admitted to the hearing record were
24 the following:²⁶

25
26 ²⁴ See MAP Exhibit F. The letter contains a typographical error in the citation to the Declaration when it
27 states "... Mogollon Airpark Unit 48 CC&Rs ..."

28 ²⁵ The entirety of documents generated by and from the parties in these two petitions are an indication of
29 their history and existing relationship.

30 ²⁶ At the hearing, the parties often summarized information contained in referenced Exhibits or simply
referenced an exhibit, which, when reviewed in depth for consideration herein, contained evidentiary details
noted herein.

- a. For Petitioner, Petition #19 and attachments, Exhibits 5, 6, 8, 9, 13, 15, 17, 18, 102, 103, 106, 121, 147-148, 149, and 157.
- b. For MAP, Petition #34 and attachments, Exhibits B, C, D, E, F, K (page 138, Lot 19 photograph), and HH (page 390, Lot 213 photograph).
- c. Joint Stipulated Statement of Facts (dated June 18, 2020) and the parties' legal memoranda previously filed.

25. At hearing, Petitioner acknowledged that he had been living full-time in the Tract G Hangar/Home, but then gave widely inconsistent dates of occupancy, stating it had only been "for about one year," from September 26, 2017 (when he got a certificate of occupancy) until "about the end of September 2018, possibly middle of 2018 or early 2018."²⁷ Petitioner indicated that he had not been given notice of the Amendment and only learned of it from the Board meeting minutes after the fact; however, such statement is at odds with his stated refusal to have signed off on the Acknowledgment (approving the Amendment).²⁸

26. Petitioner presented phone records which he opined demonstrated that, based on his comings and goings tracked by the cell phone calls/towers, he was only occupying Tract G Hangar/Home about 30% to 35% of the time *from November 1, 2019 to May 15, 2020*. Petitioner testified that he has moved to Concho, Arizona, where he and his friend have 3 parcels of land and have lived in a travel trailer on one parcel since January 2019.²⁹ Petitioner indicated that he intends to build on one of the parcels. Petitioner predicts that he would only be back in the Hangar in the event of forest fire in the area of Concho.

27. Raised in this hearing and argued to preserve the issue for judicial review, with regard to enforcement of the Declaration and Amendment, Petitioner argued that the Amendment must be struck as not adopted properly and as unfairly and unreasonably altering the Declaration. Petitioner further argued that there had been

²⁷ Audio Hearing Record at 1:50:22 – 1:51:14.

²⁸ See Joint Stipulated Facts, Para 10.

²⁹ This date is yet another date on which Petitioner is indicating he was not living in the Tract G Hangar/Home. As to Concho, Petitioner indicated that the parcels are 2, 1 ½, and 5 acres and are all zoned agricultural; he would have to obtain a rezoning for residential in order to build a home on any of the parcels.

1 longstanding and widespread utilization of Tract Hanger/Homes as full-time residences
2 without any enforcement action by MAP and, therefore, MAP has waived the right to
3 enforce the Amendment against Tract G.³⁰ Finally, Petitioner argued that he was entitled
4 to dismissal of the MAP Petition #34 and an award of attorney fees.

5 28. Specifically, with regard to adoption of the Amendment, Petitioner
6 argued that, pursuant to A.R.S. § 33-1817(A)(2), the Amendment was not properly
7 adopted as it needed unanimous approval because the Amendment would have applied
8 to fewer than all the lots bound by the Declaration, *i.e.*, having not included Tract B in the
9 Amendment.

10 29. MAP argued that the Declaration was appropriately amended, having
11 obtained “at least the required minimum signatures and authorizations from the Lot
12 Owners in *Unit IVB* to adopt the AMENDMENT.”³¹ MAP’s position is that A.R.S. § 33-
13 1817(A)(1), not A.R.S. § 33-1817(A)(2), is the applicable statutory provision regarding this
14 Amendment. MAP argued that Tract B, as a common area including the taxiways, was
15 not subject to “conditions, covenants or restrictions” within the Declaration and, thus, need
16 not have been included in the Amendment, *i.e.*, an amendment dealing with residential or
17 possible residential lots. MAP requested the remedies of preliminary and permanent
18 injunctions against Petitioner continuing to violate the Declaration and Amendment,
19 against Petitioner continuing to live full-time in the Tract G Hangar/Home, and ordering
20 Petitioner to comply with all aspects of the Declaration and Amendment. Further, MAP
21 requested an award of attorney fees and costs.

22 CONCLUSIONS OF LAW

23 30. This matter lies within the Department’s jurisdiction. Pursuant to A.R.S. §§
24 32-2102 and 32-2199 et al., regarding a dispute between an owner and a planned
25 community association, the owner or association may petition the department for a
26 hearing concerning violations of condominium documents or violations of the statutes that
27

28 ³⁰ The parties’ legal arguments in this regard are not addressed herein due to the limited jurisdiction of the
29 Tribunal in considering the cross-petitions.

30 ³¹ Joint Stipulation.

1 regulate condominiums as long as the petitioner has filed a petition with the department
2 and paid a filing fee as outlined in A.R.S. § 32-2199.05.

3 31. Pursuant to A.R.S. §§ 32-2199(2), 32-2199.01(D), 32-2199.02, and 41-
4 1092, OAH has the authority to consider and decide the contested petitions. OAH has the
5 authority to interpret the contract between the parties. *See Tierra Ranchos Homeowners*
6 *Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007)

7 32. In these proceedings, a petitioner bears the burden of proving by a
8 preponderance of the evidence that a respondent has violated the planned community
9 document(s') provisions or statutes alleged to have been violated.³²

10 33. "A preponderance of the evidence is such proof as convinces the trier of
11 fact that the contention is more probably true than not."³³ A preponderance of the evidence
12 is "[t]he greater weight of the evidence, not necessarily established by the greater number
13 of witnesses testifying to a fact but by evidence that has the most convincing force; superior
14 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
15 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
16 the other."³⁴

17 34. The parties stipulated to a revised issue between the parties: whether
18 the Amendment was required to obtain 75% approval pursuant to the Declaration or
19 whether the Amendment was required to obtain unanimous approval pursuant to A.R.S. §
20 33-1817(A)(2). Based on the hearing record, the Administrative Law Judge concludes
21 that the Amendment was required to obtain 75% approval pursuant to the Declaration.
22 Applying that conclusion back to Petition #19, Respondent was not in violation of A.R.S. §
23 33-1817(A)(2) in the adoption of the Amendment, which was proper pursuant to the
24 criteria set forth in the Declaration and A.R.S. § 33-1817(A)(1). Therefore, Petition #19
25 should be dismissed.

26 35. As to Petition #34, after the adoption of the Amendment, the hearing
27 record demonstrates that Petitioner was in violation of the Amendment in living full-time in

28 ³² See ARIZ. ADMIN. CODE R2-19-119.

29 ³³ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

30 ³⁴ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

1 Tract G Hangar/Home.³⁵ Petitioner acknowledged that he was living full-time in Tract G
2 Hangar/Home. In response to the allegations contained in Petition #34, Petitioner did not
3 demonstrate with any clarity a point in time at which he allegedly stopped living full-time in
4 Tract G Hangar/Home; his testimony was inconsistent. Given the inconsistency of
5 Petitioner's testimony in this regard, the Administrative Law Judge cannot conclude that
6 Petitioner had stopped living in the Tract G Hangar/Home at the time Petition #34 was
7 filed on December 16, 2019. Thus, MAP has proven its allegation of Petitioner being in
8 violation of the Amendment by living full-time in Tract G Hangar/Home.

9 36. The Declaration contains a provision that the "area devoted to living
10 purposes" within a Tract Hangar/Home must be no less than 1,200 square feet. However,
11 in this case, MAP failed to clearly document its belief, or allegation, that the living space
12 within Tract G Hangar/Home was less than 1,200 square feet. Therefore, the
13 Administrative Law Judge concludes MAP has partially demonstrated the allegations
14 contained in Petition #34, as is noted above.

15 37. Finally, MAP cited no statutory authority of this Tribunal with regard to
16 "enforcement" of a homeowner's association governing documents or with regard to any
17 injunctive relief within petitions filed with the Department.

18 38. Based on the hearing record, the Administrative Law Judge concludes
19 that the hearing record demonstrates the following:

- 20 a. Petition #19 should be dismissed. MAP is the prevailing party on Petition #19.
- 21 b. Petition #34 should be partially dismissed, as to its allegation regarding the
22 amount of living space within Tract G Hangar/Home); and,
- 23 c. Petition #34 should be partially affirmed as to the Petitioner-admitted and
24 proven allegation of Petitioner living full-time in the Tract G Hangar/Home in
25 violation of the Amendment. Despite the dismissal of the living space
26 allegation, MAP is the prevailing party on Petition #34.

27 **ORDER**

28
29 ³⁵ The Administrative Law Judge makes no determination whether the Declaration did or did not allow full-
30 time residential occupancy in Tract Hangar/Homes prior to the Amendment.

1 IT IS ORDERED that MAP be deemed the prevailing party in these cross-
2 petitions and that each party shall bear their own filing fee.

3 **NOTICE**

4 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties**
5 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S.**
6 **§ 41-1092.09, a request for rehearing in this matter must be filed with the**
7 **Commissioner of the Department of Real Estate within 30 days of the service of**
8 **this Order upon the parties.**

9 Done this day, July 28, 2019.

10 /s/ Kay Abramsohn
11 Administrative Law Judge
12
13
14

15 Transmitted electronically this day, July 28, 2020 to:

16 Judy Lowe, Commissioner
17 Arizona Department of Real Estate
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