

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Michael J. Stoltenberg,

No. 20F-H2020059-REL

4 Petitioner,

**ADMINISTRATIVE LAW JUDGE
DECISION**

5 vs.

6
7 Rancho Del Oro Homeowners Association

8

HEARING: August 3, 2020

9
10 **APPEARANCES:** Petitioner Michael J. Stoltenberg appeared on his own behalf. Nicole
11 Payne, Esq. represented Respondent Rancho Del Oro Homeowners Association. Diana
12 Crites and Rian Baas appeared as witnesses.

13 **ADMINISTRATIVE LAW JUDGE:** Sondra J. Vanella

14 **FINDINGS OF FACT**

15 **BACKGROUND AND PROCEDURE**

16 1. Respondent Rancho Del Oro Homeowners Association ("Respondent") is
17 a homeowners' association ("HOA") whose members own homes in Rancho Del Oro in
18 Yuma, Arizona.

19 2. Petitioner Michael J. Stoltenberg ("Petitioner") owns a home in Rancho
20 Del Oro at 11777 E. Calle Gaudi and is a member of Respondent.

21 3. On or about April 21, 2020, Petitioner filed a single-issue petition with the
22 Arizona Department of Real Estate ("Department") that alleged that Respondent had
23 violated its Covenants, Conditions, and Restrictions ("CC&Rs") § 5.1 and Arizona Revised
24 Statutes ("A.R.S.") § 10-3842 by failing "to do their job in 2020 with maintaining
25 landscaping, and are acting in bad faith." Petitioner further alleged: "This petition is being
26 resubmitted because Judge refused to allow evidence into 20F-H2019005-REL-RHG"
27 and "The HOA continual refusal to follow court ruling 19F-H1918038-REL show they have
28 no respect for ADRE and Homeowners Association Dispute Resolution process."
29 Petitioner requested that Respondent be fined "the maximum amount [sic] possible."
30

4. Respondent filed a Motion to Dismiss the Petition. The Department referred the Petition to the Office of Administrative Hearings, an independent state agency, for an evidentiary hearing.

5. A hearing was held on August 3, 2020. Petitioner submitted thirty-eight exhibits, although only six were admitted as the others were not relevant to the instant proceeding. Petitioner testified on his own behalf. Respondent submitted four exhibits and three were admitted. Respondent presented the testimony of its property manager, Diana Crites, who is also a designated broker licensed by the Department, as well as the testimony of Rian Baas, the owner of Mowtown Landscape, the landscaping company contracted by Respondent to perform the landscaping services for the Association.

HEARING EVIDENCE

6. Petitioner asserted that Respondent has failed to comply with a Decision in a prior proceeding before the Office of Administrative Hearings in Docket Number 19F-H1918038-REL that concluded that Respondent was required to provide landscaping maintenance.

7. Petitioner acknowledged that Respondent was not expected to start landscaping his property until January 2020.

8. Petitioner relied on Article V of the CC&Rs entitled Duties and Powers of the Association. Section 5.1 provides in relevant part as follows:

5.1 Duties. In addition to the powers delegated to it by its articles or the Bylaws, and without limiting their generality, the Association, acting by and through the Board . . . has the obligation to conduct all business affairs of common interest to all Owners and to perform the duties set forth below.

a. Maintenance. The Association shall maintain, repair, replace, restore, operate and manage all facilities, improvements, furnishings, equipment and landscaping thereon, and all property that ***may be acquired by the Association***. . . . Maintenance shall include, without limitation, landscaping, painting, maintaining, repairing and replacing of the ***Common Area***. ***It shall also include maintenance of the landscaping on individual Lots outside of structures.*** . . .

Emphasis added.

1 9. Petitioner contended that the CC&Rs do not specify what types of
2 landscaping are included and asserted that all types of landscaping outside of structures
3 are included. Petitioner testified that his landscaping is unique and includes xeriscape
4 with geometric patterns and “water features” that need to be maintained, as well as
5 walking paths that need to be stained. Petitioner’s front yard landscaping is rock and
6 Petitioner contended that when the rock wears thin, Respondent should be responsible
7 for replenishing it.

8 10. The “water features” to which Petitioner referred is a pool.

9 11. Petitioner further asserted that Respondent did not budget for the cost it
10 would incur in maintaining his landscaping.

11 12. Petitioner acknowledged that Respondent had been performing the front
12 yard landscaping since January 2020. Petitioner also acknowledged that the gate to
13 access his back yard was always locked for liability reasons due to the “water feature.”

14 13. Diana Crites, owner of Respondent’s property management company,
15 Crites and Associates, testified regarding a text message she received from Rian Baas on
16 March 24, 2020. The text message stated:

17 On 3/19 Luis went by 11777 E Calle Gaudi at RDO with paper that Jill
18 printed up to leave if no one answered door . . . lady answered door and said
19 she does not want anyone in the back yard because she had a pool and that
20 is the reason for the lock on gate. . . Luis said she was very nice about it.¹

21 14. Ms. Crites also testified about a photograph that was texted to her
22 depicting a lock on the gate in Petitioner’s yard, with the words, “Been locked up and no
23 one answering the door since we started on the property.”

24 15. Ms. Crites also read into the record a letter regarding Petitioner’s
25 property written by Mr. Baas. The letter states in pertinent part:

26 In January of 2020 when Mowtown Landscape took over the maintenance
27 contract of Rancho del Oro HOA for two months we knocked on the door
28 every week and left business cards with contact information. There is a lock
29 on the gate going to the back yard and we were trying to see if they [sic]
30 people inside the house wanted us to maintenance the back yard. No one

¹ See Exhibit 2.

1 ever answered or came to the door. Every week we continue to service the
2 front and side yard.²

3 16. Ms. Crites explained that the landscaping services at the Rancho del
4 Oro community are done on the same day of every week and that the landscape schedule
5 is consistent. Ms. Crites further asserted that the HOA does not provide “concierge”
6 landscape services and cannot afford to do so. For example, it does not maintain potted
7 plants in an individual homeowner’s yard, driveways, or the walls that divide the
8 properties. Rather, the HOA provides maintenance of the front yards and mowing and
9 blowing of the back yards. The HOA also maintains the sprinkler systems. The services
10 provided to the individual homeowners are uniform throughout the Association. The HOA
11 does not maintain pools, other than the community pool, which is maintained by Crystal
12 Clear Pool Maintenance.

13 17. Ms. Crites testified that the HOA will perform landscape services in a
14 homeowner’s back yard if the landscape company is granted access to the yard and the
15 owner leaves the gate unlocked. Ms. Crites explained that some owners choose not to
16 grant access because of pets, and therefore, not every homeowner’s back yard is
17 maintained by the HOA.

18 18. Mr. Baas testified that his company is contracted by Respondent to
19 perform the landscaping at the community and that his full crews are at that location every
20 Wednesday and Thursday, with few exceptions. Mr. Baas testified that Petitioner’s front
21 yard is landscaped, typically, every Thursday afternoon. Mr. Baas testified that his
22 company does not maintain pools. Mr. Baas also testified that he has left multiple notes
23 and business cards at Petitioner’s front door. Mr. Baas specified that he has left a
24 business card or note on Petitioner’s front door four or five times between January 2020
25 and March 2020. Either he or someone from his crew knocked on Petitioner’s front door
26 and no one ever answered the door until a woman, presumably, Petitioner’s wife,
27 answered the door in March and instructed that the back yard was not to be accessed.

28
29

² See Exhibit 3.

Mr. Baas testified that the front yard of Petitioner's residence has been continuously maintained since January 2020.

19. Petitioner acknowledged that he has refused to allow Respondent access to his back yard to perform landscape services because he is concerned about the liability of leaving his gate unlocked due to having a "water feature."

CONCLUSIONS OF LAW

1. A.R.S. § 32-2199(B) permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of planned community documents under the authority Title 33, Chapter 16.³ This matter lies with the Department's jurisdiction.

2. Petitioner bears the burden of proof to establish that Respondent violated its CC&Rs by a preponderance of the evidence.⁴ Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.⁵

3. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."⁶ 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."⁷

4. Section 5.1(a) of the CC&Rs requires Respondent to maintain members' yards. However, nothing therein requires Respondent to maintain an individual member's pool. Moreover, the credible, probative, and substantial evidence, coupled with Petitioner's own admission, established that since January 2020, Petitioner has refused to allow Respondent access to his back yard in order to perform landscape maintenance to

³ See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce the development's CC&Rs

⁴ 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).

⁵ See A.A.C. R2-19-119(B)(2).

⁶ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁷ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

1 the back yard. The evidence established that Respondent has attempted to access
2 Petitioner's back yard on multiple occasions and was specifically instructed in March
3 2020, that Respondent was not permitted to access Petitioner's back yard. Since January
4 2020, Respondent has consistently maintained Petitioner's front yard landscaping.

5 5. At hearing, Petitioner did not address an alleged violation by Respondent of
6 A.R.S. § 10-3842.

7 **ORDER**

8 IT IS ORDERED that Petitioner's Petition is denied because he has not established
9 that Respondent violated any CC&R because Petitioner has denied Respondent access
10 to his back yard notwithstanding Respondent's repeated attempts since January 2020.

11 **NOTICE**

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

17 Done this day, August 17, 2020.

18
19 /s/ Sondra J. Vanella
20 Administrative Law Judge

21
22 Transmitted electronically to:

23 Judy Lowe, Commissioner
24 Arizona Department of Real Estate

25 Transmitted through US Mail to:

26 Michael J. Stoltenberg
27 11777 E Calle Gaud
28 Yuma, Arizona 85367
29
30

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