

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Wendy Ellsworth,

No. 20F-H2020043-REL

4 PETITIONER,
5 vs.

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 Vincenz Homeowners' Association,
7
8 RESPONDENT.

9 **HEARING:** August 19, 2020

10 **APPEARANCES:** Brian Hatch, Esq. appeared on behalf of Petitioner Wendy
11 Ellsworth. Mark K. Sahl, Esq. appeared on behalf of Respondent Vincenz Homeowners'
12 Association.

13 **ADMINISTRATIVE LAW JUDGE:** Velva Moses-Thompson

14
15 **FINDINGS OF FACT**

16 1. Petitioner Wendy Ellsworth owns property in Respondent Vincenz
17 Homeowners' Association (VHA or Vincenz).

18 2. On or about January 15, 2020, the Arizona Department of Real Estate
19 (Department) received a single-issue petition from Ms. Ellsworth. The petition contained
20 an allegation that VHA violated section 10.11.1 of its (Covenants, Conditions, and
21 Restrictions (CC&Rs). Ms. Ellsworth's petition provided, in relevant part, as follows:

22 waiver of the ability to enforce a specific covenant. Petitioner
23 will prove that the Vincenz CC&Rs do not contain a relevant
24 non-waiver provision and that that violations of the street
25 parking prohibition have been "frequent" since Vincenz's
26 inception, and therefore, Respondent does not have the right
27 to enforce 10.11.1 [] of the CC&Rs regarding parking

28 All errors in original.

29 3. VHA CC&R Article 10 § 10.11.1 provides:

30 Vehicles. No private passenger automobiles or pickup trucks
shall be parked upon the Property or any roadway adjacent

thereto except within a garage, in a private driveway appurtenant to a Dwelling Unit, or within areas designated for such purpose by the Board.

4. The matter was referred to the Office of Administrative Hearings (OAH) for an evidentiary hearing.

5. On or about February 21, 2020, the Department issued a Notice of Hearing setting the above-captioned matter for hearing on March 27, 2020, at the OAH in Phoenix, Arizona.¹

6. The Notice of Hearing provided that the issue set for determination was whether VHA was in violation of “community documents CC&R’s Article 10, Section 10.11.1.”

7. A hearing was held on August 19, 2020.

8. At hearing, Ms. Ellsworth initially testified that VHA had never enforced CC&R Article 10, Section 10.11.1. Later in this Ms. Ellsworth admitted on cross examination that she was unsure whether VHA had ever enforced CC&R Article 10, Section 10.11.1.

9. VHA’s position was the petition should be dismissed because Ms. Ellsworth did not even contend, nor provide any facts to establish that VHA parked an automobile or pickup truck in any area listed in CC&R Article 10 § 10.11.1. VHA contended that the OAH only had jurisdiction over alleged violations of VHA’s governing documents or an applicable Arizona statute, under ARIZ. REV. STAT. § 32-2199.01(A). VHA further contended that the OAH did not have jurisdiction over Ms. Ellsworth’s request for a declaratory judgment that VHA waived its right to enforce CC&R Article 10, § 10.11.1.

CONCLUSIONS OF LAW

1. ARIZ. REV. STAT. § 32-2199(B) permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of

¹ The hearing was continued to August 19, 2020.

1 planned community documents under the authority Title 33, Chapter 16.² This matter
2 lies with the Department's jurisdiction.

3 2. Petitioner bears the burden of proof to establish that Respondent violated
4 on its CC&Rs by a preponderance of the evidence.³ Respondent bears the burden to
5 establish affirmative defenses by the same evidentiary standard.⁴

6 3. "A preponderance of the evidence is such proof as convinces the trier of
7 fact that the contention is more probably true than not."⁵ A preponderance of the
8 evidence is "[t]he greater weight of the evidence, not necessarily established by the
9 greater number of witnesses testifying to a fact but by evidence that has the most
10 convincing force; superior evidentiary weight that, though not sufficient to free the mind
11 wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one
12 side of the issue rather than the other."⁶

13 4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give
14 effect to the intent of the parties.⁷ "Restrictive covenants must be construed as a whole
15 and interpreted in view of their underlying purposes, giving effect to all provisions
16 contained therein."⁸ CC&R Article 10, Section 10.11.1 forbids parking a private
17 passenger automobile or pickup truck in a roadway, garage, or in an area that has not
18 been designated for parking by the Board. Ms. Ellsworth did not even allege that VHA
19 parked an automobile or a truck in a roadway, garage, or in an area that has not been
20 designated for parking by the Board.

21 5. Ms. Ellsworth failed to establish that VHA violated section 10.11.1 of the
22 VHA CC&Rs. To the extent that Ms. Ellsworth is requesting a declaratory judgment that
23 VHA has waived its right to enforce CC&R Article 10, Section 10.11.1., this tribunal

24 ² See ARIZ. REV. STAT. § 33-1803, which authorizes homeowners associations in planned communities to
25 enforce the development's CC&Rs

26 ³ 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
27 Ariz. 369, 372, 249 P.2d 837 (1952).

28 ⁴ See A.A.C. R2-19-119(B)(2).

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

30 ⁶ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

⁷ See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

⁸ *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 does not have jurisdiction to make such a determination.

2 **ORDER**

3 **IT IS ORDERED**, the petition is dismissed.

4 **NOTICE**

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

10 Done this day, September 8, 2020.

11 /s/ Velva Moses-Thompson
12 Administrative Law Judge

13 Transmitted electronically to:

14 Judy Lowe, Commissioner
15 Arizona Department of Real Estate

16 Transmitted through US Mail to:

17 Brian A. Hatch PLLC
18 Brian A. Hatch
19 7405 E. Monte Christo, Suite 201
20 Scottsdale, Arizona 85260

21 CARPENTER, HAZLEWOOD, DELGADO & BOLEN LLP
22 Mark K. Sahl, Esq.
23 1400 E. Southern Ave, Suite 400
24 Tempe, AZ 85282