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VS.

No. 20F-H2020060-REL

ADMINISTRATIVE LAW JUDGE DECISION

APPEARANCES: Petitioner Laura B. Ganer appeared on behalf of herself. Mark
nl, Esq. appeared on behalf of Respondent Vincenz Homeowners Association.

FINDINGS OF FACT

2. In 2020, VHA adopted a new parking policy that provided, in relevant part, as follows:

(1) Immediately in front of a Lot, so long as the Allowed Vehicles parked in front of the Lot are Allowed Vehicles associated with the Owner or resident of that Lot (including guests of an Owner or resident), or the Owner of the Lot has consented to the parking of the Allowed Vehicles;

(3) Along any public street within the Association that does not border any Lot (i.e. parking is allowed along the public streets in front of any Common Area tract owned by the Association).

Furthermore, the parking of said vehicles in the areas designated above must comply with the Rules stated herein.

3. On or about May 20, 2020, the Arizona Department of Real Estate (Department) received a single-issue petition from Ms. Ganer. The petition contained an allegation that VHA violated Article 10, section 11, Article 7, section 3, and Article 12, section 2 of its (Covenants, Conditions, and Restrictions (CC&Rs).

4. VHA CC&R Article 10 § 10.11.1 provides:

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.

5. VHA CC&R Article 10 § 10.11.2 provides:

No other vehicles (including but not limited to, mobile homes, motor homes, boats, recreational vehicles, commercial vehicles, trailers, trucks, campers, permanent tents or similar vehicles or equipment) shall be kept, placed or maintained upon the Property or any roadways adjacent thereto, except: (a) motor vehicles which do not exceed 18.5 feet, 75 inches in height or 84 inches in width, (b) motor vehicles which are owned by any guest or invitee of any Owner or tenant and which are parked on a Lot only during such time as the guest or invitee is visiting the Owner or tenant but in no event shall such motor vehicle be parked on a Lot for more than seven (7) days during any six (6) month period of time, (c) wherein double gates have been installed for the purpose of storing such vehicles on the side Dwelling Unit so long as such vehicles are not Visible from Neighboring Property; or (d) in such areas and subject to such rules and regulations as the Board may designate and adopt. . .

6. VHA CC&R Article 7 § 3 provides:

By a majority vote of the Board, the Association may, from time to time and subject to the provisions of this Declaration, adopt, amend and repeal the Association Rules. The Association Rules shall be reasonable. The Association Rules may restrict and govern the use of the Common Area; provided, however, that the Association Rules shall not discriminate among Owners and Occupants except to reflect

1 their different rights and obligations as provided herein, and
2 shall not be inconsistent with this Declaration, the Articles or
3 the Bylaws. The Association Rules shall be intended to
4 enhance the preservation and development of the Property
5 and the Common Area. Upon adoption, the Association Rules
6 shall have the same force and effect as if set forth herein.
7 Sanctions for violation of the Association Rules of this
8 Declaration may be imposed by the Board and may include
9 suspension of the right to vote and the right to use the
10 recreational facilities on the Common Area, and may also
11 include reasonable monetary fines. No suspension of the
12 Owner's right to vote or of the right of such Owners (or any
13 Occupant of such Owner's Lot or any guest or household
14 member of such Owner or Occupant) to use the recreational
15 facilities on the Common Area due to a violation of the
16 Association Rules may be for a period longer than sixty (60)
17 days (except where such Owner or Occupant fails or refuses
18 to cease or correct an ongoing violation or commits the same
19 or another violation, in which event such suspension may be
20 extended for additional periods not to exceed sixty (60) days
21 each until such violation ceases or is corrected).

15 7. VHA CC&R Article 12 § 2 provides:

16 Except as otherwise provided in this Declaration, this
17 Declaration may be amended only by the affirmative vote (in
18 person or by proxy) or written consent of: (a) Members holding
19 not less than sixty-seven percent (67%) of all Class A votes
20 then entitled to be cast; and (b) so long as the Class B
21 membership is in existence, Declarant. No amendment to this
22 Declaration shall be effective unless and until such
23 amendment is Recorded.

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

24 9. On or about July 1, 2020, the Department issued a Notice of Hearing
25 setting the above-captioned matter for hearing on August 27, 2020, at the OAH in
26 Phoenix, Arizona.

27 10. The Notice of Hearing provided, in relevant part, as follows:

28 The dispute between Petitioner and Vincenz Homeowners
29 Association arises from alleged violations of community

documents CCR's Article 10, Sec. 11, Article 7, Sec. 3 and Article 12, Sec.2.

11. A hearing was held on August 27, 2020.

12. At hearing, Ms. Ganer asserted that the intention of CC&R Article 10 Section 10.11.1 was to limit parking in VHA. Ms. Ganer argued that the parking policy violates CC&R Article 7, Section 3, because it is unreasonable as the policy allows for parking virtually everywhere within VHA.

13. VHA's position was the petition should be dismissed because Ms. Ganer 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 and CC&R Article 10 § 10.11.2. 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 contended that VHA properly adopted the parking policy pursuant to CC&R Article 10 § 10.11.1. VHA contended that CC&R Article 7 Section 3 does not apply because it did not adopt the parking policy under CC&R Article 7 Section 3. Additionally, VHA contended that the board policy was not unreasonable and the Board has not violated Article 12 § 2 because an amendment is not required to adopt parking rules and regulations pursuant to CC&R Article 10, Section 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 planned community documents under the authority Title 33, Chapter 16.¹ This matter lies with the Department's jurisdiction.

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

¹ See ARIZ. REV. STAT. § 33-1803, which authorizes homeowners associations in planned communities to enforce the development's CC&Rs

² 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).

³ See A.A.C. R2-19-119(B)(2).

3. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."⁴ 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."⁵

4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give effect to the intent of the parties.⁶ "Restrictive covenants must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein."⁷ CC&R Article 10, Section 10.11.1 forbids parking a private passenger automobile or pickup truck in a roadway, garage, or in an area that has not been designated for parking by the Board. Ms. Ganer did not even allege that VHA parked an automobile or a truck in a roadway, garage, or in an area that has not been designated for parking by the Board.

5. Ms. Ganer failed to establish that VHA violated section 10.11.1 and 10.11.2 of the VHA CC&Rs.

6. Upon consideration of all of the evidence presented in this matter, the Administrative Law Judge concludes that VHA did not violate CC&R Article 7 § 3, Article 10 § 10.11, and CC&R Article 12 § 2 when it adopted the parking policy.

ORDER

IT IS ORDERED, the petition is dismissed.

NOTICE

Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties unless a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S. § 41-1092.09, a request for rehearing in this matter

⁴ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁵ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

⁶ See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

⁷ *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 **must be filed with the Commissioner of the Department of Real Estate**
2 **within 30 days of the service of this Order upon the parties.**

3 Done this day, September 16, 2020.

4
5 /s/ Velva Moses-Thompson
6 Administrative Law Judge

7 Transmitted electronically to:

8 Judy Lowe, Commissioner
9 Arizona Department of Real Estate

10 Transmitted through US Mail to:

11
12 Laura B Ganer
13 2745 E Parkview Dr.
14 Gilbert, AZ 85295

15 Nicole Payne
16 1400 E. Southern Ave., Suite 400
17 Tempe, AZ 85282