

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Keith D Smith,
 Petitioner,

No. 21F-H2120003-REL

4 vs.

5 Sierra Foothills Condominium Association,
 Respondent

**ADMINISTRATIVE LAW JUDGE
DECISION**

6
7 **HEARING:** October 26, 2020

8 **APPEARANCES:** Kevin D. Smith on his own behalf; Stuart Rayburn for Respondent

9 **ADMINISTRATIVE LAW JUDGE:** Thomas Shedden

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11 **FINDINGS OF FACT**

12 1. On August 27, 2020, the Arizona Department of Real Estate issued a
13 Notice of Hearing setting the above-captioned matter for hearing on October 26, 2020 at
14 the Office of Administrative Hearings in Phoenix, Arizona.

15 2. The Notice of Hearing shows that Petitioner Keith D. Smith alleges that
16 Respondent Sierra Foothills Condominium Association has violated ARIZ. REV. STAT.
17 sections 33-1218(C) and 33-1248, and CC&R sections 1.5, 3.1, 3.4, and 7.1(C). Mr.
18 Smith filed his petition with the Department on July 24, 2020.

19 3. At the hearing, Mr. Smith acknowledged that his petition was limited to the
20 issues of whether the Association had violated CC&R section 7.1(C)(an alleged
21 violation of the Board's authority to make rules and regulations) and ARIZ. REV. STAT.
22 section 33-1248 (an alleged open meeting laws violation).

23 4. Mr. Smith appeared and testified on his own behalf. The Association
24 presented the testimony of Stuart Rayburn, its president, and Harold Bordelon.

25 5. The Association manages the common elements of a commercial
26 condominium that consists of those common elements and two buildings, Building A
27 and Building B.

28 6. Both issues involve a monument sign at the property. The monument sign
29 has space for only five businesses to advertise. At a meeting on June 10, 2020, the

1 Board adopted a policy or rule that, among other things, limits the use of the monument
2 sign to Units in Building B.

3 7. Mr. Smith asserts that this rule violates CC&R section 7.1(C) and that the
4 Board violated the open meeting law at the June 10, 2020 meeting.

5 8. At the hearing, the Association took the position that the monument sign
6 was not a common element because it is not listed as a common element in the CC&Rs
7 and is not shown as a common element in the plat. In its answer however, the
8 Association acknowledged that the monument sign is a common element. See Answer
9 p. 5, Ins. 4 to 7. Consequently, the Association has waived any argument that the
10 monument sign is not a common element.

11 CC&R section 7.1(c)

12 9. CC&R section 7.1 is entitled "Purposes, Rights, Powers and Duties of the
13 Association." Subsection 7.1(c) provides in part:

14 The Board ... subject to the provisions of this Declaration, may
15 adopt, amend and repeal Rules and Regulations. The Rules
16 and Regulations may ... restrict and govern the use of any
17 area by any Owner or Occupant...; provided however that the
18 Rules and Regulations shall not unreasonably discriminate
19 among Owners and Occupants and shall not be inconsistent
20 with the Act, this Declaration, the Articles, or the Bylaws.
(Underscore added.)

21 10. CC&R section 6.10 requires that all signage comply with the
22 "comprehensive sign package" in exhibit F to the CC&Rs, and that signs are subject to
23 reasonable Rules and Regulations. The existing sign package did not address the
24 monument sign. At the June 10, 2020 meeting, the Association adopted new rules
25 applicable to the monument sign. At issue is the Association's decision to allow only
26 Building B's Unit owners to use the monument sign.

27 11. Mr. Smith alleges that in doing so the Association has violated its duty to
28 act fairly when creating rules, and that the Association's actions were in violation of
29 CC&R section 6.26(a) that provides: "Whenever any 'Owner' is limited by or restricted
30 by these occupancy and use restrictions contained in this Article 6, the same use

1 restrictions and/or limitations shall be applicable to all Occupants.” (Underscore added
2 by ALJ.)

3 12. Mr. Smith testified to the effect that his deed gives him an undivided
4 interest in the common elements, meaning that no owner has exclusive use of the
5 monument sign.

6 13. The Association adopted the rule limiting use of the monument sign to
7 owners of Units in Building B because: (1) the monument sign has a limited number of
8 spaces in which the Unit owners can place signs to advertise their businesses; and (2)
9 Building A has street frontage and signs can be hung on that building, whereas Building
10 B does not have street frontage, which limits the utility of hanging signs on Building B.

11 14. Mr. Smith had admitted into evidence an email from the City of Phoenix
12 showing that any signs or advertisements on the Building had to be contiguous to his
13 Unit. In contrast, the Association had admitted into evidence Section 705 of the City’s
14 Zoning Ordinance that shows that the Sign Code is to be construed with flexibility and
15 that allows for signs to be placed on building walls “even though not on a wall of the
16 space occupied by” that tenant.

17 15. The City Ordinance does not allow a business to post signs on a building
18 that it does not occupy, which means that Units in Building B cannot hang signs on
19 Building A.

20 16. Mr. Smith’s petition included two estimates to have the monument sign
21 altered to allow more businesses to advertise on it. One plan would require that the
22 existing signs be reduced in size by one-half, which Mr. Smith was willing to pay for,
23 whereas the second plan would be to increase the size of the monument sign.

24 17. The Association’s position is that to adopt Mr. Smith’s proposed solution
25 would require the approval of the existing business owners and rescission of the
26 approvals to use the monument sign previously granted to those businesses.

27 18. Mr. Bordelon testified to the effect that some of Mr. Smith’s proposed
28 alterations did not meet the City Code.

29 The open meeting laws

19. The Association approved the rule regarding usage of the monument sign at the meeting on June 10, 2020.

20. Mr. Smith alleges that prior to the June 10th meeting the Board members had "Obviously communicated with each other via email and reached their decision without ever hearing my argument." Mr. Smith reasoned that this must have been the case because Mr. Rayburn called for a vote to approve the proposed rule for the monument sign without discussion.

21. Mr. Smith acknowledged that he had no emails to support his allegation.

22. Mr. Rayburn and Mr. Bordelon each presented credible testimony that there was discussion before the vote. The discussion was protracted lasting about an hour and a half; Mr. Smith spoke for about twenty minutes, and Mr. Bordelon also spoke.

23. Prior to the discussion, Mr. Rayburn made a recommendation or statement regarding independent research he had conducted on the City of Phoenix ordinance, the CC&Rs and By-laws, and the existing sign rules.

CONCLUSIONS OF LAW

1. In his petition, Mr. Smith alleges that the Association has violated its CC&Rs and ARIZ. REV. STAT. section 33-1248. Consequently, the Department of Real Estate has authority over this matter. ARIZ. REV. STAT. Title 32, Ch. 20, Art. 11.

2. Mr. Smith bears the burden of proof to show that the alleged violations occurred. The standard of proof on all issues in this matter is that of a preponderance of the evidence. ARIZ. ADMIN. CODE § R2-19-119.

3. A preponderance of the evidence is:

The 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. BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

The alleged violation of CC&R section 7.1(C)

1 4. Mr. Smith alleges that the Board's sign rule is unreasonable and that it
2 violates CC&R section 6.26's prohibition on treating unit owners differently.

3 5. Mr. Smith has not proven that the Association violated CC&R section
4 7.1(C) because (1) it was not unreasonable for the Association to limit the usage of the
5 monument sign to Units in B because the Units in A have other street frontage available
6 for signage; and (2) although CC&R section 6.26 does prohibit disparate treatment of
7 Owners, by its express terms, CC&R section 6.26 applies only to CC&R Article 6, and
8 not Article 7.

9 The alleged open meeting law violation

10 6. Mr. Smith offered no substantial evidence in support of his allegation that
11 the Board members had communicated prior to the June 10th meeting. And his
12 testimony that the Board called for a vote without discussion is proven to be in error.

13 7. At the hearing, Mr. Smith alluded to other perceived deficiencies with the
14 conduct of the meeting, but these are not properly before the tribunal because Mr.
15 Smith did not raise them in his petition. See ARIZ. REV. STAT. § 41-1092.07(F)(6).

16 8. Mr. Smith did not prove that the Association violated ARIZ. REV. STAT.
17 section 33-1248.

18 9. Consequently, Mr. Smith's petition should be dismissed.

19 **ORDER**

20 **IT IS ORDERED** that Keith D. Smith's petition is dismissed.

21 **NOTICE**

22 **Pursuant to ARIZ. REV. STAT. section 32-2199.02(B), this Order is binding on the**
23 **parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. section 32-**
24 **2199.04. Pursuant to ARIZ. REV. STAT. section 41-1092.09, a request for rehearing**
25 **in this matter must be filed with the Commissioner of the Department of Real**
26 **Estate within 30 days of the service of this Order upon the parties.**

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30 Done this day, November 16, 2020.

1 /s/ Thomas Shedden

2 Thomas Shedden

3 Administrative Law Judge

4
5 Transmitted to:

6 Judy Lowe, Commissioner

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