IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Shannon Lee Trezza Irrevocable Trust, Petitioner, vs. Haciendas Del Conde Association, Respondent.	**No. 20F-H2020045-REL** **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: November 13, 2020

APPEARANCES: Steven Trezza, Esq. appeared via Google Meet as Trustee of Petitioner Shannon Lee Trezza Irrevocable Trust. Respondent Haciendas Del Conde Association was represented by Sharon Briggs, Esq. appearing via Google Meet.

ADMINISTRATIVE LAW JUDGE: Adam D. Stone

FINDINGS OF FACT

1. On or about January 27, 2020, Petitioner filed a Homeowners Association (HOA) Dispute Process Petition (Petition) with the Arizona Department of Real Estate (Department). Petitioner asserted a violation of Respondent, Haciendas Del Conde Association's (HDCA) Covenants, Conditions, and Restrictions (CCR's), specifically section 21(m).

2. On or about March 12, 2020, the Department issued a Notice of Hearing in which it set forth the issue for hearing as follows:

> The Petitioner alleges in the petition that [HDCA] is in violation of community documents CC&R's 21(m) and seeks resolution to the following issues:
> 1. Do the CCR's contain legally enforceable setback language?
> 2. If the setback language in paragraph 21(m) is enforceable, is it reasonable to force Petitioner to spend a large amount of money to move the carport six feet to satisfy the ten-foot setback requirement?

3. Does Petitioner have an affirmative defense of selective enforcement?
4. Does paragraph 33 of the CCR's grant Petitioner an easement and variance for the carport?
5. Can the carport be considered a nuisance to my neighbor to the North who objects to the structure and wants it moved six feet farther back from the property line?[1]

All errors in original.

3. At the hearing, Stephen Trezza testified on Petitioner's behalf, and Philip Rosenberg testified as a witness. Respondent presented the testimony of Brad Johns, President of HDCA and Philip Worcester, Secretary/Treasurer of HDCA.

HEARING EVIDENCE

4. At the hearing, Mr. Trezza testified that he has lived in the property for approximately 14 years and had not read the CCR's prior to the denial of his application. Mr. Trezza testified that when he purchased the property there was a garage but approximately one year later he converted the same into a living space.

5. Mr. Trezza testified that in August of 2019, he, along with two independent contractors, designed and built a carport.

6. Mr. Trezza testified that he failed to obtain prior Board approval for the carport and failed to obtain a permit from Pima County. Mr. Trezza further testified that he had previously built a structure on a different property and did not think he needed to seek prior approval or that a permit was needed.

7. Mr. Trezza's testified that it was his belief that Section 21(m) of the CCR's was invalid as the vote on the 2017 CCR's improper.

8. As to the vote, Mr. Trezza testified that in the fourth quarter of 2016, homeowners were sent a "redlined" version on the CCR's and were asked to vote "yes" on the adoption of the same. Mr. Trezza testified that because Section 21(m) was not redlined[2], it was not a change to the CCR's.

[1] Petitioner agreed to withdraw #5 at a pre-hearing conference on October 6, 2020.
[2] *See* Exhibit 9.

9. As to Section 21(m) not being "redlined", Mr. Trezza testified that the language was copied from a 1993 Amendment adopting a 10 foot setback. Mr. Trezza argued that the vote from 1993 too was invalid, thus the Amendment should not have been adopted. Mr. Trezza then argued that if Section 21(m) was not properly adopted by the 1993 Amendment, then Section 21(m) in the proposed CCR's sent out to the homeowners should have been "redlined" too if HDCA intended to adopt the same.

10. Mr. Trezza testified further that the ballot[3] used in the vote was defective under A.R.S. § 10-3708 as it did not contain a place to vote "no", and thus the vote was improper.

11. Mr. Trezza also testified that he believed that the Statute of Limitations for challenging the 1993 Amendment had not run, as he only became aware of the 1993 Amendment during the course of investigating this action.

12. In addition, Mr. Trezza testified that the 10 foot setback is incorrect under the Pima County[4] code (it is zero feet) as the Board in 1993 misinterpreted the zoning requirements.

13. Mr. Trezza also testified that once he became aware of the Board action regarding the carport, he proposed several resolutions but none were accepted. Mr. Trezza testified that he was not treated fairly as other members of HDCA who failed to obtain prior approval, but whose projects were later approved.

14. Finally, Mr. Trezza argued that HDCA unreasonably withheld their approval as there was no 10 foot setback requirement per Pima County, and that the carport was not unattractive nor did it devalue any of the community property.

15. Phil Rosenberg testified for Petitioner. He was hired by Petitioner to assist with obtaining the permit with Pima County.

16. Mr. Rosenberg testified that he is a semi-retired general contractor and now assists homeowners and builders with Registrar of Contractors complaints and issues such as this one. Mr. Rosenberg testified that he helped Mr. Trezza submit the permit to Pima County and also assisted with researching the zoning requirements. Mr. Rosenberg

[3] *See* Exhibit 10.
[4] *See* Exhibit 30.

testified that the carport was attractive, it was built with high quality materials and does not interfere with neighboring views. It was his opinion that the carport enhances the desirability of the Petitioner's lot. Mr. Rosenberg also testified that it was not uncommon for CCR's to be more restrictive than city or county requirements.

17. Mr. Johns testified that he was elected Board President in 2014 and first noticed the carport being built in late August 2019, as he was heading out of town. Mr. Johns further testified that he placed the architectural approval forms on Petitioner's door. Mr. Johns testified that the lack of obtaining prior approval was not the reason for the denial, rather it was the 10 foot setback. He further testified that the Board had successfully worked with homeowners who failed to obtain prior approval, and Mr. Trezza was not discriminated against. In addition, Mr. Johns testified that he did not know or previously interact with Mr. Trezza prior to this issue. Mr. Johns testified that what made this case different from the other similar examples was that Petitioner built a stand-alone structure rather than an addition to an existing structure. On cross examination, Mr. Johns testified that HDCA did not seek a preliminary injunction in court as they were not aware of the property boundaries.

18. Philip Worcester testified that he sent correspondence on November 14, 2019,[5] informing Petitioner that it had failed to submit a formal proposal for review by the Board, and also gave Petitioner an additional thirty days to submit the same or be subject to penalties. Mr. Worcester also testified that Mr. Trezza had made three or four requests for documents and Mr. Worcester complied with the same. Mr. Worcester also testified that he inquired if Mr. Trezza would like to accompany him to the storage facility on at least two occasions, but Mr. Trezza failed to take him up on his offer. Mr. Worcester also testified that he never interacted with Mr. Trezza prior to this issue.

19. In summation, Ms. Briggs asserted that the vote on the 2017 CCR's was valid pursuant to A.R.S. § 33-1817, and it was irrelevant if Section 21(m) was "redlined" or not, as the homeowners could have objected if they did not agree with that provision. Because of this, she argued that Mr. Trezza's argument about the 1993 Amendment too

[5] *See* Exhibit 28 and Exhibit H.

was irrelevant, as the entire CCR's were now being voted on whether or not Section 21(m) was a new section or a restatement of the 1993 Amendment. Further, based upon the testimony Ms. Briggs argued that the Board did not treat Petitioner any differently than other homeowners, however, if the Board disregarded its CCR's, it would show favoritism and show that Petitioner is being treated differently.

CONCLUSIONS OF LAW

1. Arizona statute permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of planned community documents or violations of statutes that regulate planned communities. A.R.S. § 32-2199 et seq. That statute provides that such petitions will be heard before the Office of Administrative Hearings.

2. Petitioner bears the burden of proof to establish that Respondent committed the alleged violations by a preponderance of the evidence.[6] Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.[7]

3. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."[8] 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."[9]

4. Section 21(m) of the 2017 CCR's states:

> Notwithstanding anything else set forth in the Covenant's Conditions and Restrictions, as amended, or otherwise permitted under applicable zoning or other lass, no building, roof, ramada, gazebo or other structure of any kind or nature except a patio wall, will be permitted within ten (10) feet of any side or back property line on Lots 13-37 and 58-114 or within forty (40) feet of any side or back property

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[6] *See* ARIZ. REV. STAT. Section 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).
[7] *See* A.A.C. R2-19-119(B)(2).
[8] MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).
[9] BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

line on Lots 1-12, Haciendas Catalina del Rey, a subdivision of Pima County, Arizona.[10]

5. A.R.S. § 10-3708, Action by written ballot; online voting provides in part that:

> A. Unless prohibited or limited by the articles of incorporation or bylaws, any action that the corporation may take at any annual, regular or special meeting of members may be taken without a meeting if the corporation delivers a written ballot to every member entitled to vote on the matter.
>
> B. A written ballot shall:
>
> 1. Set forth each proposed action.
>
> 2. Provide an opportunity to vote for or against each proposed action.

6. A.R.S. § 33-1817(A), provides that:

> A. Except during the period of declarant control, or if during the period of declarant control with the written consent of the declarant in each instance, the following apply to an amendment to a declaration:
>
> 1. The declaration may be amended by the association, if any, or, if there is no association or board, the owners of the property that is subject to the declaration, by an affirmative vote or written consent of the number of owners or eligible voters specified in the declaration, including the assent of any individuals or entities that are specified in the declaration.

7. The Administrative Law Judge concludes that based on the evidence the vote on the 2017 CCR's was proper and Section 21(m) controls the issue at hand. Mr. Trezza's reliance on A.R.S. § 10-3708 is unfounded as that section deals with corporation voting, while A.R.S. § 33-1817(A) controls planned community voting and it only requires "an affirmative vote or written consent" (i.e. a "yes" vote in this case). Further, Mr. Trezza's argument that Section 21(m) was not "redlined" likewise is not persuasive. The entire proposed CCR's were provided to each member. Whether they read the

[10] *See* Exhibit 1.

non-“redlined” portions or not, the members could have voted not to accept the same, but they voted to accept the CCR’s as written.

8. Likewise, Mr. Trezza’s argument that he only became aware of the 1993 Amendment during this process is unpersuasive. As pointed out during the hearing, when the property was purchased, Mr. Trezza became bound by the CCR’s in existence at that time, whether he read them or not. Thus, Mr. Trezza’s argument about the Statute of Limitations likewise fails. Further, he also would have had the opportunity to not vote “yes” to the 2017 CCR’s, but no evidence was provided as to how he voted. In either case, Mr. Trezza is still presumed to have known about the 1993 and subsequently the 2017 CCR’s, and must abide by the same.

9. Further compounding the situation is that Mr. Trezza did not seek prior approval for building his carport. Mr. Johns and Mr. Worcester testified clearly that this was not the reason for the denial and provided examples of other homeowners who were granted approval at a later time after failing to seek prior approval. It also appears that there was no discrimination as Mr. Trezza was given the opportunity to cure the problem however he chose not to. By not seeking the prior approval however, Mr. Trezza and not the HDCA, created the expenses he may have to incur to remedy the situation.

10. Therefore the Administrative Law Judge concludes the following: 1. The CCR’s contain legally enforceable setback language, as the Respondent may require different setback requirements than Pima County; 2. Section 21(m) was properly incorporated into the CCR’s which were properly passed in 2017, and thus are enforceable. It is reasonable to make Petitioner comply with the same, regardless of the cost, as it brought the additional expenses upon itself for failure to obtain prior approval; 3. There was no selective enforcement as evidence was presented that the Board routinely allowed homeowners to provide a chance to cure their failure to obtain prior approval; and 4. There is no right to an easement under Section 33 of the CCR’s.

ORDER

In view of the foregoing,

IT IS ORDERED that the Petition be denied on all issues.

IT IS FURTHER ORDERED Respondent be deemed the prevailing party in this matter.

No Civil Penalty is found to be appropriate in this matter.

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

Done this day, November 18, 2020.

/s/ Adam D. Stone
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate

Transmitted through US Mail to:

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