

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Donald S Fern & Judith A. Hedges,
4 Petitioner,
5 vs.
6 San Ignacio Heights, Inc.,
 Respondent.

No. 21F-H2120005-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

7 **HEARING:** November 3, 2020

8 **APPEARANCES:** Lance Leslie, Esq. for Petitioners; Michael S. Shupe, Esq. for
9 Respondent

10 **ADMINISTRATIVE LAW JUDGE:** Thomas Shedden

11 **FINDINGS OF FACT**

12 1. On October 5, 2020, the Arizona Department of Real Estate
13 ("Department") issued a Notice of Hearing setting the above-captioned matter for
14 hearing on November 3, 2020 at the Office of Administrative Hearings in Phoenix,
15 Arizona.

16 2. The Notice of Hearing shows that Petitioner(s) Donald S. Fern and Judith
17 A. Hedges allege that Respondent San Ignacio Heights Inc. has violated Second
18 Amended and Restated Declaration of CC&Rs Article VI (D) "View Obstructions."

19 3. The matter was convened as scheduled, at which time the parties agreed
20 that the matter could be decided based on the information in the administrative record
21 provided by the Department. Consequently, no testimony was taken, but each party
22 provided a closing argument.

23 4. Petitioners own lot 46, located at 1546 West Acala Street in Green Valley,
24 which is a "view lot" as defined in the CC&Rs.

25 5. CC&R Article VI is entitled "Architecture, Plantings & Site Improvements."

26 6. Article VI(D), "View Obstructions" provides that "An unobstructed view of
27 the Santa Rita Mountains shall be maintained for Owners of View Lots."

1 7. In February 2018, the Respondent's ARC gave approval to the owners of
2 lot 47 to construct a pergola on their property. Petitioners' allegation is that the pergola
3 is obstructing their view in violation of Article VI(D).

4 8. The exhibits to the petition show that the Petitioners purchased lot 46 on or
5 before July 30, 2018. Petitioners contend that the pergola was constructed after the
6 sellers of lot 46 moved and before Petitioners purchased the home, but the dates of
7 these events are not in the record.

8 9. In December 2019, Petitioners contacted the owners of lot 47 in an effort
9 to resolve their concerns regarding the pergola. These efforts were not successful.

10 10. The record does not show when Petitioners contacted the Respondent
11 about the pergola, but through a letter dated January 15, 2020, the Respondent
12 informed Petitioners that its Board was standing by its February 2018 decision to
13 approve construction of the pergola.

14 11. Petitioners and the Respondent exchanged communications regarding the
15 issue. The record shows that the Respondent offered two reasons for its decision: (1)
16 the previous owners of lot 46 were given notice of the request to add the pergola but did
17 not object when approval was granted in February 2018; and (2) the configuration of the
18 nine lots on West Acala is such that they can never have a truly unobstructed view, and
19 that in the case of Petitioners' lot, maintaining an unobstructed view would require the
20 removal of eight houses to the east-southeast of their home.

21 12. Petitioners filed with the Department their single issue petition on July 24,
22 2020. Through its answer filed on August 25, 2020, the Respondent provided that on
23 August 20, 2020, the Board met in a special executive session at which it determined
24 that the approval of the pergola was made in error and it rescinded that approval. The
25 Respondent took the position that the relief Petitioners were requesting had been
26 obtained and that the Department should dismiss the matter.

27 13. The Department did not dismiss the matter, Petitioners did not withdraw
28 their petition, and the Department issued its Notice of Hearing on October 5, 2020.
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30

14. At the hearing, the Respondent's counsel informed the tribunal that the owners of lot 47 had a contractor scheduled to remove the pergola the day after the hearing.

15. Petitioners argue that the Respondent should be assessed a civil penalty.

CONCLUSIONS OF LAW

1. In their petition, Petitioners allege that Respondent has violated its CC&Rs. Consequently, the Department of Real Estate has authority over this matter. ARIZ. REV. STAT. Title 32, Ch. 20, Art. 11.

2. Petitioners bear the burden of proof to show that the alleged violation 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).

4. "The administrative law judge may order any party to abide by the statute, condominium documents, community documents or contract provision at issue and may levy a civil penalty on the basis of each violation.... If the petitioner prevails, the administrative law judge shall order the respondent to pay to the petitioner the filing fee required by section 32-2199.01." ARIZ. REV. STAT. § 32-2199.02(A).

5. The Respondent acknowledges that it violated CC&R Article VI(D) by granting the owner of lot 47 approval to construct the pergola. Respondent has already rescinded that approval and no order requiring Respondent to abide by the CC&Rs is necessary.

6. Even though Respondent's acknowledgement of error came before the Notice of Hearing was issued, Petitioners are the prevailing party and the tribunal is required by statute to order the Respondent to pay to Petitioners the filing fee.

1 7. Petitioners have not proven that the Respondent should be assessed a
2 civil penalty.

3 **ORDER**

4 **IT IS ORDERED** that Petitioners Donald S. Fern and Judith A. Hedges are the
5 prevailing party in this matter;

6 **IT IS FURTHER ORDERED** that Respondent San Ignacio Heights Inc. must pay
7 to Petitioners their filing fee of \$500.00 within thirty days of receipt of this Order.

8 **NOTICE**

9 **Pursuant to ARIZ. REV. STAT. section 32-2199.02(B), this Order is binding on the**
10 **parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. section 32-**
11 **2199.04. Pursuant to ARIZ. REV. STAT. section 41-1092.09, a request for rehearing**
12 **in this matter must be filed with the Commissioner of the Department of Real**
13 **Estate within 30 days of the service of this Order upon the parties.**

14 Done this day, November 20, 2020.

15 /s/ Thomas Shedden
16 Thomas Shedden
17 Administrative Law Judge

18 Transmitted to:

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