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ADMINISTRATIVE LAW JUDGE DECISION

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1 4. The parties failed to resolve the matter informally.

2 5. On or about September 23, 2020, the Department issued a Notice of
3 Hearing to the parties notifying them that an administrative hearing regarding the Petition
4 would be conducted by the Office of Administrative Hearings.

5 6. On October 23, 2020, Caribbean filed a Motion for Summary Judgment,
6 arguing first that Petitioner is seeking declaratory and injunctive relief that cannot be
7 granted by the Department or the Tribunal and he must seek such in another forum.
8 Caribbean argued that Petitioner is required to file a derivative action under the Arizona
9 Nonprofit Corporation Act at Arizona Revised Statutes (A.R.S.) § 10-3630 *et seq.*
10 Caribbean further argued that Petitioner has raised more than one issue but has only paid
11 a filing fee for a single-issue petition and, therefore, must pay additional filing fees.
12 Finally, Caribbean argues the Enabling Statutes are unconstitutional, and neither the
13 Department nor the Tribunal OAH have jurisdiction to accept or hear the Petition.³

14 7. The Tribunal's authority is limited to rule on the Petition and its alleged
15 violations. The alleged issue is that the Caribbean Board is in violation of the Caribbean
16 CC&Rs by refusing to "manage, operate, maintain and administer" one particular area
17 within Caribbean, which area Petitioner argues is a "common area" or "common element."

18 8. Petitioner argued that this particular location will be lost to its rightful
19 owners, *i.e.*, the 40 Unit owners, if Caribbean Board does not claim ownership of the area.
20 Petitioner argued that each of the 40 owners has an "undivided ownership interest in the
21 common areas and [common] elements" of Caribbean.⁴ Petitioner argued that each
22 owner is required in its Deed to accept the Caribbean plat (Plat).⁵

23 9. The "common area" or "common element" of which Petitioner is concerned
24 is located in an outside area on the second level between exterior walls of Unit 206 and
25 Unit 207.⁶ That area is not specifically delineated on the Plat; the Plat is blank in that
26 location.

27 ³ Re-urged at the administrative hearing following Petitioner's presentation of his case, the Tribunal declined
28 to grant the Motion for Summary Judgment.

29 ⁴ See Exhibit 5.

30 ⁵ See Exhibit 7.

⁶ Petitioner lives in Unit 101.

10. The otherwise blank space on the Plat document between Unit 206 and Unit 207 is, in fact, taken up by a concrete slab and outside iron railings attached to the slab which railings essentially fence off the slab between the two Units.⁷ The area is not a staircase landing and may only be accessed by Unit 207 through a door from one of the rooms in Unit 207.

11. Petitioner argued that Unit 207 does not include any space other than the interior of the Unit and its delineated “balcony” that is identified on the Plat document. In this regard, Petitioner argued that all space/area not delineated on the Plat document as an Apartment, or as a patio (as such are delineated on the first level) or as a balcony (as such are delineated on the second level), are “common area” belonging to the 40 Unit owners. Petitioner further argued that this particular space is, in fact, a “common [architectural] element” belonging to all 40 Unit owners.

12. Petitioner argued that the owners of Unit 207 are exclusively occupying this particular “common area” or “common element” as though that area is another “room” of Unit 207 by moving in furniture, putting up walls, and making improvements to the exterior walls of Unit 206. Photographs demonstrated that this area contains furniture and other decorative items.⁸

13. At hearing, Alex Gomez, a Caribbean Board Member,⁹ testified that the Board's position regarding the disputed area is that the area is not a common area but is a "balcony" attached to the specific unit, *i.e.*, attached to Unit 207. Mr. Gomez indicated that Caribbean has never "maintained" any balconies, including the disputed area. Mr. Gomez acknowledged that this area is an original feature of Caribbean and is not delineated on the Plat.

14. At hearing, Caribbean argued that the disputed area is not a common area and is not a common element, but is a “limited common element” of which the Unit 207 owners have exclusive right to use.

CONCLUSIONS OF LAW

⁷ See Exhibit 10, photographs.

⁸ *Id.*

⁹ Mr. Gomez testified that he has, currently, been a Board member for about one year; he previously served on the Board, overall totaling Board service for about 3 year.

1 1. The Department has jurisdiction to receive petitions, hear disputes between
2 a property owner and a condominium community association, and take other actions
3 pursuant to Arizona Revised Statutes (A.R.S.), Title 33, Chapter 16.

4 2. The Arizona Office of Administrative Hearings (Tribunal) is a separate state
5 agency authorized by statute to hear and decide agency-referred contested matters
6 through the conduct of an administrative hearing and issuance of a written decision.

7 3. In this proceeding, pursuant to Arizona Administrative Code (A.A.C.) R2-19-
8 119, Petitioner bears the burden of proving by a preponderance of the evidence that, as
9 alleged, Caribbean has violated CC&Rs Article 1, Sections 1.5 and 1.8; Article 3, Section
10 3.4; Article 4, Section 4.1; Article 8, Section 8.1; and, Article 12, Section 12.4” by refusing
11 to claim ownership and manage, operate, maintain and administer the at-issue.

12 4. A preponderance of the evidence is “[e]vidence which is of greater weight or
13 more convincing than the evidence which is offered in opposition to it; that is, evidence which
14 as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW
15 DICTIONARY 1182 (6th ed. 1990).

16 5. Article 1, Section 1.5 of the CC&Rs defines “Apartment” as follows:¹⁰

17 “Apartment” means a part of the Property, including one or
18 more rooms situated in an Apartment Building comprising a
19 part of the Property designated or intended for independent
20 use as a dwelling unit, as so specified on the plat or survey
21 attached as Exhibit “B”. Each Apartment shall consist of the
22 space enclosed and bounded by the horizontal and vertical
23 planes as shown on said Plat, and shall also include the patio
24 and balcony areas identified with the Apartment by said Plat.

25 6. Article 1, Section 1.6 of the CC&Rs defines “Common Elements” as follows:

26 “Common Elements” means the “general common elements”
27 as that term is defined in Section 33-551, Arizona Revised
28 Statutes, together with the parking areas, yard areas, storage
29 areas, swimming pool and swimming pool furniture and
30 equipment, outside walks and driveways, landscaping, and all
other portions of the Property except the Apartments.¹¹

¹⁰ See Exhibit 1. The CC&Rs were recorded in 1973.

¹¹ A.R.S. § 33-551, formerly a provision within the laws regarding “Horizontal Property Regimes” (originally enacted in Laws 1962, Chapter 89, Section 1) was repealed in Laws 1985, Chapter 192, Section 1, effective

1 7. Article 1, Section 1.8 of the CC&Rs defines "Plat" as follows:

2 "Plat" means the plat of survey of the Property and of all
3 Apartments submitted to this horizontal regime, said Plat
4 being in two pages, attached hereto as Exhibit "B" and
5 recorded simultaneously with the recording of this
6 Declaration.

7 8. Article 3, Section 3.4 of the CC&Rs provides as follows:

8 The Common Elements shall be exclusively managed,
9 operated, maintained and administered by the Association,
10 acting through its Board, for the use and benefit of all Owners,
11 and for such other purposes as determined from time to time
12 by said Board. The Board shall have the exclusive right and
13 power to establish and impose rules and regulations
14 governing the use, maintenance and development of all and
15 any part of the Common Elements, and any Owner, or any
16 other person using any part of the Common Elements shall
17 abide by such rules and regulations.

18 9. Article 4, Section 4.1 of the CC&Rs provides as follows:

19 Title to the Common Elements shall be vested in the Owners
20 who, as among one another, shall own such Common
21 Elements as tenants in common, with ownership of an
22 undivided percentage interest in said Common Elements in
23 accordance with their respective percentage interests in the
24 Common Elements as set forth in Exhibit "C", provided,
25 however, that no Owner shall exercise any right of partition
26 with respect to his undivided percentage interest in said
27 Common Elements, or bring any action for dissolution of the
28 Association, so long as anyone of the restrictions or
29 conditions stated in any part of Article III or this Article IV,
30 remain in effect, it being agreed that these restrictions are
 necessary in order to preserve the rights of the Owners with
 respect to the operation and management of the Common
 Elements.

 10. Article 7, Section 7.2 of the CC&Rs provides, in pertinent part, as follows:

January 1, 1986. A.R.S. § 33-551 through § 33-561 dealt with definitions, declarations, interest in common elements, withdrawal from regime, individual apartments and common interests, tax and special assessments, levies, liens, limitation on partition, and management. Those statutory provisions were replaced with A.R.S. § 33-1201 through § 33-1270, Condominiums.

Each Owner shall be entitled to the exclusive use of the interior surfaces (extending to the middle) of the perimeter walls including patio and balcony walls, doors, floors and ceilings and the surfaces of the patio and balcony floors within his Apartment ...

11. Article 8, Section 8.1 of the CC&Rs provides as follows:

If any portion of the Common Elements shall actually encroach upon any Apartment, or if any Apartment shall actually encroach upon any portion of the Common Elements, or if any Apartment shall actually encroach upon another Apartment, as the Common Elements and the Apartments are shown by the surveys comprising the Plat, there shall be deemed to be mutual easements in favor of the Owners of the Common Elements and the respective Owners involved to the extent of such encroachment so long as the same shall exist.

12. Article 9, Section 9.2 of the CC&Rs provides as follows:

The Common Elements shall be used only by the Owners residing therein, their guests and other authorized visitors and for such purposes as are incidental to the residential use of the Apartments or such other purposes as may be approved by the Board.

13. Article 12, Section 12.4 of the CC&Rs provides as follows:

Each grantee of Declarant, by the acceptance of a deed of conveyance, or each purchaser under any agreement of sale, accepts the same subject to all restrictions, conditions, covenants, reservations, liens and charges, and the jurisdiction, rights and powers created or reserved by this Declaration, and all rights, benefits and privileges of every character hereby granted, created, reserved or declared, and all impositions and obligations hereby imposed shall be deemed and taken to be covenants running with the land and equitable servitudes, and shall bind any person having at any time any interest or estate in said land, and shall inure to the benefit of such grantee or purchaser in like manner as though the provisions of this Declaration were recited and stipulated in full in each and every deed of conveyance or purchase contract.

14. A.R.S. § 33-1212, Unit Boundaries, provides as follows:¹²

Except as provided by the Declaration,

...

4. Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, entryways or patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but located outside the unit's boundaries, are limited common elements allocated exclusively to that unit.

15. A.R.S. § 33-1218, Limited Common Elements, provides as follows:¹³

A. Except for the limited common elements described in § 33-1212, paragraphs 2 and 4, other than porches, balconies, patio and entryways, the declaration shall specify to which unit or units each limited common element is allocated. ...

16. The hearing record presents a variety of positions for possible interpretation. CC&R Article 1, Section 1.5 defines Apartment as the part of the Property so delineated on the Plat document; however, the Plat document does not delineate this particular disputed area in any manner. The disputed area is not delineated on the Plat document as a part of the "Apartment" or as a "patio" or as a "balcony." The parties did not dispute that access to the disputed area may only be gained through Unit 207; neither party indicated that Unit 207's access to the disputed area was added at some time after the Property buildings were built, *i.e.* that the Unit 207 access was not an original feature. CC&R Article 1, Section 1.6 describes a Common Element with some specificity, but also includes "all other portions of the Property except the Apartments." The Apartments are clearly delineated on the Plat document. CC&R Article 9, Section 9.2 provides that Common Elements are used "for such purposes as are incidental to the residential use of the Apartments or such other uses as may be approved by the Board." Mr. Gomez testified that the Board's position was that the disputed area is a "balcony" attached to Unit 207; however, he did not reference any particular Board approval determination reduced to writing and designating the disputed area as such. However, and finally, A.R.S. § 33-1212(A) provides that "[a]ny shutters, awnings, window boxes, doorsteps, stoops,

¹² This statutory provision was enacted in Laws 1985, Chapter 192, §3, effective January 1986.

¹³ *Id.*

1 porches, balconies, entryways or patios, and all exterior doors and windows or other
2 fixtures designed to serve a single unit, but located outside the unit's boundaries, are
3 limited common elements allocated exclusively to that unit." Accordingly, the
4 Administrative Law Judge concludes that the disputed area must be a balcony "designed
5 to serve a single unit, but located outside the unit's boundaries."

6 17. Therefore, based on the hearing record, the Administrative Law Judge
7 concludes that Petitioner has not established, as alleged, any violation by Caribbean of
8 the referenced CC&R provisions. As a result, the Administrative Law Judge concludes
9 that Petitioner's Petition shall be dismissed.

10 **RECOMMENDED ORDER**

11 IT IS ORDERED that Petitioner's Petition is dismissed.

12 IT IS FURTHER ORDERED that Petitioner bears his \$500.00 filing fee.

13 **NOTICE**

14 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties**
15 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S.**
16 **§ 41-1092.09, a request for rehearing in this matter must be filed with the**
17 **Commissioner of the Department of Real Estate within 30 days of the service of**
18 **this Order upon the parties.**

19 Done this day, December 17, 2020.

20 /s/ Kay Abramsohn
21 Administrative Law Judge

22 Transmitted electronically to:

23 Judy Lowe, Commissioner
24 Arizona Department of Real Estate
25 100 N. 15th Avenue, Suite 201
26 Phoenix, Arizona 85007

27 John D. Klemmer
28 1901 E. Missouri Ave, #101
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Petitioner

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By FDS