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No. 20F-H2020053-REL

ADMINISTRATIVE LAW JUDGE DECISION

Respondent.

APPEARANCES: James Frisch, Esq. and Michael Resare, Esq. appeared on behalf of Petitioner Erik R. Pierce via Google Meet. Heather Hampstead, Esq. and Nicholas Nogami, Esq. appeared via Google Meet on behalf of Respondent Sierra Leone Community Association.

ADMINISTRATIVE LAW JUDGE: Adam D. Stone

1. The Arizona Department of Real Estate ("Department") is authorized by statute to receive and to decide Petitions for Hearing from members of homeowners' associations and from homeowners' associations in Arizona.

2. Respondent Sierra Morado Community Association (“SMCA”) is a homeowners’ association whose members own single-family houses on lots in Tucson, Arizona.

3. Petitioner Erik R. Pierce owns a house in and is a member of SMCA.

4. On March 23, 2020, Petitioner filed a complaint with the Arizona Department of Real Estate (“ADRE”). Petitioner alleged that Respondent was in violation of sections 4.27 and 11.1 of the SMCA CC&R’s.²

¹ The record was held open until February 2, 2021, to allow the parties to submit written closing arguments.

² See Agency file.

1 5. SMCA filed a written answer to the petition, denying that it had violated
2 any of the complaint items in the Petition.³ The Department referred the petition to the
3 Office of Administrative Hearings, an independent state agency, for an evidentiary
4 hearing.

5 6. A hearing was originally scheduled for June 24, 2020, however the parties
6 had stipulated to continue the matter in hopes of reaching a settlement. After several
7 continuances, the parties requested that a hearing be scheduled.

8 7. A hearing was held on January 25, 2021.

9 8. Petitioner submitted 6 exhibits and presented the testimony of four
10 witnesses. Respondent submitted 23 exhibits. Per stipulation of the parties, all exhibits
11 were entered into the record.

12 9. Mr. Pierce testified that the reason for his complaint was that his
13 neighbors, the Kinstles, installed a hot tub and it was visible from the Pierce's backyard.

14 10. Mr. Pierce testified specifically that when there were occupants in the hot
15 tub, they were visible from inside his house and that the occupants in the hot tub could
16 also look directly into the Pierce's home which violated his right to privacy.

17 11. Mr. Pierce testified that on September 4, 2019, he submitted a complaint
18 informing SMCA that the hot tub was visible from his property and upon information and
19 belief, the Kinstle's failed to submit the ARC Form prior to the installation of the hot tub.

20 12. Mr. Pierce testified that SCMA then informed the Kinstle's that they
21 installed the hot tub without approval, and directed the Kinstle's to submit the plans and go
22 through the proper approval process. Mr. Pierce testified that after several rejections from
23 the Board, the Kinstle's hot tub was approved on February 10, 2020, so long as a pergola
24 and screening were installed.⁴

25 13. Mr. Pierce testified that on or about March 3, 2020, he received a letter
26 from Jodie Cervantes, a Community Manager with AAM, LLC (the property management
27 company at the time), that the hot tub installation was approved with the pergola
28 screening requirement and that the complaint was closed.

29 ³ *Id.*

30 ⁴ See Respondent's Exhibit 17.

1 14. Mr. Pierce testified further that to date, the Kinstle's have failed to install
2 the pergola and screening, and that the Board has failed to enforce this violation of the
3 CC&R's.

4 15. Bill Oliver testified that he was the President of SMCA from the fall of 2019
5 until about April 2020. Mr. Oliver testified that the Board would approve architectural
6 requests retroactively, and did so in this case, with the stipulations of the pergola and
7 screening.

8 16. Mr. Oliver testified that the Board had a rigorous process of enforcement
9 and would enforce violations if the Board was made aware of the same. However, Mr.
10 Oliver testified that he did not remember if a violation letter was sent to the Kinstle's after
11 the hot tub was approved.

12 17. Jodie Cervantes testified next. Ms. Cervantes testified that she was
13 employed by AAM, LLC, and served as the Community Manager for SMCA from 2019
14 through June 2020.

15 18. Ms. Cervantes believed that once she became aware of the hot tub issue,
16 the CC&R's were enforced to ensure that the Kinstle's complied with the same. She did
17 note that there were some delays in the submission of plans, but ultimately the Kinstle's
18 hot tub was approved with the pergola and screening requirement.

19 19. Ms. Cervantes further testified that it was her belief that the matter was
20 now closed and no further warning letters or other enforcement actions could be taken
21 because she believed that the Kinstle's had six months to comply with the pergola and
22 screening requirements. Ms. Cervantes testified that she believed the six month deadline
23 was in the Design Guidelines, but could not point to the specific language regarding the
24 same.

25 20. Current SMCA Board President, Martin Douglas testified next. Mr.
26 Douglas testified that he became Board president in April 2020, when Mr. Oliver resigned.

27 21. Mr. Douglas testified that he had not been to the Kinstle's property to
28 inspect the hot tub, but was at the Pierce's residence for another matter. He testified that
29 the hot tub was not visible to him when he was at the Pierce's.
30

1 22. Mr. Douglas stated that while he was unaware if there was a six month
2 grace period to install the pergola and screening, he testified that there were no further
3 enforcement actions due to the ongoing litigation and multiple settlement offers which
4 were being exchanged.

5 23. Finally, Mr. Douglas testified that upon resolution of this case that the
6 Board will follow through with enforcement actions should the Kinstle's fail to comply with
7 the pergola and screening requirement.

8 **CONCLUSIONS OF LAW**

9 1. A.R.S. § 32-2199(B) permits an owner or a planned community
10 organization to file a petition with the Department for a hearing concerning violations of
11 planned community documents under the authority Title 33, Chapter 16. Such petitions
12 will be heard before the Office of Administrative Hearings, an independent state agency.

13 2. Petitioner bears the burden of proof to establish that Respondent violated
14 CC&R Sections 4.27 and 11.1 by a preponderance of the evidence.⁵ Respondent bears the
15 burden to establish affirmative defenses by the same evidentiary standard.⁶

16 3. "A preponderance of the evidence is such proof as convinces the trier of
17 fact that the contention is more probably true than not."⁷ A preponderance of the evidence
18 is "[t]he greater weight of the evidence, not necessarily established by the greater number
19 of witnesses testifying to a fact but by evidence that has the most convincing force; superior
20 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
21 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
22 the other."⁸

23 4. Article 4, Section 4.27, states:

24 4.27 Swimming Pools and Spas. No swimming pool shall be
25 constructed or installed on any Lot and no addition, alteration, repair,
26 change or other work which in any way alters a swimming pool shall be
made or done without the prior written approval of the Architectural Review

27 ⁵ 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
28 Ariz. 369, 372, 249 P.2d 837 (1952).

⁶ See A.A.C. R2-19-119(B)(2).

⁷ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

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

1 Committee for the construction, installation, addition, alteration, repair,
2 change or replacement of a swimming pool shall submit to the
3 Architectural Review Committee a written request for approval
4 specifying in detail the nature and extent of the addition, alteration,
5 repair, change or other work which the Owner desires to perform. No
6 above-ground swimming pool may be constructed upon any Lot;
7 provided, however, that what is commonly referred to as a "spa,"
8 "Jacuzzi" or "hot tub" having a functioning water depth of no more than
9 36 inches and a height above ground of no more than 12 inches may
10 be installed on a Lot if properly screened and set back from the Lot
11 line, if neither it nor its occupants are Visible from Neighboring
12 Property, and with the prior written approval of the Architectural
13 Review Committee as provided in this Section.⁹

14 5. Further Article 11, Section 11.1 states as follows:

15 11.1 Enforcement. The Association or any Owner ***shall have the***
16 ***right to enforce*** the Project Documents in any manner provided for
17 in the Project Documents or by law or in equity, including, but not
18 limited to, an action to obtain an injunction to compel removal of any
19 Improvements constructed in violation of this Declaration or to
20 otherwise compel compliance with the Project Documents. The
21 failure of the Association or an Owner to take enforcement action
22 with respect to a violation of the Project Documents shall not
23 constitute or be deemed a waiver of the right of the Association or
24 any Owner to enforce the Project Documents in the future. If any
25 lawsuit is filed by the Association or any Owner to enforce the
26 provisions of the Project Documents or in any other manner arising
27 out of the Project Documents or the operations of the Association,
28 the prevailing party in such action shall be entitled to recover from the
29 other party all attorney fees incurred by the prevailing party in the
30 action. In addition to any other rights or remedies available to the
Association pursuant to the Project Documents or at law or in equity,
the Board shall have the power to levy reasonable monetary
penalties against an Owner for a violation of the Project Documents
by the Owner, a Lessee of the Owner or by any Resident of the
Owner's Lot, provided the Owner is given notice and opportunity to
be heard.¹⁰

26 (Emphasis added)

28
29 ⁹ See Respondent's Exhibit 20.

30 ¹⁰ *Id.*

1 6. As a preliminary matter, Respondent argues that because Petitioner filed a
2 single-issue petition, only one of the sections can be the subject of this dispute. The tribunal
3 believes that because Section 4.27 was essentially resolved by the Board instructing the
4 Kinstle's erect a pergola and install screening, this issue has been resolved. The heart of
5 the matter is whether SMCA followed Section 11.1 in enforcing their requirements for the
6 pergola and screening against the Kinstle's.

7 7. Based upon the evidence provided, the Kinstle's are in violation of the
8 requirement the ARC Committee imposed on them. To date, no pergola or screening has
9 been installed around the hot tub. However, Section 11.1 only gives the Board a *right* to
10 enforce, not an absolute obligation. While Petitioner is understandably upset that there has
11 yet to be any follow through on enforcement of the screening requirements, this tribunal
12 finds the testimony of Mr. Douglas more persuasive, namely that the Board has delayed in
13 enforcing because it was trying to foster an agreement with the neighbors. Section 11.1
14 expressly granted the Board this discretion, and it should not be disturbed. This tribunal
15 takes Mr. Douglas at his word that more strict enforcement will occur at the conclusion of
16 this case, in hopes that both the Kinstle's and the Petitioner are able to enjoy their
17 properties.

18 8. Therefore, Petitioner did not establish that Respondent violated CC&R
19 Section 11.1.

20 ORDER

21 IT IS ORDERED that Petitioners' petition is denied.

22 NOTICE

23 Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties unless
24 a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S. § 41-
25 1092.09, a request for rehearing in this matter must be filed with the Commissioner
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1 of the Department of Real Estate within 30 days of the service of this Order upon the
2 parties.

3 Done this day, February 10, 2021.
4

5 /s/ Adam D. Stone
6 Administrative Law Judge
7

8 Transmitted electronically to:
9

10 Judy Lowe, Commissioner
11 Arizona Department of Real Estate
12

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