

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Michael J. Stoltenberg,

4 Petitioner,

5 vs.

6 Rancho Del Oro Homeowners Association,

7 Respondent

No. 20F-H2020059-REL-RHG

**ADMINISTRATIVE LAW JUDGE
DECISION**

9
10 **HEARING:** February 2, 2021

11 **APPEARANCES:** Petitioner Michael J. Stoltenberg appeared on his own behalf. Nicole
12 Payne, Esq. represented Respondent Rancho Del Oro Homeowners Association.

13 **ADMINISTRATIVE LAW JUDGE:** Sondra J. Vanella

14 **FINDINGS OF FACT**

15 Initial Hearing

16 1. Petitioner Michael J. Stoltenberg ("Petitioner") filed the instant Petition
17 asserting that Respondent Rancho Del Oro Homeowners Association ("Respondent")
18 had violated its Covenants, Conditions, and Restrictions ("CC&Rs") § 5.1 and Arizona
19 Revised Statutes ("A.R.S.") § 10-3842 by failing "to do their job in 2020 with maintaining
20 landscaping, and are acting in bad faith." Petitioner further alleged: "This petition is being
21 resubmitted because Judge refused to allow evidence into 20F-H2019005-REL-RHG"
22 and "[t]he HOA continual refusal to follow court ruling 19F-H1918038-REL show they
23 have no respect for ADRE and Homeowners Association Dispute Resolution process."
24 Petitioner requested that Respondent be fined "the maximum amount [*sic*] possible."

25 2. Petitioner asserted that Respondent has failed to comply with a Decision in
26 a prior proceeding before the Office of Administrative Hearings in Docket Number 19F-
27 H1918038-REL that concluded that Respondent was required to provide landscaping
28 maintenance.

29 3. Petitioner acknowledged that Respondent was not expected to start
30 landscaping his property until January 2020.

1 4. Petitioner relied on Article V of the CC&Rs entitled Duties and Powers of the
2 Association. Section 5.1 provides in relevant part as follows:

3
4 5.1 Duties. In addition to the powers delegated to it by its articles or the
5 Bylaws, and without limiting their generality, the Association, acting by and
6 through the Board . . . has the obligation to conduct all business affairs of
common interest to all Owners and to perform the duties set forth below.

7 a. Maintenance. The Association shall maintain, repair, replace, restore,
8 operate and manage all facilities, improvements, furnishings, equipment
9 and landscaping thereon, and all property that ***may be acquired by the***
10 ***Association***. . . . Maintenance shall include, without limitation, landscaping,
11 painting, maintaining, repairing and replacing of the ***Common Area***. ***It***
shall also include maintenance of the landscaping on individual Lots
outside of structures. . . .

12 Emphasis added.

13 5. Petitioner contended that the CC&Rs did not specify what types of
14 landscaping were included and asserted that all types of landscaping outside of structures
15 were included. Petitioner asserted that the maintenance of his pool was included in
16 Respondent's landscaping responsibilities. Petitioner acknowledged that Respondent
17 had been performing the front yard landscaping since January 2020. Petitioner also
18 acknowledged that the gate to access his back yard was always locked for liability
19 reasons due to having a pool. At the initial hearing, Petitioner acknowledged that he had
20 refused to allow Respondent access to his back yard to perform landscape services
21 because he was concerned about the liability of leaving his gate unlocked due to having a
22 pool.

23 6. The Administrative Law Judge dismissed Petitioner's Petition for the
24 following reasons: i) Petitioner's admission that since January 2020, Petitioner had
25 refused to allow Respondent access to his back yard in order to perform landscape
26 maintenance to the back yard; ii) Respondent had attempted to access Petitioner's back
27 yard on multiple occasions and was specifically instructed that Respondent was not
28 permitted to access Petitioner's back yard; iii) since January 2020, Respondent had
29 consistently maintained Petitioner's front yard landscaping; and iv) Section 5.1(a) of the
30

1 CC&Rs required Respondent to maintain members' yards, however, nothing therein
2 required Respondent to maintain an individual member's pool.

3 7. Petitioner subsequently submitted a request for rehearing claiming: i)
4 irregularity in the proceedings or abuse of discretion by the Administrative Law Judge; ii)
5 accident or surprise that could not have been prevented by ordinary prudence; iii) newly
6 discovered material evidence that could not with reasonable diligence have been
7 discovered and produced at the original hearing; iv); error in the admission or rejection of
8 evidence or other errors of law occurring during the proceeding; v); that the findings of fact
9 or decision was arbitrary, capricious, or an abuse of discretion; and vi) that the findings of
10 fact or decision was not supported by the evidence or was contrary to law. In the request,
11 Petitioner asserted that "the Judge did not explain or how to interpret 5.1 of the Rancho
12 Del Oro HOA CC&Rs and ARS 10-3842 Code of Conduct for Board Members with
13 regards to previous hearing's ruling"¹ and "there were Americans with Disabilities Act
14 (ADA) issues with the hearing as well as privacy issues." The Commissioner of the
15 Department of Real Estate ("Department") issued an Order Granting Rehearing "for the
16 reasons outlined in the Respondent's Rehearing Petition" without further explanation.

17 Rehearing

18 8. The rehearing was held on February 2, 2021. Petitioner alleged in his
19 rehearing request that he had "experienced hearing loss" which "put [him] at a severe
20 disadvantage and prevented him from presenting [his] case fully and effectively. Also,
21 there was evidence that cannot be submitted digitally, copied or mailed. This evidence
22 falls under Financial Privacy Act, and is Personally Identifiable Information. . . ." Petitioner
23 appeared in person to accommodate his disability. Petitioner did not submit any
24 documentary evidence at the hearing, stating that it was already contained in the record.

25 9. At the rehearing, Petitioner asserted multiple times that Respondent did not
26 have an elected Board and was "falsely representing themselves as an HOA" and refused
27 to accept that Respondent had legal representation. Petitioner's objection to
28

29 ¹ All errors in original.

Respondent's legal representation was an issue outside the scope of the hearing and this was repeatedly communicated to Petitioner throughout the rehearing process.

10. Petitioner asserted that Respondent was required to perform landscaping and that having a pool required a gate to be locked. Petitioner contended that Respondent did not communicate the landscaping schedule to Petitioner in order to afford Petitioner an opportunity to unlock the gate at the time when the landscaping was being performed.

11. Petitioner further asserted that because "landscaping" was not defined in the CC&Rs, he believed his pool should be included because "it is part of the landscaping." Petitioner contended that the maintenance of the pool should be the responsibility of Respondent, including maintenance of the pool pump and filter, chemicals, patio, and all hardscape. Petitioner did not cite to any authority in support of his assertion, notwithstanding that Petitioner bears the burden to prove the alleged violation by Respondent, his assertion that pool maintenance was included in the definition of "landscaping," and that it was Respondent's responsibility to perform such.

CONCLUSIONS OF LAW

1. A.R.S. § 32-2199(B) permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of planned community documents under the authority Title 33, Chapter 16.²

2. This matter lies with the Department's jurisdiction. The Department is authorized by statute to receive and to decide petitions for hearings from members of homeowners' associations in Arizona.

3. Petitioner bears the burden of proof to establish the alleged violations by Respondent as set forth in Petitioner's Petition.³ Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.⁴

² See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce the development's CC&Rs.

³ 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 Ariz. 369, 372, 249 P.2d 837 (1952).

⁴ See A.A.C. R2-19-119(B)(2).

1 4. "A preponderance of the evidence is such proof as convinces the trier of fact
2 that the contention is more probably true than not."⁵ A preponderance of the evidence is
3 "[t]he greater weight of the evidence, not necessarily established by the greater number of
4 witnesses testifying to a fact but by evidence that has the most convincing force; superior
5 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
6 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
7 the other."⁶

8 5. Article V of the CC&Rs Section 5.1(a) provides as follows:

9 The Association shall maintain, repair, replace, restore, operate and
10 manage all facilities, improvements, furnishings, equipment and
11 landscaping thereon, and all property that ***may be acquired by the***
12 ***Association. . . . Maintenance shall include, without limitation,***
13 ***landscaping, painting, maintaining, repairing and replacing of the Common***
14 ***Area. It shall also include maintenance of the landscaping on***
15 ***individual Lots outside of structures. . . .***

16 Emphasis added.

17 6. Petitioner did not offer a definition of landscaping to support his assertion
18 that Respondent was responsible for maintaining his swimming pool.

19 7. Various online sources define "landscaping" as follows:

20 Oxford English Dictionary (oed.com): "To lay out (a garden, etc.) as a
21 landscape."

22 Dictionary.com: "to improve the appearance of (an area of land, a highway,
23 etc.), as by planting trees, shrubs, or grass, or altering the contours of the
24 ground."

25 Merriam-Webster (m-w.com): "to modify or ornament (a natural landscape)
26 by altering the plant cover."

27 Law Insider (lawinsider.com): 1. "any combination of trees, shrubs,
28 flowers, grass or other horticultural elements, together with decorative
29 stonework, paving, screening or other architectural elements, all of which is
30 designed to enhance the visual amenity of a property and to provide a screen
to mitigate any objectionable aspects that may detrimentally affect adjacent
land;" 2. "the placement of plants, contoured features, water features,
paving, street furniture and other soft and hard elements for the purposes of
enhancing the aesthetic appeal, environmental management, amenity and

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

⁶ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

value of a property;" 3. "the improvement of a lot, parcel, or tract of land with a combination of living plants such as grasses, shrubs, trees, and/or other plant materials and nonliving materials such as rocks, mulch, walls, fences, and/or ornamental objects designed and arranged to produce an aesthetically pleasing effect."

8. Pursuant to A.R.S. § 32-1122(A)(1), the Arizona Registrar of Contractors ("Registrar") "shall classify and qualify applicants for a license." The Registrar previously issued residential R-21 Landscaping and Irrigation Systems licenses, which are now known as residential R-21 Hardscaping and Irrigation Systems licenses. Those licenses allow the licensees to install, alter, and repair the following:

1. Non-loadbearing concrete
2. Uncovered patios, walkways, driveways made of brick, stone, pavers or gravel
3. Wooden decks no higher than 29 inches above finish grade
4. Decorative garden walls up to six feet from finish grade
5. Fences and screens up to six feet from finish grade
6. Retaining walls up to three feet from the finish grade of the lower elevation
7. Free standing fire pits, fireplaces, or barbeques – electric, plumbing, and gas must be subcontracted to a properly licensed contractor
8. Low voltage landscape lighting
9. Water features that are not attached to swimming pools; including any necessary: electrical wiring of 120 volts or less, connection to potable water lines, backflow prevention devices, hose bibs, excavating, trenching, boring, backfilling, or grading
10. Irrigation systems, including any necessary: electrical wiring of 120 volts or less, connection to potable water lines, backflow prevention devices, hose bibs, excavating, trenching, boring, backfilling, or grading
11. Residential outdoor misting systems. Freestanding or attached to existing appurtenance, not more than 1000 PSI.
12. Free standing and uncovered outdoor kitchens – electric, plumbing, and gas must be subcontracted to a properly licensed contractor With the exception of free standing fire pits, fireplaces, or barbeques, this classification does not allow the licensee to install, contract for, or subcontract new electrical service panels, gas or plumbing lines, blasting, covered outdoor kitchens, gazebos, room additions, **swimming pools, pool deck coatings**, concrete driveways, load bearing walls, or perimeter fencing.

Emphasis added.

1 9. The Registrar also issues the residential R-6 Swimming Pool Service and
2 Repair license classification which “allows the licensee to service and perform minor
3 repair of residential pools and accessories, excluding plumbing connections to a potable
4 water system, gas lines, gas chlorine systems, and electrical work beyond the first
5 disconnect. This classification does not allow the licensee to perform a complete
6 replacement of plaster or pebble pool interiors and decks.”

7 10. Petitioner seeks an “interpretation” of the above-quoted section of the
8 CC&Rs that would require Respondent to maintain his pool and hardscape in his back
9 yard. It is Petitioner who bears the burden to establish that Respondent is legally
10 obligated to maintain his pool and hardscape. Petitioner however, failed to establish by a
11 preponderance of the evidence that Respondent must do so.

12 11. The definitions set forth previously, while more expansive than merely
13 plants, cannot reasonably be read to include a swimming pool and the associated
14 mechanical equipment.

15 12. Further the State’s contracting license classifications support a conclusion
16 contrary to Petitioner’s contention. The Hardscaping and Irrigation Systems license
17 classification previously known as the Landscaping and Irrigation Systems license
18 specifically precludes the licensee from contracting regarding swimming pools and pool
19 deck coatings. Additionally, the Swimming Pool Service and Repair license classification
20 is required to perform minor repairs of residential pools and accessories.

21 13. The Registrar’s licensing scheme supports a conclusion that landscaping
22 maintenance and pool maintenance are two separate and distinct services. Given that
23 there are separate license requirements to service a swimming pool and to perform
24 landscaping services, the CC&Rs cannot reasonably be interpreted to include pool
25 maintenance when it required Respondent to maintain landscaping.

26 14. Petitioner admitted that Respondent did not have access to his back yard to
27 perform landscaping services at any time relevant to the Petition. Respondent is not
28 found in violation of the governing documents. However, given that Petitioner is required
29 to keep his gate secured due to having a pool, it is reasonable, going forward, for
30 Respondent to communicate the days and times that it will be performing the landscaping

1 of Petitioner's back yard so that Petitioner can provide access for that service while
2 maintaining safety precautions.

3 **ORDER**

4 **IT IS ORDERED** that Petitioner Michael J. Stoltenberg's Petition is dismissed.

5 **NOTICE**

6 This administrative law judge order, having been issued as a result of a
7 rehearing, is binding on the parties. A.R.S. § 32-2199.02(B). A party wishing to
8 appeal this order must seek judicial review as prescribed by A.R.S. § 41-1092.08(H)
9 and title 12, chapter 7, article 6. Any such appeal must be filed with the superior
10 court within thirty-five days from the date when a copy of this order was served
11 upon the parties. A.R.S. § 12-904(A).

12 Done this day, February 12, 2021.

13 /s/ Sondra J. Vanella
14 Administrative Law Judge
15

16 Transmitted electronically to:

17 Judy Lowe, Commissioner
18 Arizona Department of Real Estate

19 Transmitted through US Mail to:

20 Michael J. Stoltenberg
21 11777 E Calle Gaud
22 Yuma, AZ 85367

23 Lydia A. Peirce Linsmeier
24 CARPENTER, HAZLEWOOD, DELGADO & BOLEN LLP
25 1400 E. Southern Ave., Suite 400
26 Tempe, Arizona 85282
27
28
29
30