

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Keith D Smith,
 Petitioner,

4 vs.
5 Sierra Foothills Condominium Association,
6 Respondent.

No. 21F-H2120003-REL-RHG

**ADMINISTRATIVE LAW JUDGE
DECISION**

7 **HEARING:** The original hearing was conducted on October 26, 2020; this rehearing
8 was considered based on the record from the original hearing, Petitioner's Request for
9 Rehearing and Respondent's Response to that Request

10 **APPEARANCES:** Keith D. Smith appeared on his own behalf at the original hearing.
11 Respondent was represented by its president Stuart Rayburn

12 **ADMINISTRATIVE LAW JUDGE:** Thomas Shedden

13 **FINDINGS OF FACT**

14 1. On January 22, 2021, the Arizona Department of Real Estate issued an
15 Order Granting Rehearing and Notice of Rehearing, setting the above-captioned matter
16 for rehearing on March 21, 2021 at the Office of Administrative Hearings in Phoenix,
17 Arizona.

18 2. Petitioner is Keith D. Smith and Respondent is Sierra Foothills
19 Condominium Association. The Department set the rehearing in response to a motion
20 from Mr. Smith.

21 3. The original hearing was conducted on October 26, 2020, at which Mr.
22 Smith appeared and testified, and the Association presented the testimony of Stuart
23 Rayburn, its president, and Harold Bordelon.

24 4. The Association manages the common elements of a commercial
25 condominium that consists of those common elements and two buildings, Building A
26 and Building B.

27 5. Mr. Smith owns a unit in Building A.

1 6. On July 24, 2020, Mr. Smith filed a two-issue petition with the Department
2 alleging that the Association had violated ARIZ. REV. STAT. sections 33-1218(C) and 33-
3 1248, and CC&R sections 1.5, 3.1, 3.4, and 7.1(c).

4 7. At the beginning of the original hearing, the ALJ engaged in discussion
5 with Mr. Smith to have him identify with particularity his two issues.

6 8. Mr. Smith confirmed that he was alleging that on June 10, 2020 the
7 association violated ARIZ. REV. STAT. section 33-1248, referred to as the open meeting
8 law.

9 9. When asked which provision of the CC&Rs he alleged the Association
10 violated, Mr. Smith questioned whether he was limited to one provision. The ALJ
11 explained that because Mr. Smith had paid for only two issues, only two issues could be
12 heard at the hearing, meaning that he was limited to only one alleged violation in
13 addition to his open meeting law allegation.

14 10. Mr. Smith then agreed that he was alleging that the Association had
15 violated CC&R section 7.1(c), which he referred to as his “first issue” and the “common
16 elements” issue.

17 11. More specifically, Mr. Smith alleged that the Association’s rule that only
18 owners from Building B were allowed to advertise on a monument sign was in violation
19 of CC&R section 7.1(c) that prohibits rules that “unreasonably discriminate among
20 Owners and Occupants and [requires that rules] shall not be inconsistent with the Act,
21 this Declaration, the Articles, or the Bylaws.”

22 12. During the original hearing, Mr. Smith argued that the Association’s
23 monument-sign rule violated section 7.1(c) because it violates section 6.26(a) that
24 provides: “Whenever any ‘Owner’ is limited by or restricted by these occupancy and use
25 restrictions contained in this Article 6, the same use restrictions and/or limitations shall
26 be applicable to all Occupants.”

27 13. In an Administrative Law Judge Decision dated November 16, 2020, the
28 undersigned concluded that:

29 Mr. Smith has not proven that the Association violated CC&R
30 section 7.1(C) because (1) it was not unreasonable for the

1 Association to limit the usage of the monument sign to Units in
2 B because the Units in A have other street frontage available
3 for signage; and (2) although CC&R section 6.26 does prohibit
4 disparate treatment of Owners, by its express terms, CC&R
5 section 6.26 applies only to CC&R Article 6, and not Article 7.

6 ***

7 Mr. Smith offered no substantial evidence in support of his
8 allegation that the Board members had communicated prior to
9 the June 10th meeting. And his testimony that the Board
10 called for a vote without discussion is proven to be in error.

11 At the hearing, Mr. Smith alluded to other perceived
12 deficiencies with the conduct of the meeting, but these are not
13 properly before the tribunal because Mr. Smith did not raise
14 them in his petition. See ARIZ. REV. STAT. § 41-1092.07(F)(6).

15 Mr. Smith did not prove that the Association violated ARIZ.
16 REV. STAT. section 33-1248.

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18
19 14. Mr. Smith's Request for Rehearing consisted of the Department's HOA
20 Dispute Rehearing Request form; a fifteen page letter dated December 18, 2020
21 outlining his reasons for requesting the rehearing and the perceived deficiencies in the
22 Original Decision; and various attachments.

23 15. On January 13, 2021, the Association filed with the Department its
24 Response to Mr. Smith's Request for Rehearing providing rebuttal arguments and
25 requesting that Mr. Smith's request for rehearing be denied.

26 16. No evidence was taken in this matter, and this Decision is based on the
27 record from the original hearing, Mr. Smith's Request for Rehearing, and Respondent's
28 Response to Mr. Smith's request.

1 17. Mr. Smith checked the following boxes as “the particular grounds for [the]
2 rehearing request on the Department’s Rehearing Request form:

3 D 1. Irregularity in the proceedings or any order or abuse of
4 discretion by the administrative law judge that deprived a
5 party of a fair hearing.

6 D 6. Error in the admission or rejection of evidence or other
7 errors of law occurring during the proceeding.

8 D 7. That the findings of fact or decision is arbitrary,
9 capricious, or an abuse of discretion.

10 D 8. That the findings of fact or decision is not supported by
11 the evidence or is contrary to law.

12 18. Regarding the monument sign, in his request for rehearing, Mr. Smith
13 asserts that: the ALJ’s Findings of Fact “appear to be arbitrary, error in evidence, not
14 supported by evidence or contrary to law” [sic]; the ALJ may not have considered all the
15 evidence, and that the Decision was “arbitrary and may not be supported by evidence
16 and may be contrary to law.”

17 19. Mr. Smith then argued that the ALJ’s conclusion that “the Association was
18 not unreasonable with implementing the new rules is contrary to the evidence,
19 governing documents and State Statutes;” and the conclusion that “CC&R section 6.26
20 is only limited to CC&R Article 6 is arbitrary and contrary to contractual norms.”

21 20. Regarding the open meeting law, in his request for rehearing, Mr. Smith
22 asserts that: the findings of fact “appear to be arbitrary, error in evidence, not supported
23 by evidence [sic],” and the ALJ “may not have considered all relevant evidence
24 presented at the hearing, there were irregularities in the proceedings that may have
25 deprived [me of] a fair hearing and that there may have been error with admission of
26 evidence.”

27 The Monument Sign

28 21. CC&R section 6.10 requires that all signage comply with the
29 “comprehensive sign package” in exhibit F to the CC&Rs, and it provides that signs are
30 subject to reasonable Rules and Regulations. The existing sign package did not

1 address the monument sign. At the June 10, 2020 meeting, the Association adopted
2 new rules applicable to the monument sign under which only Building B's Unit owners
3 are allowed use the monument sign.

4 22. The Association adopted the rule limiting use of the monument sign to
5 owners of Units in Building B because: (1) the monument sign has a limited number of
6 spaces in which the Unit owners can place signs to advertise their businesses; and (2)
7 Building A has street frontage and signs can be hung on that building, whereas Building
8 B does not have street frontage, which limits the utility of hanging signs on Building B.

9 23. Section 705 of the City of Phoenix's Zoning Ordinance shows that the Sign
10 Code is to be construed with flexibility and that it allows for signs to be placed on
11 building walls "even though not on a wall of the space occupied by" that tenant. The
12 City Ordinance does not however allow a business to post signs on a building that it
13 does not occupy, which means that Units in Building B cannot hang signs on Building A.

14 24. Mr. Smith alleges that the monument-sign rule is in violation of CC&R
15 section 6.26(a) that provides: "Whenever any 'Owner' is limited by or restricted by these
16 occupancy and use restrictions contained in this Article 6, the same use restrictions
17 and/or limitations shall be applicable to all Occupants."

18 25. In his request for rehearing, Mr. Smith argues that the ALJ erred and
19 applied faulty logic because the CC&Rs must be read as a whole. As Mr. Smith himself
20 writes however, "*The CC&R's should be read and applied as one continuous document*
21 *unless the document clearly states otherwise*" (italics in original, underscore added),
22 and in this case, section 6.26(a) explicitly limits its effect to Article 6.

23 26. Mr. Smith further argues that if the ALJ is correct, section 6.24 must also
24 be considered. That section allows reasonable rules to be promulgated, and Mr. Smith
25 has not shown that the rule at issue is unreasonable. Moreover, Mr. Smith did not allege
26 in his petition that the Association violated section 6.24.

27 27. As configured at the time of the original hearing, the monument sign had
28 space for only five units to advertise. Mr. Smith's petition included two estimates to have
29 the monument sign altered to allow more businesses to advertise on it. One plan would
30 require that the existing signs be reduced in size by one-half, which Mr. Smith was

1 willing to pay for, whereas the second plan would be to increase the size of the
2 monument sign.

3 28. Mr. Smith and the other unit owners each have an undivided interest in the
4 Association's common elements. At the original hearing, Mr. Smith asserted that this
5 means that no owner has exclusive use of the monument sign.

6 29. In his request for rehearing, Mr. Smith argues to the effect that the ALJ did
7 not properly consider this information and that an association's common elements may
8 not be partitioned. In support of his argument, Mr. Smith cites ARIZ. REV. STAT. section
9 33-1217, but in his petition Mr. Smith did not allege a violation that statute, and there
10 was no evidence adduced to show that the monument sign has been partitioned.

11 30. The Association's position is that adopting Mr. Smith's proposal to modify
12 the monument sign would require the approval of the existing business owners and
13 rescission of the approvals to use the monument sign previously granted to those
14 businesses.

15 31. In his request for rehearing, Mr. Smith argues to the effect that the
16 Association's position is not factual because those owners have no ownership and no
17 contracts for the use of the sign, and no owner would be required to approve any
18 change in the use of the sign. He also adds that the owners now using the monument
19 sign would not be prohibited from continuing to use it, but rather would only see the size
20 of their signs reduced by half.

21 32. In the original hearing, Mr. Bordelon testified to the effect that some of Mr.
22 Smith's proposed alterations did not meet the City Code. In his request for rehearing,
23 Ms. Smith argued that this was not true and that both of his proposals to alter the
24 monument sign do meet the City Code.

25 The open meeting laws

26 33. The Association approved the rule regarding usage of the monument sign
27 at the meeting on June 10, 2020.

28 34. In his petition Mr. Smith wrote:

29 [W]hen agenda item 6 (Review and Discussion sign) was
30 addressed, the President "called for a vote to approve the new

1 rules pertaining to the monument sign. There was no
2 discussion just a call for a vote. Obviously, the board
3 members communicated with each other via email and
4 reached their decision without ever hearing my argument. I
5 informed the President that I should be allowed to discuss my
6 concerns prior to the vote and was allowed to speak, however
7 the entire BOD had their minds made up for the unfair rule
8 change.”

9 35. Mr. Smith acknowledges that there was a discussion of the monument-
10 sign issue at the June 10, 2020 meeting, but he asserts that his point is, and always
11 was, that the president called for a vote without asking for discussion first. Mr. Smith
12 then asks: how could a vote be called for if there had been no discussion of the item?

13 36. At the original hearing, Mr. Smith provided no emails in support of his
14 allegation that the board had communicated before the meeting. In his request for
15 rehearing, Mr. Smith asserts that he has an email in support of his position, but he
16 provides no information as to why he did not offer that document during the original
17 hearing. As such, it cannot be considered now.

18 37. In his request for rehearing, Mr. Smith argues that the ALJ determined that
19 his petition was limited to the June 10, 2020 meeting and that this was not the only open
20 meeting law violation he intended to raise.

21 **CONCLUSIONS OF LAW**

22 1. In his petition, Mr. Smith alleges that the Association has violated its
23 CC&Rs and ARIZ. REV. STAT. section 33-1248. Consequently, the Department of Real
24 Estate has authority over this matter. ARIZ. REV. STAT. Title 32, Ch. 20, Art. 11.

25 2. Mr. Smith bears the burden of proof to show that the alleged violations
26 occurred. The standard of proof on all issues in this matter is that of a preponderance of
27 the evidence. ARIZ. ADMIN. CODE § R2-19-119.

28 3. A preponderance of the evidence is:

29 The greater weight of the evidence, not necessarily established
30 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

1 wholly from all reasonable doubt, is still sufficient to incline a fair
2 and impartial mind to one side of the issue rather than the other.
3 BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

4 4. Substantial evidence is evidence that a reasonable mind would use to
5 reach a conclusion. *See e.g., Mealey v. Arndt*, 206 Ariz. 218, 76 P.3d 892 (App. 2003).

6 5. The parties were required to have their evidence, including proposed
7 exhibits, available on the date of the original hearing. Consequently, evidence that Mr.
8 Smith did not present at the original hearing cannot be considered in this rehearing.
9 *See* ARIZ. ADMIN. CODE § R2-19-115.

10 6. "Findings of fact shall be based exclusively on the evidence and on
11 matters officially noticed" as set out in the petition. *See* ARIZ. REV. STAT. § 41-
12 1092.07(F)(6).

13 7. An Administrative Law Judge Decision must be based on evidence that is
14 substantial, reliable and probative. *See* ARIZ. REV. STAT. § 41-1092.07(F)(1).

15 8. Mr. Smith paid the fee for a two-issue hearing and at the original hearing
16 he agreed that these issues were whether the Association violated section 7.1(c) and
17 whether the Association had violated the open meeting law on June 10, 2020. The
18 hearing and this rehearing are limited to those two issues.

19 The alleged violation of CC&R section 7.1(C)

20 9. Mr. Smith alleges that the Board's monument-sign rule is unreasonable
21 and that it violates CC&R section 6.26(a)'s prohibition on treating unit owners differently.

22 10. Mr. Smith argues that the CC&Rs must be considered as a single
23 document unless the document clearly states otherwise. Section 6.26(a) provides that
24 the use restrictions "contained in this Article 6" are applicable to all owners.
25 Consequently, section 6.26(a) cannot be read to require that rules promulgated under
26 section 7.1(c) must apply to all owners. This is confirmed by the fact that section 7.1(c)
27 on its face allows discrimination among owners.

28 11. In his request for rehearing, Mr. Smith raises the point that an
29 association's common elements are not subject to partition, citing ARIZ. REV. STAT.
30 section 33-1217. But in his petition Mr. Smith did not allege a violation of that statute

1 and there was no substantial evidence adduced to show that the monument sign has
2 been partitioned.

3 12. The Association limited the use of the monument sign to Units in B
4 because the Units in A have street frontage available for signage, whereas those in B
5 do not. This was a reasonable limitation, and Mr. Smith has not met his burden to show
6 otherwise or that the Association violated CC&R section 7.1(c).

7 The alleged open meeting law violation

8 13. At the original hearing, Mr. Smith offered no substantial evidence in
9 support of his allegation that the Board members had communicated prior to the June
10 10th meeting.

11 14. In his request for a rehearing, Mr. Smith also presents no substantial
12 evidence in support of his allegation, but rather raises a rhetorical question asking how
13 a vote could be called for without discussion if the members had not communicated
14 before the meeting. Mr. Smith did reference an email that he asserts supports his
15 argument, but this was not presented at the original hearing and cannot be considered
16 in this rehearing. See ARIZ. ADMIN. CODE § R2-19-115.

17 15. In his request for rehearing, Mr. Smith argues that the ALJ did not properly
18 state his argument. Accepting this as true does not change the fact that Mr. Smith has
19 presented no substantial evidence to show that the Board members communicated
20 before the June 10, 2020 meeting.

21 16. In his request for rehearing, Mr. Smith asserts that he intended to present
22 evidence of other open meeting law violations, but these are not properly before the
23 tribunal because Mr. Smith paid the fee for only two issues.

24 17. Mr. Smith did not prove that the Association violated ARIZ. REV. STAT.
25 section 33-1248.

26 Conclusion

27 18. In his request for rehearing, Mr. Smith asserts that the ALJ may not have
28 considered all the evidence from the first hearing because not all the evidence was
29 detailed in the Administrative Law Judge Decision. For the most part, the evidence he
30 cites was not necessary to resolve the two issues under consideration. And there is no

1 requirement that all evidence be addressed in an Administrative Law Judge Decision,
2 provided that the Decision is supported by evidence that is substantial, reliable and
3 probative. See ARIZ. REV. STAT. § 41-1092.07.

4 19. Because Mr. Smith has not proven that the Association committed the two
5 alleged violations, his petition should be dismissed.

6 **ORDER**

7 **IT IS ORDERED** that Keith D. Smith's petition is dismissed.

8 **NOTICE**

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

15 Done this day, June 3, 2021,

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

19 Transmitted to:

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