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vs. Petitioner,

ADMINISTRATIVE LAW JUDGE DECISION

ADMINISTRATIVE LAW JUDGE: Adam D. Stone

5. On or about March 30, 2021, Mountain Bridge filed a Motion to Dismiss, alleging among other items, that the petition contained more than one issue. On

1 or about April 6, 2021, the Tribunal ordered that Mr. Smith declare which issue he was
2 seeking to address or file an Amended Petition. On or about April 8, 2021, Mr. Smith filed
3 an Amended Petition essentially claiming the same issues, however, this time he
4 submitted the \$1,000.00 filing fee.

5 6. The hearing occurred on April 22, 2021 and June 2, 2021.

6 7. Mr. Smith represented himself and called Christa Smith, Amber Martin and
7 Jim Rayment as witnesses and offered 20 exhibits into evidence. Respondent did not call
8 any witnesses and offered 7 exhibits into evidence.

9 8. Mr. Smith testified that the crux of his Petition concerned his backyard
10 neighbor's installation of a flagpole and how Mountain Bridge failed to take enforcement
11 actions.¹

12 9. Mr. Smith testified that when he and his wife were searching for homes in
13 the neighborhood, they purposely sought out their particular lot due to the views from the
14 windows.

15 10. Further, Mr. Smith testified that once the flagpole was erected, he contacted
16 the neighbor, who happened to be Mountain Bridge's President (Mr. Riggs), who told him
17 that he did not consider the views from the Smith home.

18 11. Mr. Smith testified that in May 2020, he began to review the CC&R's to
19 determine how the flagpole was approved as it would have been visible from his property.
20 Mr. Smith believed that the Mountain Bridge's Architectural Review Committee (ARC) had
21 an obligation to consider the view from his property.

22 12. Mr. Smith testified further that since the end of May 2020, he had requested
23 enforcement more than ten times, and it was his belief that only one letter had been sent
24 to Mr. Riggs.

25 13. Mr. Smith testified that since the community manager was not helpful, he
26 then attempted to follow the process set out in Article 11 in the CC&R's. On September 8,
27

28 ¹ Mr. Smith was also seeking to address a violation of Article 6 of the CC&R's, whereby he was mistakenly
29 charged for attorney's fees. Mountain Bridge addressed the same and determined it was issued in error and
30 withdrew the charge. As such, the Tribunal only focused on the issues surrounding the flagpole.

2020, Mr. Smith filed a Claim with Mountain Bridge and hoped that it would participate in negotiations per Article 11.3.2.

14. Mr. Smith testified that he did not receive a response from Mountain Bridge or its attorneys until after the 30 day negotiation period. Mr. Smith testified that despite informing Mountain Bridge in writing on October 8, 2020,² and October 17, 2020,³ that he would seek formal mediation, he did not pursue the same as he believed that Mountain Bridge would not participate due to Mountain Bridge not acting in good-faith during the negotiation period.

15. With regard to A.R.S. §33-1811, Mr. Smith testified that he believed that Mountain Bridge violated the same, as Mr. Riggs failed to make the proper disclosures due to this being a board decision.

16. In sum, Mr. Smith requested a finding that Mountain Bridge violated A.R.S. §33-1811 as well as Article 11 in the CC&R's. He further requested that a civil penalty be ordered against Mountain Bridge.

17. Amber Martin testified that she had been the community manager since June 2020. She testified that she did not remember if any formal enforcement had been initiated, but that there had been a courtesy call to Mr. Riggs regarding the flagpole.

18. Ms. Martin also testified that there were no meetings between Mr. Smith and Mountain Bridge during the negotiation period.

19. Finally, Ms. Martin testified that on September 30, 2020, Mr. Riggs submitted a new application to the ARC to move the flagpole to accommodate Mr. Smith and this was approved.⁴

20. Jim Rayment testified that in May 2020 he was the chair of the ARC when it approved the flagpole. Mr. Rayment discussed the phrase "visible for neighboring property", and believed that it was to apply more for antennas and solar panels. He further testified that whether or not the flagpole was visible from the neighboring properties was not considered.

² See Exhibit 13

³ See Exhibit 14

⁴ See Exhibit F.

1 21. Christa Smith testified as to much of what Mr. Smith testified to and affirmed
2 that once the complaint was filed in September 2020, nobody met with them to negotiate a
3 resolution.

4 **CONCLUSIONS OF LAW**

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

9 2. Petitioner bears the burden of proof to establish that Respondent violated
10 CC&R § 3.1 by a preponderance of the evidence.⁵ Respondent bears the burden to
11 establish affirmative defenses by the same evidentiary standard.⁶

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

19 4. A.R.S. § 33-1811 states:

20 If any contract, decision or other action for compensation taken by or
21 on behalf of the board of directors would benefit any member of the
22 board of directors or any person who is a parent, grandparent,
23 spouse, child or sibling of a member of the board of directors or a
24 parent or spouse of any of those persons, that member of the board
25 of directors shall declare a conflict of interest for that issue. The
26 member shall declare the conflict in an open meeting of the board
27 before the board discusses or takes action on that issue and that
28 member may then vote on that issue. Any contract entered into in
29 violation of this section is void and unenforceable.

30

⁵ See A.R.S. § 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); *see also Vazzano v. Superior Court*, 74
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 5. Mr. Smith would like this Tribunal to believe that “decision” in the statute
2 does not have to involve compensation. The Tribunal respectfully disagrees. Perhaps if the
3 statute were written, “if any contact, decision, or action for compensation...”, Mr. Smith may
4 be correct. However, the word “other” would indicate that the contract or decision would
5 involve compensation. Admittedly, the best practice of a Board member would be to
6 abstain from voting on their own request, however, the statute does not require the same.
7 Therefore, the Tribunal finds that Mr. Smith has not sustained his burden in demonstrating
8 that Mountain Bridge violated A.R.S. § 33-1811.

9 6. With Mr. Smith’s second issue, the Tribunal believes it was extremely
10 lenient in how it allowed Mr. Smith to present testimony and evidence of the violations of the
11 CC&R’s. The Tribunal informed Mr. Smith during the hearing that the attorney’s fees
12 assessment issue was moot thus dismissing the Article 6 complaint. Mr. Smith then tried to
13 argue that ARC failed to consider his property rights when approving the flagpole and failed
14 to enforce, as well as failing to abide by Article 11. Further, because “Visible from
15 Neighboring Property” as mentioned in Article 1 is a definition, it is impossible for Mountain
16 Bridge to violate the same.

17 7. That then leaves a possible violation of Article 11. Article 11.3.2 states:

18 The Claimant and Respondent shall make every reasonable effort to
19 meet in person and confer for the purpose of resolving the Claim by
20 good faith negotiation. If requested in writing, accompanied by a
21 copy of the Claim Notice, the Board may appoint a representative to
22 assist the parties in negotiating a resolution of the Claim.⁹

23 The credible evidence presented demonstrated that Mountain Bridge, or its
24 attorneys, did not communicate with Mr. Smith until October 13, 2020,¹⁰ approximately 35
25 days after the claim was noticed. While this dispute occurred during the COVID-19
26 pandemic, certainly communications could have been sent to Mr. Smith informing him
27 there may be some delays in communication. However, there were none, and thus no
28 valid justification for the Board not entering into negotiations with the Smiths. Therefore,

29 ⁹ See Respondent’s Exhibit A.

30 ¹⁰ See Petitioner’s Exhibit 7.

1 the Tribunal finds that Mountain Bridge failed to negotiate in good faith and violated Article
2 11.3.2 of the CC&R's.

3 **ORDER**

4 IT IS ORDERED that Petitioners' petition is denied as to a violation of A.R.S. 33-
5 1811, and is deemed the prevailing party as to his claim of an Article 11 violation. Thus,
6 Petitioner is entitled to his filing fee of \$500.00 and Respondent must reimburse the same
7 with 30 days. Finally, the Tribunal declines to award a civil penalty in this matter.

8 **NOTICE**

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

14 Done this day, June 11, 2021.

15 /s/ Adam D. Stone
16 Administrative Law Judge

17
18 Transmitted electronically to:

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