

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Arthur Fisenko & Viktoriya Tkach-Fisenko,
4 Petitioners,

No. 21F-H2121046-REL

5 vs.

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 Bellvue Homeowners Association,
7 Respondent.

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HEARING: August 30, 2021 at 9:00 AM.

10 **APPEARANCES:** Laurence Stevens, Esq. appeared on behalf of Arthur Fisenko
11 and Viktoriya Tkach-Fisenko ("Petitioners"). Jamie Palfai, Esq. appeared on behalf of
12 Bellvue Homeowners Association ("Respondent") with Samuel Truett as a witness.

13 **ADMINISTRATIVE LAW JUDGE:** Jenna Clark.

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After review of the hearing record in this matter, the undersigned Administrative
16 Law Judge makes the following Findings of Fact and Conclusions of Law, and issues this
17 ORDER to the Commissioner of the Arizona Department of Real Estate ("Department").

18 **FINDINGS OF FACT**

19 **BACKGROUND AND PROCEDURE**

20 1. The Department is authorized by statute to receive and to decide petitions
21 for hearings from members of homeowners' associations and homeowners' associations
22 in the State of Arizona.

23 2. On or about April 23, 2021, the Department received a two-issue petition
24 from Petitioner which alleged that the Association was in violation of Arizona Revised
25 Statutes ("ARIZ. REV. STAT.") § 33-1817(B)(3) and Article VII, Section 2 of the
26 Association's its Covenants, Conditions, and Restrictions ("CC&Rs").¹ Specifically,
27 Petitioners alleged that the Association's Architectural Committee arbitrarily and
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¹ See Department's electronic file at HO21-21046_Fisenko_Petition.pdf; see also Petitioners' July 30, 2021,
30 NOTICE OF ISSUE FOR HEARING which amended this issue(s) before the Tribunal from four (4) to two (2).

1 capriciously rejected Petitioner's landscaping modification request(s) to (a) move and
2 extend a block wall, (b) install pavers, and (c) install artificial grass.²

3 3. On April 23, 2021, Petitioner tendered a \$500.00 payment for the petition
4 fee in this matter to the Department.³

5 4. On April 26, 2021, the Department provided Respondent with notice of
6 Petitioner's petition, and advised that a response was due no later than May 21, 2021.⁴

7 5. On May 19, 2021, the Department received Respondent's ANSWER whereby
8 it denied all of the complaint items in the underlying petition.⁵ On May 28, 2021, the
9 Department received a SUPPLEMENTAL ANSWER from Respondent which provided further
10 clarifications and context for its denials.⁶

11 6. On May 24, 2021, the Department referred this matter to the Office of
12 Administrative Hearings ("OAH"), an independent state agency, for an evidentiary hearing
13 on July 21, 2021.⁷ Per the NOTICE OF HEARING the issue to be determined is as follows:

14 **Whether the Association violated ARIZ. REV. STAT." § 33-1817(B)(3) and/or**
15 **CC&Rs Article VII, Section 2.**

16 7. On or about July 30, 2021, Petitioners filed notice to amend their issues as
17 follows:

18 "[Respondent] will be litigating the issue of Respondent's denial of their
19 Architectural Request for approval of their plan to move their garage-side yard wall
20 eight feet (8') forward on their property. The new wall would be made of the same
21 materials, and have the same appearance, as the existing wall, except that the
22 existing single-wide gate will be replaced by the double-wide gate previously
23 approved by Respondent. The issue regarding Respondent's denial of Petitioner's
24 Architectural Request for approval of their plan to install pavers and artificial grass
25 in their front yard became moot when Respondent reversed its denial on July 15,
26 2021."

26 ² *Id.*

27 ³ See Department's electronic file at HO21-21046_Payment.pdf.

28 ⁴ See Department's electronic file at HO21-21046_Notice_Petition.pdf.

29 ⁵ See Department's electronic file at HO20-21046_Response_Petition.pdf.

30 ⁶ See Department's electronic file at HO20-21046_Response_Petition_kdvlaw.pdf.

⁷ On July 21, 2021, the above-captioned matter was continued and reset for August 30, 2021, whereby it was heard.

THE PARTIES AND GOVERNING DOCUMENTS

8. Respondent is a homeowners' association whose members own properties in a residential real estate development located in Phoenix, Arizona 85023. Membership for the Association is compromised of the Bellvue subdivision.

9. Petitioner is a Bellvue subdivision property owner and a Member of the Association.

10. The Association is governed by its CC&Rs and overseen by a Board of Directors ("the Board"). The CC&Rs empower the Association to control certain aspects of property use within the development. When a party buys a residential unit in the development, the party receives a copy of the CC&Rs and agrees to be bound by their terms. Thus, the CC&Rs form an enforceable contract between the Association and each property owner. The Association's bylaws the structure of day-to-day governance and contain information on voting processes, quorum requirements, meeting provisions, and other operating guidelines.

11. The Association is also regulated by Title 33, Chapter 16, Article 1 of the ARIZ. REV. STAT.

12. CC&Rs Article VII, Section 2 – Review by Committee (Non-Developer Improvements), states, in pertinent parts, that "The Committee shall have the right to refuse to approve any Alteration which is not suitable or desirable in their opinion for aesthetic or other reasons, and they shall have the right to take into consideration ... (iv) the harmony thereof with the surroundings (including color and quality of materials and workmanship).

HEARING EVIDENCE

13. Arthur Fisenko testified on behalf of Petitioners and submitted 9 exhibits⁸ into the record. Respondent called no witnesses but did submit 1 exhibit⁹ into the record. The Department's electronic file, including the NOTICE OF HEARING, were also admitted into the record. The substantive facts are as follows:

⁸ See Petitioner Exhibits 1-11, and 16.

⁹ See Respondent Exhibit 4.

- 1 a. On February 08, 2021, Petitioners submitted an Architectural Request to the
2 Association's Architectural Review Committee ("ARC").¹⁰ The request
3 noted, in pertinent parts, that the project was the installation of "a wall with 8'
4 gage on the north side of the house." Dimensions were listed as "11'x37'
5 front south & 22'x25' front north." [sic] The materials to be used was identified
6 as "concrete blocks," with the color to be used identified as "wall (match
7 existing wall)." Attached to the form was as photograph of Petitioner's home
8 with handwritten drawings and notes.
- 9 b. On February 09, 2021, the ARC issued a letter to Petitioners,
10 acknowledging receipt of their request(s).¹¹
- 11 c. On February 17, 2021, the ARC issued a letter to Petitioners advising of its
12 disapproval of their request(s).¹² In an attached memorandum dated
13 February 15, 2021, the ARC provided the following reasons for the basis of
14 its denial: (i) the length of the wall was not defined in the request and the
15 ARC had concerns about the impact to Petitioners' neighbor to the north,
16 and (ii) the 8ft gate would be approved on the west end of the existing wall,
17 but not in the location identified in the request.¹³
- 18 d. On March 18, 2021, Petitioners emailed the head of the ARC to plead their
19 case and ask for a meeting with all ARC members at their property to
20 discuss their request.¹⁴ On March 23, 2021, Petitioners received a response
21 that instructed them to submit a new Architectural Request Form that
22 included (i) a complete and signed form, (ii) a plot plan, (iii) elevation plans,
23 and (iv) specifications.¹⁵

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27 ¹⁰ See Petitioners Exhibit 5.

28 ¹¹ See Petitioners Exhibit 6.

29 ¹² See Petitioners Exhibit 7.

30 ¹³ See Petitioners Exhibit 8.

¹⁴ See Petitioners Exhibit 9.

¹⁵ *Id.*

- 1 e. Petitioners did not provide the ARC with any additional information or
2 specifications regarding their request. Instead, on April 01, 2021, counsel
3 for Petitioners issued a demand for satisfaction letter to the Association.¹⁶
4 f. On April 22, 2021, counsel for the Association issued a letter to Petitioners
5 which asked for Petitioners submit their Architectural Request Form “in
6 compliance with the Declaration and/or the Rules and Regulations¹⁷ for
7 review and/or consideration.” The letter closed by noting that failure for
8 Petitioners to comply would result in disapproval of their request(s).¹⁸
9 g. Because no supplemental information was received by or on behalf of
10 Petitioners, their Architectural Request was denied.
11 h. Petitioners filed their petition with the Department as a result.

12 14. In closing, Respondent argued that Petitioners’ Architectural Request Form
13 was deficient as incomplete because pertinent and relevant information was missing,
14 which meant that the ARC was unable to approve it. Respondent opined that Petitioners
15 could have avoided the entire administrative hearing process had they provided the
16 supplemental information as directed so that the ARC could approve their request.

17 15. In closing, Petitioners argued that because Respondent approved the
18 paver/artificial grass portion of its request without supplemental information, the
19 Association could have and should have approved the wall portion of its request as well.
20 Petitioners argued that their Architectural Request Form had been filled out without the
21 assistance of counsel, to the best of their abilities, and any omissions or ambiguities were
22 excusable errors.

23 **CONCLUSIONS OF LAW**

24 1. This matter lies within the Department’s jurisdiction pursuant to ARIZ. REV.
25 STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a
26 planned community association. The owner or association may petition the department
27 for a hearing concerning violations of community documents or violations of the statutes

28 ¹⁶ See Petitioners Exhibit 10.

29 ¹⁷ See Respondent Exhibit 4

30 ¹⁸ See Petitioners Exhibit 10.

1 that regulate planned communities as long as the petitioner has filed a petition with the
2 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

3 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
4 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested
5 case at bar. OAH has the authority to interpret the contract between the parties.¹⁹

6 3. In this proceeding, Petitioners bear the burden of proving by a
7 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1817(B)
8 (3) and/or Article VII, Section 2 of the CC&Rs.²⁰

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

16 5. ARIZ. REV. STAT. § 33-1817(B)(3) states, specifically regarding Declaration
17 amendment; design, architectural committees, that "Notwithstanding any provision in the
18 community documents, approval of a construction project's architectural designs, plans
19 and amendments shall not unreasonably be withheld."

20 6. The issues in this matter is whether the Association improperly denied
21 Petitioners' landscaping request. Specifically, whether the Association was arbitrary and
22 capricious in its denial of Petitioners' request to move their garage-side yard wall eight (8)
23 feet forward on their property, using the same materials as the existing wall so that it bears
24 the same appearance as exiting wall, except that the existing single-wide gate will be a
25 double-wide gate as previously approved by Respondent.

26 7. Here, the material facts are clear.

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28 ¹⁹ See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

29 ²⁰ See Arizona Administrative Code ("ARIZ. ADMIN. CODE") R2-19-119.

30 ²¹ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

²² BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

1 8. Regarding the wall portion of the Architectural Request at issue, Petitioners
2 have not established by a preponderance of the evidence that the ARC acted outside of its
3 authority or jurisdiction by refusing to grant Petitioners' request(s) in violation of Article VII,
4 Section 2, of the CC&Rs. Additionally, there is nothing in the record to support a
5 determination that Respondent violated ARIZ. REV. STAT. § 33-1817(B)(3) by
6 "unreasonably" refusing to grant Petitioners' request(s). The credible and relevant
7 evidence of record establishes that Petitioners' did not provide sufficient and/or requisite
8 information necessary for the ARC to make a reasonably objective determination. The
9 record also reflects that Petitioners did not attempt to cure their application by providing
10 the ARC with the supplemental information it requested. Not only were Petitioners
11 permitted to provide the ARC with additional information to support their request(s), they
12 were also specifically told what information to provide. Given the totality of the
13 circumstances, Respondent's refusal to grant Petitioners' Architectural Request was
14 neither arbitrary nor capricious.

15 9. Because the record does not establish violation(s) of ARIZ. REV. STAT. § 33-
16 1817(B)(3) or CC&Rs Article VII, Section 2, by a preponderance of the evidence, the
17 undersigned Administrative Law Judge must conclude that Petitioners failed to sustain
18 their burden of proof in this matter. Therefore, their petition must be denied.

19 **ORDER**

20 Based on the foregoing,

21 **IT IS ORDERED** that Petitioners' petition be denied.

22 *In the event of certification of the Administrative Law Judge Decision by the*
23 *Director of the Office of Administrative Hearings, the effective date of the Order will be five*
24 *days from the date of that certification.*

25 **NOTICE**

26 **Pursuant to ARIZ. REV. STAT. §32-2199.02(B), this ORDER is binding on the**
27 **parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. § 32-2199.04.**
28 **Pursuant to ARIZ. REV. STAT. § 41-1092.09, a request for rehearing in this matter**
29 **must be filed with the Commissioner of the Arizona Department of Real Estate**
30 **within 30 days of the service of this ORDER upon the parties.**

1 Done this day, September 20, 2021.

2 OFFICE OF ADMINISTRATIVE HEARINGS

3
4 /s/ Jenna Clark
5 Administrative Law Judge
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7 Transmitted electronically to:

8 Judy Lowe, Commissioner
9 Arizona Department of Real Estate
10 DGardner@azre.gov

11 Bellvue Homeowners Association, Respondent
12 Jamie B. Palfai, Esq.
13 O'Hagan Meyer LLC, Counsel for Respondent
14 JPalfai@ohaganmeyer.com

15 Arthur Fisenko & Viktoriya Tkach-Fisenko, Petitioners
16 c/o Laurence B. Stevens, Esq.
17 Stevens & Van Cott, PLLC, Counsel for Petitioners
18 lbs@stevensvancott.com
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