

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Rodney & Patricia Kirby,
4 Petitioners,

No. 21F-H2121049-REL

5 vs.

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 Dove Cove Estates Homeowners
7 Association,
8 Respondent.

9 **HEARING:** September 22, 2021 at 1:00 PM.

10 **APPEARANCES:** Rodney and Patricia Kirby ("Petitioners") appeared on their own
11 behalf. Lydia Peirce Linsmeier, Esq., and Kaylee Ivy, Esq., appeared on behalf of Dove
12 Cove Estates Homeowners Associations ("Respondent" and "Association") with Regis
13 Salazar as a witness.

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

15
16 After review of the hearing record in this matter, the undersigned Administrative
17 Law Judge makes the following Findings of Fact and Conclusions of Law, and issues this
18 ORDER to the Commissioner of the Arizona Department of Real Estate ("Department").

19 **FINDINGS OF FACT**

20 **BACKGROUND AND PROCEDURE**

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

24 2. On or about April 30, 2021, Petitioners filed a single-issue petition with the
25 Department which alleged that the Association violated Covenants, Conditions, and
26 Restrictions ("CC&Rs"), Article IV sections 4.1, 4.1.1, 4.1.2, and 4.1.3 by refusing to
27 remove two (2) sissoo trees located on community property, just behind Petitioners'

1 residence.¹ Petitioners did not indicate on their petition what remedy, if any, they sought
2 from the Department.

3 3. On May 25, 2021, Respondent returned its ANSWER to the Department
4 whereby it denied all complaint items in the petition.²

5 4. Per the NOTICE OF HEARING, the Department referred this matter to the
6 Office of Administrative Hearings ("OAH"), an independent state agency, for an
7 evidentiary hearing on July 28, 2021³, regarding the following issue:

8 **Whether Dove Cove Estates Homeowners Association (Respondent)**
9 **are in violation of CC&Rs Article IV, Sections 4.1, 4.1.1, 4.1.2, and 4.1.3**
10 **for failing to remove two (2) trees on community property, at the rear of**
11 **Petitioners' retaining wall, which have caused damage to Petitioners'**
12 **pool and patio slab.**⁴

13 THE PARTIES AND GOVERNING DOCUMENTS

14 5. Respondent is a homeowners' association whose members own properties
15 in a residential real estate development located in Buckeye, Arizona. Membership for the
16 Association is compromised of the Dove Cove Estates subdivision.

17 6. Petitioners are Dove Cove Estates subdivision property owners and
18 members of the Association.

19 7. The Association is governed by its CC&Rs and overseen by a Board of
20 Directors ("the Board"). The CC&Rs empower the Association to control certain aspects of
21 property use within the development. When a party buys a residential unit in the
22 development, the party receives a copy of the CC&Rs and agrees to be bound by their
23 terms. Thus, the CC&Rs form an enforceable contract between the Association and each
24 property owner.

25 8. On or about September 10, 2003, the Association's CC&Rs were recorded
26 with the Maricopa County Recorder's Office.

27 ¹ See Department's electronic file at HO21-21049_Notice_Petition.pdf.

28 ² See Department's electronic file at HO21-21049_Response_Petition.pdf.

29 ³ The matter was continued on July 23, 2021, and reset for September 22, 2021, at 1:00 p.m. whereby it was
30 heard.

⁴ See Department's electronic file at HO21-21049_Notice_Hearing.pdf.

9. Dove Cove Estates CC&Rs Article IV, Maintenance, provides, in pertinent part, as follows:

4.1 Association's General Responsibilities. The Association shall maintain and keep in good condition and repair the Common Area (and certain other areas, as more expressly provided in this Section 4.1), and the costs of such maintenance shall be Common Expense of the Association (subject to any insurance then in effect.) This maintenance shall include, but not be limited to:

4.1.1 maintenance, repair and replacement of all landscaping, structures and improvements (including, without limitation, any and all recreational facilities and appurtenant improvements) situated upon the Common Area;

4.1.2 maintenance, repair and replacement of all landscaping in or upon public rights-of-way immediately adjacent to the exterior boundaries of the Property (or between such public rights-of-way and perimeter or boundary walls on or surrounding the exterior boundaries of the Property), and of any perimeter or boundary walls on or surrounding the exterior boundaries of the Property;

4.1.3 maintenance, repair and replacement of all landscaping and signs within areas designated on one or more subdivision plats or other instruments Recorded by, or bearing the written approval of, Declarant (or, after termination of the Class B membership, the Association) with respect to all or portions of the Property as "landscape easements," "landscape and wall easements" or "landscape and sign easements" (or similar designations) to be maintained by the Association.⁵

HEARING EVIDENCE

10. Petitioners testified on their own behalf and submitted Exhibits 4, 5, and 7. Respondent presented the testimony of Regis Salazar and submitted Exhibits 1 through 6. The Department's electronic file was also admitted into the record. The substantive evidence of record is as follows:

a. Petitioners have owned residential property in Dove Cove Estates for seventeen years. Petitioners, who are both advanced in age and retired, use their pool almost daily for exercise. Petitioners maintain their pool themselves, as well as their backyard landscaping.

⁵ See Department's electronic file at HO21-21049 Notice Petition.pdf.

- 1 b. The Association has a landscaping contract with ProQual Landscaping
2 ("ProQual"). ProQual provides landscaping services for all Common Areas
3 within Dove Cove Estates, including the Common Area behind Petitioners'
4 property.
- 5 i. The Association only removes trees in the subdivision, or pays for
6 tree removal, upon the written recommendation of ProQual.
- 7 c. Approximately five feet away from Petitioners' backyard's retaining wall are
8 two sissoo trees, which are growing from a hill that slopes downward into
9 the remainder of the Association's Common Area. The trees were planted
10 as saplings when Petitioners first purchased their home. The trees did not
11 become a nuisance to Petitioners until about ten years later. The trees are
12 currently stand approximately 35 feet high.
- 13 d. In or around 2017, Petitioners began complaining to Association's property
14 management company about problems they were experiencing with the
15 sissoo trees. Specifically, Petitioners complained that debris from the trees,
16 including leaves and small dead animals, fell into their pool and clogged the
17 pump which had to be replaced several times. Additionally, Petitioners
18 complained that roots from the trees caused complications with their
19 retaining wall and back patio.
- 20 i. These issues persisted through the date of the hearing.
- 21 ii. Because COVID-19 related chlorine supply-chain issues drove up
22 the cost of the pool maintenance product, Petitioners also incurred
23 greater costs cleaning the sissoo related debris from their pool since
24 early 2020 despite the fact that their pool is covered.
- 25 e. In April of 2021, ProQual, accompanied by the Association's President,
26 inspected the two trees at issue behind Petitioners' property and determined
27 that there was not a need to cut the trees down. The Association and
28 ProQual left the trees on the landscaping schedule for regular trimming.
- 29 f. On an unknown date, three sissoo trees were removed from the Common
30 Area directly behind one of Petitioners' neighbor's residences. It is unknown

whether the Association, neighbor, or insurance bore the cost(s) related to the trees removal.

11. In closing, Respondent argued that its duty to maintain foliage in the Common Areas, including behind Petitioners' property, had been fulfilled based on ProQual's maintenance schedule. Respondent further argued that since it reasonably relied on ProQual's expert advice as an arborist, and ProQual had not advised to remove the sissoo trees behind Petitioners' property, that Respondent was not in violation of Article IV of the CC&Rs.

12. In closing, Petitioners argued that their health and welfare were at risk because of the debris falling onto their property from the sissoo trees in Respondent's Common Area. Petitioners' opined that Respondent could not have taken that into consideration because no evidence suggested that Respondent ever looked at their backyard or the sissoo trees from that vantage point. Petitioners denied ever being given the opportunity to pay for the removal of the trees, and argued that the only correspondence they had ever received regarding the issue was from Respondent's counsel threatening them not to touch the trees at all. Petitioners further opined that it was unfair that they were required to pay dues, and did, only to have their request not given the time and consideration it deserved.

CONCLUSIONS OF LAW

1. This matter lies within the Department's jurisdiction pursuant to ARIZ. REV. STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a planned community association. The owner or association may petition the department for a hearing concerning violations of community documents or violations of the statutes that regulate planned communities as long as the petitioner has filed a petition with the department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D), 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested case at bar. OAH has the authority to interpret the contract between the parties.⁶

⁶ See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

1 **IT IS ORDERED** that Petitioners' petition is granted.¹¹

2 **IT IS FURTHER ORDERED** that Respondent pay Petitioners their filing fee of
3 \$500.00, to be paid directly to Petitioners within thirty (30) days of this Order.

4 **NOTICE**

5 **This ADMINISTRATIVE LAW JUDGE ORDER, having been issued as a result**
6 **of a rehearing, is binding on the parties. ARIZ. REV. STAT. § 32-**
7 **2199.02(B). A party wishing to appeal this order must seek judicial**
8 **review as prescribed by ARIZ. REV. STAT. § 41-1092.08(H) and title 12,**
9 **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**
11 **was served upon the parties. ARIZ. REV. STAT. § 12-904(A).**

12 Done this day, October 12, 2021.

13
14 **Office of Administrative Hearings**

15
16 /s/ Jenna Clark
17 Administrative Law Judge

18
19 Transmitted electronically to:

20 Judy Lowe, Commissioner
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28 ¹¹ Because this Tribunal has no statutory authority to grant Petitioners' declaratory or injunctive relief, this
29 decision is expressly issued to "Order Respondent to abide by the section of the planned community
30 specified." No civil penalty shall be imposed as a result of this ORDER.