

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Aaron J. Gragg,

4 Petitioner,

5 v.

6
7 Anthem Parkside at Merrill Ranch
Community Association, Inc.,

8 Respondent
9

No. 21F-H2121042-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

10 **HEARING:** June 29, 2021, with further hearing on October 19, 2021

11 **APPEARANCES:** Petitioner Aaron J. Gragg appeared on his own behalf. Curtis Ekmark,
12 Esq. represented Respondent Anthem Parkside at Merrill Ranch Community Association,
13 Inc. Michelle Haney appeared as a witness for Respondent.

14 **ADMINISTRATIVE LAW JUDGE:** Sondra J. Vanella
15

FINDINGS OF FACT

16 1. Anthem Parkside at Merrill Ranch Community Association, Inc.
17 (“Respondent”) is a planned community located in Anthem, Arizona.

18 2. On or about March 30, 2021, Aaron J. Gragg (“Petitioner”) filed a Petition
19 with the Arizona Department of Real Estate (“Department”), alleging four violations by
20 Respondent of the provisions of A.R.S. § 33-1803, A.R.S. § 33-1805, and the Covenants,
21 Conditions & Restrictions (“CC&Rs”) sections 2.4(a) and 12.4(a). Petitioner specifically
22 alleged, in relevant part, as follows:

23 ISSUE 1: Respondent failed to comply with Article 12.4(a) Alternate Dispute
24 Resolution procedures of the CC&R’s when [R]espondent refused to
25 participate in ADR. . .

26 ISSUE 2: A.R.S. § 33-1803 VIOLATION. Respondent has been violating
27 A.R.S. § 33-1803 by fraudulently assessing violations that have not actually
28 been observed. . .
29
30

1 ISSUE 3: A.R.S. § 33-1805 VIOLATION Respondent failed to comply with
2 the applicable standard relating to the reasonable productions of
3 documents as required by law. . .

4 ISSUE 4: Violation of CC&R 2.4 (a) SIMILAR TREATMENT Respondent
5 has been selectively enforcing informal conditions generated by the
6 [R]espondent, relating to issues not addressed in the declarations, and that
7 are inconsistent with the declaration's covenants and restrictions . . .

8 3. On or about April 2, 2021, the Department issued a Notice to Respondent
9 regarding the Petition.

10 4. On or about April 27, 2021, Respondent filed an Answer to the Petition
11 denying all allegations.

12 5. On or about May 11, 2021, the Department issued a Notice of Hearing to the
13 parties notifying them that a hearing on the Petition would be conducted by the Office of
14 Administrative Hearings.

15 6. On June 29, 2021 and October 19, 2021, a hearing was held on the Petition
16 and the parties presented evidence and argument regarding the violations alleged in the
17 Petition. Petitioner testified on his own behalf. Michelle Haney, Community Manager,
18 testified on behalf of Respondent. Respondent's Exhibits 1-23 were admitted into the
19 record.

20 7. Petitioner purchased his home in December 2017. Pursuant to the CC&Rs,
21 Petitioner was required to complete his rear yard landscaping within 120 days of close of
22 escrow. Petitioner was further required to submit plans for such landscaping for approval
23 by Respondent. Petitioner failed to submit plans for his landscaping within 180 days of
24 close of escrow, much less install the landscaping. Respondent issued two notices to
25 Petitioner prior to Petitioner first submitting plans on August 1, 2018. Those plans were
26 approved, however, Petitioner did not complete the landscaping.

27 8. Respondent issued a courtesy notice to Petitioner on November 1, 2018.
28 Petitioner submitted amended plans to Respondent in February 2019, which were
29 approved. In December 2019, Petitioner once again submitted amended plans which
30 were approved. Respondent, at that point, requested photographic evidence from

Petitioner that Petitioner was in compliance with the Design Guidelines. Thereafter, Petitioner stopped responding to Respondent.

9. Respondent sent approximately 14 notices to Petitioner regarding the lack of completion of the landscaping. Notwithstanding Petitioner's noncompliance with the community's landscape requirements, Respondent did not file suit against Petitioner. Petitioner appealed to Respondent regarding the violation notices and to reinstate Petitioner's community membership privileges.

10. On March 25, 2021, during a Board of Director's Executive Session Meeting, Petitioner presented his appeal to the Board. The Board explained to Petitioner that Petitioner's landscape violations were observed during a routine inspection by the Community Standards Administrator, and that "the easiest way to have this violation closed would be to provide proof that the backyard has been completed and the Guidelines met by submitting a photo." See Respondent's Exhibit 3. Petitioner told the Board that his backyard landscaping had been completed for eight months. *Id.* Petitioner alleged that he was not being treated similarly to all residents because no other resident has had to prove compliance with a photograph. *Id.* The Board indicated that other homeowners may not have had to submit photographs because their backyard landscaping was timely completed. *Id.*

11. After the meeting, Petitioner filed his Petition with the Department.

12. Petitioner alleged that on February 2, 2021, he filed an ADR request with Respondent and that Respondent failed to respond to his request within two weeks and that Respondent advised that he did not qualify for ADR procedures.

13. Respondent never filed suit against Petitioner or requested arbitration to enforce the Design Guidelines or for injunctive relief to compel Petitioner to install his rear yard landscaping. At the March 25, 2021 meeting between the parties, Petitioner stated that his rear yard landscaping was complete, however, when Respondent observed Petitioner's rear yard on April 16, 2021, and again after the initial hearing setting, it was still not complete. See Respondent's Exhibits 17, 20 and 23. At hearing, Petitioner blamed the lack of completion of his rear yard landscaping on his work schedule and his dogs and children, stating that they destroyed the irrigation and grass.

14. Respondent submitted evidence that other homeowners have been required to submit verification of landscape completion in order to close their files, as Respondent would not know whether landscaping has been installed until Respondent performs its routine checks. Respondent provided emails and photographs from other homeowners that were submitted to Respondent in order to verify compliance with the landscape Design Guidelines. Those emails and attached photos span dates from 2010 to 2020. See Respondent's Exhibit 4. Respondent did not request that Petitioner submit photos showing proof of compliance until December 2019, two years after Petitioner closed escrow on his home.

15. Regarding Petitioner's request that Respondent provide documents establishing design review requirements and Respondent's authority for enforcement of the Design Guidelines, Petitioner testified that Respondent ignored his request. Petitioner requested the following documents:

- i) Evidence by the HOA at each interval of allegation supporting the HOA's justification for the hundreds of dollars in repeated fines.
- ii) The location of explicit CC&R's authorizing the HOA to demand that the homeowner report to the HOA.
- iii) The explicit CC&R's location requiring the home owner to provide visual documentation of his property, family, or whatever other inappropriate request being made by the HOA.
- iv) The explicit location in the CC&R's authorizing the HOA to demand/require verification of completion of anything.

See Petitioner's Exhibits 1, 2 and 3.

16. Petitioner's requests for documentation did not cite to a specific document or record. Petitioner's alleged requests for documents were actually questions posed to Respondent. Further, Petitioner has ready access to the CC&Rs. Petitioner's request was not for documents or records, but rather for answers to legal questions.

CONCLUSIONS OF LAW

1. The Department has jurisdiction to hear disputes between a property owner and a planned community association. A.R.S. § 32-2199 *et seq.*

1 2. In this proceeding, Petitioner bears the burden of proving by a
2 preponderance of the evidence that Respondent violated A.R.S. § 33-1803, A.R.S. § 33-
3 1805, and CC&Rs sections 2.4(a) and 12.4(a). A.A.C. R2-19-119.

4 3. A preponderance of the evidence is “[e]vidence which is of greater weight or
5 more convincing than the evidence which is offered in opposition to it; that is, evidence which
6 as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW
7 DICTIONARY 1182 (6th ed. 1990).

8 4. A.R.S. § 33-1803 provides, in relevant part, as follows:

9 D. Within ten business days after receipt of the certified mail containing the
10 response from the member, the association shall respond to the member
11 with a written explanation regarding the notice that shall provide at least the
12 following information unless previously provided in the notice of violation:

13 . . .

14 2. The date of the violation or the date the violation was observed.

15 3. The first and last name of the person or persons who observed the
16 violation.

17 5. Petitioner failed to establish his allegation that Respondent assessed
18 violations that have not been observed. The credible evidence of record established that
19 Petitioner’s landscape violations were observed during routine inspections by the
20 Community Standards Administrator. Therefore, Petitioner failed to establish by a
21 preponderance of the evidence that Respondent violated A.R.S. § 33-1803.

22 6. A.R.S. § 33-1805 provides as follows:

23 A. Except as provided in subsection B of this section, all financial and other
24 records of the association shall be made reasonably available for
25 examination by any member or any person designated by the member in
26 writing as the member’s representative. The association shall not charge a
27 member or any person designated by the member in writing for making
28 material available for review. The association shall have ten business days
29 to fulfill a request for examination. On request for purchase of copies of
30 records by any member or any person designated by the member in writing
as the member’s representative, the association shall have ten business
days to provide copies of the requested records. An association may
charge a fee for making copies of not more than fifteen cents per page.

1 B. Books and records kept by or on behalf of the association and the board
2 may be withheld from disclosure to the extent that the portion withheld
3 relates to any of the following:

4 1. Privileged communication between an attorney for the association and
5 the association.

6 2. Pending litigation.

7 3. Meeting minutes or other records of a session of a board meeting that is
8 not required to be open to all members pursuant to section 33-1804.

9 4. Personal, health or financial records of an individual member of the
10 association, an individual employee of the association or an individual
11 employee of a contractor for the association, including records of the
12 association directly related to the personal, health or financial information
13 about an individual member of the association, an individual employee of
14 the association or an individual employee of a contractor for the association.

15 5. Records relating to the job performance of, compensation of, health
16 records of or specific complaints against an individual employee of the
17 association or an individual employee of a contractor of the association who
18 works under the direction of the association.

19 C. The association shall not be required to disclose financial and other
20 records of the association if disclosure would violate any state or federal
21 law.

22 7. Petitioner failed to establish that Respondent did not comply with
23 Petitioner's request for documents, as the credible evidence of record established that
24 Petitioner's request was not for documents, but rather, Petitioner was posing questions to
25 Respondent about the CC&Rs, of which Petitioner has possession. Therefore, Petitioner
26 failed to establish by a preponderance of the evidence that Respondent violated A.R.S. §
27 33-1805.

28 8. CC&R Section 12.4 governs Alternative Dispute Resolution and sets forth
29 the following:

30 (a) All Disputes shall be subject to arbitration in accordance with
this Section 12.4. This Section will apply to any Disputes regardless of
whether it involves theories based upon contract, tort, statute or other legal
theory, but shall exclude the following Disputes, which shall not be subject
to resolution pursuant to the provisions of Article II:

(i) any proceedings initiated by the Association or the
Council to collect unpaid Assessments;

(ii) any proceedings initiated by the Association or
Declarant to enforce the use and occupancy

1 restrictions in the Anthem Parkside Governing
2 Documents, the architectural, design and landscape
3 controls and the obligations regarding maintenance of
4 Lots set forth in this Declaration;

5 (iii) any proceedings initiated by the Association or
6 Declarant to enforce the Design Guidelines or any
7 Association rules;

8 (iv) any proceedings initiated by the Association to enforce
9 a contract entered into by the Association with vendors
10 providing services or materials to the Association;

11 (v) any suit by a Declarant or the Association to obtain a
12 temporary restraining order or injunction (or equivalent
13 emergency equitable relief) and such other ancillary
14 relief as the court may deem necessary in order to
15 maintain the status quo and preserve Declarant's or
16 the Association's ability to act under and enforce rules
17 under any applicable covenants; or

18 (vi) any suit which otherwise would be barred by any
19 applicable statute of limitations.

20 (b) Any person wishing to pursue resolution of, or a
21 remedy for, a Dispute (the "Claimant") must give written notice of the
22 Dispute to the person or persons believed to be responsible for the
23 circumstances causing the Dispute, or believed to be responsible for
24 remedying those circumstances (in either case, the "Respondent"). The
25 notice must set forth in reasonable detail the circumstances alleged to give
26 rise to the Dispute and the remedy or other action sought by the Claimant.

27 (c) Following delivery of such a notice, the Respondent
28 shall be afforded a reasonable opportunity to meet with or otherwise
29 communicate with the Claimant for a discussion of the circumstances giving
30 rise to the Dispute and possible resolution of the Dispute and an
examination of any physical conditions or written instruments giving rise to
the Dispute.

(d) If the Dispute is not resolved to the satisfaction of the
Claimant and the Respondent by negotiation within 30 days following
delivery of the original notice by the Claimant and the Claimant wishes to
pursue the Dispute further, the Claimant shall have 180 days following
delivery of the original notice by the Claimant to submit the Dispute to final
and binding arbitration in accordance with the Commercial Arbitration Rules
of the American Arbitration Association, as modified or as otherwise
provided in this Section 12.4. If the Claimant does not submit the Dispute to
arbitration within 180 days delivery of the original notice by the Claimant, the
Claimant shall be deemed to have waived any claims related to the Dispute,
and all other parties to the Dispute shall be released and discharged from
any and all liability to the Claimant on account of the Dispute . . .

1 9. In this case, Respondent did not file suit against Petitioner to enforce the
2 landscape Design Guidelines nor did it seek injunctive relief. Petitioner was afforded the
3 opportunity to appeal to Board and did so. Petitioner made his presentation to the Board
4 regarding his appeal on March 25, 2021. Thereafter, on March 30, 2021, Petitioner filed
5 the instant Petition with the Department. Petitioner did not submit the dispute to final and
6 binding arbitration in accordance with the Commercial Arbitration Rules of the American
7 Arbitration Association, choosing instead to file a Petition with the Department. Thus,
8 Petitioner failed to establish by a preponderance of the evidence that Respondent violated
9 CC&R Section 12.4(a) as alleged.

10 10. CC&R Section 2.4 (a) states that “[s]imilarly situated Owners shall be
11 treated similarly; provided, the Use restrictions and rules may vary by Benefited Area.” In
12 this case, the credible evidence of record established that since at least 2010,
13 Respondent has requested of homeowners that have not been in compliance with the
14 Landscape Design Guidelines, to submit photographic evidence when in compliance, in
15 order prove such compliance. See Respondent’s Exhibit 4. In this case, Petitioner has
16 not been in compliance and Respondent requested that Petitioner submit a photograph to
17 Respondent once in compliance, in order to prove such compliance. This request is no
18 different than those requests made by Respondent in the past of similarly situated
19 homeowners, i.e., those not in compliance. Petitioner failed to establish by a
20 preponderance of the evidence that Respondent violated CC&R Section 2.4 (a).

21 **ORDER**

22 **IT IS ORDERED** that Petitioner’s Petition is denied.

24 **NOTICE**

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

1 Done this day, November 1, 2021.

2 /s/ Sondra J. Vanella
3 Administrative Law Judge
4

5 Transmitted by either mail, e-mail, or facsimile November 1, 2021 to:

6 Louis Dettorre, Commissioner
7 Arizona Department of Real Estate
8 100 N. 15th Avenue, Suite 201
9 Phoenix, Arizona 85007

Attn:

10 AHansen@azre.gov
11 djones@azre.gov
12 DGardner@azre.gov

13 CARPENTER HAZLEWOOD DELGADO & WOOD, PLC
14 1400 E Southern Ave, Suite 400
15 Tempe, AZ 85282-5691
16 curtis@carpenterhazlewood.com

17 Aaron J Gragg
18 6914 W Millerton Ct.
19 Florence, AZ 85132
20 firelife1980@gmail.com
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