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No. 21F-H2121038-REL

ADMINISTRATIVE LAW JUDGE DECISION

Desert Oasis of Surprise Master
Association,
Respondent.

HEARING: November 2, 2021

APPEARANCES: Richard J. Jones on his own behalf; Troy Stratman, Esq. for Respondent

ADMINISTRATIVE LAW JUDGE: Thomas Shedden

FINDINGS OF FACT

1. On March 22, 2021, the Arizona Department of Real Estate issued a Notice of Hearing setting the above-captioned matter for hearing on April 26, 2021 at the Office of Administrative Hearings in Phoenix, Arizona. The parties agreed to continue the matter and the hearing was conducted on November 2, 2021.

2. Petitioner Richard J. Jones appeared and testified on his own behalf; Respondent Desert Oasis of Surprise Master Association was represented by counsel and presented the testimony of Paul Favale, the Association's property manager.

3. On May 11, 2020, Mr. Jones added to his property a concrete driveway running from the street to a gate at the side of his house. The parties refer to this type of driveway as a driveway extension.

4. Mr. Jones's driveway extension is not set back twelve inches from either the property line or the common block wall that forms part of that property line.

5. The Design Guidelines in effect when Mr. Jones installed his driveway extension required such driveways to be set back twelve inches from the block wall but were silent as to the property line. The common wall is part of the property line.

6. The Design Guidelines have now been modified to show that driveway extensions must be set back twelve inches from the common wall and the property line.

1 7. Section 4.1.1 of the CC&Rs shows that modifications such as driveway
2 extensions require prior approval of the ARC.

3 8. Mr. Jones did not submit to the Architectural Review Committee a request
4 for prior approval before installing his driveway extension.

5 9. The Design Guidelines show that driveway extensions will be considered
6 on a case by case basis.

7 10. The Guidelines show that sidewalks can be installed without prior approval
8 from ARC provided that these were one foot or more from the property line.

9 11. In April 2020, before installing the driveway extension, Mr. Jones
10 contacted AAM, LLC, the Association's property management company, inquiring about
11 adding two concrete strips in that area. Angela Pate informed him that such strips were
12 not allowed and informed him that another AAM employee could assist him with the
13 approval process for installing a driveway extension made of pavers.

14 12. Mr. Jones sought further guidance from Ms. Pate, but did not hear back
15 from her and he had the driveway extension installed.

16 13. After the driveway extension was installed, Mr. Jones applied to the ARC
17 for approval of that extension.

18 14. Through a letter dated December 2, 2020, the ARC informed Mr. Jones
19 that his application had been denied because the extension did not meet the twelve inch
20 setback requirement and that he should reapply after making an adjustment to cutback
21 twelve inches from the property line.

22 15. On January 12, 2021, the Association issued a Second Notice of Non-
23 compliance/Fine showing that Mr. Jones was required to make changes to the
24 unapproved driveway extension and resubmit an application to ARC.

25 16. On February 12, 2021, Mr. Jones filed with the Department a single issue
26 petition through which he asserted that the Design Guidelines for driveway extensions
27 did not require such driveways to be set back twelve inches from the property line and
28 that the Association was selectively enforcing its Guidelines and Rules.

29 17. Mr. Jones acknowledges that the Guidelines do require driveway
30 extensions to be set back twelve inches from the common wall and that his driveway

extension does not comply with the Guidelines in this regard. He stated a willingness to correct that deficiency.

18. Mr. Jones argues that because the Guidelines show that sidewalks had to be setback twelve inches from the property line, but did not show the same for driveway extensions, extensions were not subject to the same requirement.

19. Mr. Favale testified to the effect that the setback requirements are to help ensure that water does not drain to the neighbor's property.

20. Mr. Jones testified that his neighbors do not object to his driveway extension as it is now configured.

21. The Association had entered into evidence an Architectural Status Report covering August 27, 2020 through April 21, 2021. That summary shows that other Association members have had requests for approval of driveway extensions denied because the proposed driveway extensions were not set back twelve inches from the property line.

CONCLUSIONS OF LAW

1. In his petition, Mr. Jones alleges that the Association has violated its Design Guidelines. Consequently, the Department of Real Estate has authority over this matter. See ARIZ. REV. STAT. Title 32, Ch. 20, Art. 11.

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

3. A preponderance of the evidence is:

The greater weight of the evidence, not necessarily established 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 wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

4. "The administrative law judge may order any party to abide by the statute, condominium documents, community documents or contract provision at issue and may levy a civil penalty on the basis of each violation.... If the petitioner prevails, the

1 administrative law judge shall order the respondent to pay to the petitioner the filing fee
2 required by section 32-2199.01." ARIZ. REV. STAT. § 32-2199.02(A).

3 5. The Design Guidelines are part of a contract between the parties and the
4 parties are required to comply with its terms. *See Johnson v. The Pointe Community*
5 *Association*, 205 Ariz. 485, 73 P.3d 616 (App. 2003).

6 6. The Guidelines in effect when Mr. Jones installed his driveway extension
7 required that extension to be twelve inches from the common wall, which is part of the
8 property line. Mr. Jones acknowledged that his driveway extension does not comply
9 with this requirement. Consequently, Mr. Jones is in violation of the Guidelines.

10 7. Although those Guidelines did not explicitly show that the twelve inch
11 setback applied to the entire property line, the common wall is part of that property line
12 and considering that Mr. Jones did not obtain prior approval from ARC before
13 constructing his driveway extension, the Association's interpretation that the Guidelines
14 require a twelve inch setback along the property line is not unreasonable. *See Tierra*
15 *Ranchos Homeowners Ass'n v Kitchukov*, 216 Ariz. 173, 165 P.3d 173 (App. 2007)
16 (discretion must be reasonably exercised).

17 8. Mr. Jones did not show by a preponderance of the evidence that the
18 Association was in violation of the Guidelines.

19 9. The Association presented credible evidence showing that other
20 Association members have also been denied permission to build driveway extensions
21 because these did not have a twelve inch setback from the property line. Mr. Jones did
22 not show by a preponderance of the evidence that the Association was selectively
23 enforcing the Guidelines.

24 10. Mr. Jones's petition should be dismissed.

25 **ORDER**

26 **IT IS ORDERED** that Richard J. Jones's petition is dismissed.

27 **NOTICE**

28 **Pursuant to ARIZ. REV. STAT. section 32-2199.02(B), this Order is binding on the**
29 **parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. section 32-**
30 **2199.04. Pursuant to ARIZ. REV. STAT. section 41-1092.09, a request for rehearing**

1 **in this matter must be filed with the Commissioner of the Department of Real**
2 **Estate within 30 days of the service of this Order upon the parties.**

3 Done this day, November 15, 2021.

4 /s/ Thomas Shedden
5 Thomas Shedden
6 Administrative Law Judge

7
8 Transmitted by either mail, e-mail, or facsimile November 15, 2021 to:

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