

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Susan L Jarzabek,
4 Petitioner,

No. 22F-H2221008-REL

5 vs.
6 Hillcrest Improvement Association #2,
7 Respondent

**ADMINISTRATIVE LAW JUDGE
DECISION**

8 **HEARING:** November 5, 2021

9 **APPEARANCES:** Susan L. Jarzabek on her own behalf; Haidyn DiLorenzo, Esq. for
10 Respondent

11 **ADMINISTRATIVE LAW JUDGE:** Thomas Shedden

12 **FINDINGS OF FACT**

13 1. On September 15, 2021, the Arizona Department of Real Estate issued a
14 Notice of Hearing setting the above-captioned matter for hearing on November 5, 2021
15 at the Office of Administrative Hearings in Phoenix, Arizona.

16 2. Petitioner Susan L. Jarzabek appeared and testified on her own behalf;
17 Respondent Hillcrest Improvement Association #2 was represented by counsel and
18 presented the testimony of Robert Cody, president of the Association's Board.

19 3. On or about August 11, 2021, Ms. Jarzabek filed with the Department a
20 single issue petition through which she alleged that Respondent had violated CC&R
21 Article 1, Section 10 and its Enforcement, Fines and Appeals Policy ("Policy") when it
22 charged her attorney's fees.¹

23 4. According to Ms. Jarzabek, the attorney's fees at issue were wrongfully
24 assessed because the Policy requires the owner of record to be provided two warning
25 notices and a certified letter before a matter is escalated to attorney involvement.

26 5. CC&R Art. VIII, Section 1, Enforcement, provides that the Association may
27 recover from an owner its enforcement costs, including attorney's fees.

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30 ¹ CC&R Art. 1, Section 10 provides definition of "owner."

1 6. The Policy sets out a procedure in which owners who are alleged be in
2 violation of the CC&Rs will be provided Notices, with escalating fines for
3 noncompliance.

4 7. The Policy also provides in pertinent part that the Association may
5 escalate a matter to its attorney for further action, if a matter is escalated to the
6 attorney, the notice-procedure will no longer apply, and the owner will be responsible for
7 the attorney's fees and costs.

8 8. As pertinent to this matter, CC&R Article 1, Section 10 defines "Owner" as
9 the record owner.

10 9. Ms. Jarzabek is the sole owner of Lot 125, with an address of 601 East
11 Boca Raton Road in Phoenix.

12 10. The Association received from one of Ms. Jarzabek's neighbors a
13 complaint to the effect that a tree on her property was overhanging the neighbor's
14 property and causing damage to the neighbor's roof.

15 11. The Association mailed a certified letter dated January 15, 2019 to Ms.
16 Jarzabek's address, but that letter had John Jarzabek's name on it, not Ms. Jarzabek.
17 John Jarzabek is Ms. Jarzabek's husband. Neither Mr. Jarzabek, nor Ms. Jarzabek
18 claimed the certified letter and it was returned to the Association.

19 12. The Association's letter of January 15, 2019 informed Mr. Jarzabek that
20 the Association had determined that the Jarzabeks were in violation of CC&R Art. IV,
21 Section 3, and provided that they had 30 days to cure the violation.

22 13. The letter of January 15, 2019 does not meet the Association's policy for
23 Notices of Violation because it does not include all the required elements.

24 14. The Association engaged the Mulcahy Law Firm on October 15, 2019.
25 That law firm subsequently sent Ms. Jarzabek Notices of Violation on October 17 and
26 November 5, 2019.

27 15. The Association did assess against Ms. Jarzabek fines, but had removed
28 or rescinded those fines prior to the hearing. The Association had also assessed
29 against Ms. Jarzabek interest on the disputed attorney's fees, but had removed or
30 rescinded those charges prior to the hearing

16. The law firm's letters do not show that Ms. Jarzabek will be assessed attorney's fees in the matter.

17. Although Mr. Cody testified that the Association sent additional letters to Ms. Jarzabek before engaging the law firm, those are not in the record.

18. Ms. Jarzabek testified that she was not aware that there was an allegation that she was not in compliance with the CC&Rs until she received the law firm's letter of October 15, 2019.

19. Prior to filing her petition, Ms. Jarzabek submitted written requests for the documentation the Association asserted it sent to Ms. Jarzabek prior to the law firm's involvement. A Board member informed her that it did not have copies of those documents, but the law firm did have copies. There was no evidence adduced showing that either the law firm or the Association provided Ms. Jarzabek with these documents.

20. Ms. Jarzabek asserts that she was denied due process because she did not receive proper notice of the allegations against her.

CONCLUSIONS OF LAW

1. In her petition, Ms. Jarzabek alleges that the Association has violated its Enforcement, Fines and Appeals Policy. Consequently, the Department of Real Estate has authority over this matter. See ARIZ. REV. STAT. Title 32, Ch. 20, Art. 11.

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

6 6. Ms. Jarzabek has not met her burden to show that the Association violated
7 the Policy because that Policy does not require that an owner receive two notices
8 before a matter is escalated to attorney involvement.²

9 7. Ms. Jarzabek’s petition should be dismissed.

10 **ORDER**

11 **IT IS ORDERED** that Susan L. Jarzabek's petition is dismissed.

12 **NOTICE**

13 **Pursuant to ARIZ. REV. STAT. section 32-2199.02(B), this Order is binding on the**
14 **parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. section 32-**
15 **2199.04. Pursuant to ARIZ. REV. STAT. section 41-1092.09, a request for rehearing**
16 **in this matter must be filed with the Commissioner of the Department of Real**
17 **Estate within 30 days of the service of this Order upon the parties.**

18 Done this day, November 19, 2021.

19 /s/ Thomas Shedden
20 Thomas Shedden
21 Administrative Law Judge

22 Transmitted by either mail, e-mail, or facsimile November 19, 2021 to:

23 Louis Dettorre
24 Arizona Department of Real Estate
25 100 N. 15th Avenue, Suite 201
26 Phoenix, Arizona 85007
27 Attn:
28 AHansen@azre.gov
29 djones@azre.gov

30 ² Although Ms. Jarzabek has not proven that the Association violated the Policy, it is not within this
tribunal’s jurisdiction to determine whether the attorney’s fees levied against Ms. Jarzabek are a valid
debt, and the tribunal offers no opinion on that issue. *See* ARIZ. REV. STAT. § 41-1092.07(F)(6)(findings
must be limited to matters officially noticed).

1 DGardner@azre.gov
2 vnunez@azre.gov

3 Susan L Jarzabek
4 601 E Boca Raton Rd
5 Phoenix, AZ 85022

6 Beth Mulcahy, Esq.
7 Mulcahy Law Firm, PC
8 3001 E. Camelback Rd., Ste. 130
9 Phoenix, AZ 85016
10 bmulcahy@mulcahylaw.net

11 By Miranda Alvarez
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