

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Sam & Pipper O' Shaughnessy Stangl,
4 Petitioners,
5 vs.
6 Sabino Vista Townhouse Association,
 Respondent.

No. 22F-H2221009-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

7 **HEARING:** November 8, 2021

8 **APPEARANCES:** Petitioners Sam & Pipper O' Shaughnessy Stangl appeared
9 on behalf of themselves. Blake R. Johnson, Esq. appeared on behalf of Respondent
10 Sabino Vista Townhouse Association.

11 **ADMINISTRATIVE LAW JUDGE:** Velva Moses-Thompson

12
13 **FINDINGS OF FACT**

14 1. The Arizona Department of Real Estate (Department) is authorized by statute
15 to receive and to decide Petitions for Hearings from members of homeowners'
16 associations and from homeowners' associations in Arizona.

17 2. Respondent Sabino Vista Townhouse Association is a homeowners'
18 association whose members own townhomes in the Sabino Vista Townhouse
19 subdivision.

20 3. Petitioners own a townhome unit in the Sabino Vista Townhouse subdivision
21 and are a member of Respondent.

22 4. On or about August 6, 2021, Petitioners filed a single-issue petition with the
23 Department that alleged that Respondent had violated its Covenants, Conditions, and
24 Restriction (CC&R) Article 6 by failing to maintain and otherwise manage all property up
25 to the exterior lines and patio enclosures.

26 5. Respondent filed a written answer to the petition, denying that it had violated
27 any CC&Rs.

28 6. The Department referred the petition to the Office of Administrative Hearings,
29 an independent state agency, for an evidentiary hearing.

1 7. A hearing was held on November 8, 2021. Petitioner Sam Shaughnessy
2 testified on behalf of himself and submitted exhibits A-F. Respondent submitted the
3 testimony of Charles Taylor Ostermeyer and submitted exhibit D.

4 8. Article 6 of Respondent's Declaration of CC&Rs concerns Common
5 Maintenance. Article 6 of the CC&Rs provides, in relevant part, as follows:

6 The Association, or its duly authorized representative, shall
7 maintain and otherwise manage all property up to the exterior
8 building lines and patio enclosures including but not limited to
9 the landscaping, lighting, parking areas, streets and
10 recreational facilities (including swimming pool service), roofs,
11 common elements, decorative walls, drainage, road way
12 easements and the building located upon the common
13 properties, and such additional maintenance as the Board of
14 Directors of the Association shall from time to time determine
15 to be in the best interest of the Association and the owners
16 and shall maintain and otherwise manage and be responsible
17 for the rubbish removal of all areas within the common
18 properties. The Board of Directors of the Association shall use
19 a reasonably high standard of care in providing for the repair,
20 management and maintenance of said property, so that said
21 townhouse project will reflect high pride of ownership. All
22 maintenance and repair of the individual dwelling units and
23 patios shall be the sole obligation and expense of the
24 individual owners, except to the extent the exterior
25 maintenance and repair is provided by the Association.

26 In the event that the need for maintenance or repair is caused
27 through the willful or negligent act of the owner, his family,
28 guests, tenants or invitees or licensees, the cost of such
29 maintenance or repairs shall be added to and become a part
30 of the assessment to which such owner and hi slot are subject.

9. Petitioners alleged in the petition that Respondent has failed to maintain and
otherwise manage the area behind their townhome back two acres. Petitioners stated
in the petition that they have lived in the townhome for approximately 24 years.
Petitioners allege that they have observed Respondent's landscapers in their immediate
back area a total of 12 hours. Petitioners also alleged that they observed a landscaper
raking the area immediately behind their patio wall for approximately 20 minutes for the
first time in 24 years, last month.

1 10. At hearing, Petitioner Sam O' Shaughnessy Stangl asserted that
2 Respondent has allowed weeds and rubbish to grow in the area behind his townhome.
3 Mr. O'Shaughnessy alleged that the rubbish serves as a pack rat for rattlesnakes.
4 Mr. O'Shaughnessy submitted into evidence a photograph that Mr. O'Shaughnessy
5 identified as the skin of a rattlesnake in his back yard.

6 11. Respondent presented the testimony of Charles Taylor Ostermeyer.
7 Mr. Ostermeyer is the secretary of Respondent's Board of Directors. Mr. Ostermeyer
8 explained that there is a bicycle waking path in the back of the homes followed by
9 natural desert area and underbrush. Mr. Ostermeyer explained that the rough area of
10 the desert starts after about 30 to 40 feet in the back of the homes.

11 12. Respondent submitted into evidence Exhibit D, minutes from an Annual
12 Board Meeting. The minutes show that the Landscaping Committee notified a resident
13 that only 4 feet behind the residence is maintained and cleared; the remainder of the
14 area is natural desert. Mr. Ostermeyer initially testified that the Board had adopted a
15 rule limiting the maintenance of the land behind the homes to 4 feet. However, when
16 asked by the Administrative Law Judge whether he had any other basis for believing
17 that the Board adopted a rule limiting maintenance to 4 feet behind the homes, other
18 than the minutes, Mr. Ostermeyer responded, "It would be conjecture on my part."
19 See Mr. Ostermeyer's testimony on the hearing audio at 47:45 to 48:14 minutes.
20 Mr. Ostermeyer contended that it would be too costly for Respondent to clear out the
21 entire region that consists of many trees and weeds.

22 13. Respondent contended that it applied the business judgment rule that
23 applies to non- profit organizations in Arizona and determined that it would not maintain
24 the open desert area.

25 **CONCLUSIONS OF LAW**

26 1. A.R.S. § 32-2199(B) permits an owner or a planned community organization
27 to file a petition with the Department for a hearing concerning violations of planned
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community documents under the authority Title 33, Chapter 16.¹ This matter lies with the Department's jurisdiction.

2. Petitioners bear the burden of proof to establish that Respondent violated CC&R § 5(G) by a preponderance of the evidence.² Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.³

3. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."⁴ A preponderance of the evidence is "[t]he 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."⁵

4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give effect to the intent of the parties.⁶ "Restrictive covenants must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein."⁷ Article VI of the CC&Rs provides that the Association, "....shall maintain and otherwise manage all property up to the exterior building lines and patio enclosures including but not limited to the landscaping. And common elements...." The Association is also required to use a "high standard of care" in the maintenance of the Association's property "so that said townhouse project will reflect a high pride of ownership."

5. The preponderance of the evidence shows that Respondent has not maintained the two acres located behind Petitioners' home as required by Article VI of

¹ See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce the development's CC&Rs

² See A.R.S. § 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952).

³ See A.A.C. R2-19-119(B)(2).

⁴ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁵ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

⁶ See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

⁷ *Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. App. 1993) (quoted in *Powell*, 211 Ariz. at 557 ¶ 16, 125 P.3d at 377).

1 the CC&Rs. Respondent provided no evidence of an Amendment to Article VI of the
2 CC&Rs. Respondent provided evidence of Board Minutes where a homeowner was
3 advised that only 4 feet behind the homes would be maintained. However, Respondent
4 provided no evidence of a rule properly adopted by the Board that would limit the
5 common area to be maintained by the Board.

6 **ORDER**

7 **IT IS ORDERED** that Petitioners be deemed the prevailing party in this matter.

8 **IT IS FURTHER ORDERED** that Respondent pay Petitioners their filing fee of
9 \$500.00, to be paid directly to Petitioners within thirty (30) days of this Order.

10 **IT IS FURTHER ORDERED** Respondent is directed to comply with the
11 requirements of Article VI of the CC&Rs going forward.

12 No Civil Penalty is found to be appropriate in this matter.

13 **NOTICE**

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

19 Done this day, November 29, 2021.

20 /s/ Velva Moses-Thompson
21 Administrative Law Judge
22

23 Transmitted electronically to:

24 Louis Dettorre, Commissioner
25 Arizona Department of Real Estate
26

27 Louis Dettorre
28 Commissioner
29 Arizona Department of Real Estate
30 100 N. 15th Avenue, Suite 201
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