

1                                   **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2  
3 Nancy L. Pope,  
4       Petitioner,  
5 vs.  
6 La Vida Homeowners Association,  
7       Respondent.

**No. 22F-H2221013-REL**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

---

8       **HEARING:** February 10, 2022

9       **APPEARANCES:** Petitioner Nancy L. Pope appeared on her own behalf. La Vida  
10 Homeowners Association was represented by Erik J. Stone.

11       **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer

---

12                                   **FINDINGS OF FACT**

13                                   **BACKGROUND AND PROCEDURE**

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

17       2.       On or about September 14, 2021, Petitioner filed a single-issue petition with  
18 the Department which alleged that Respondent La Vida Homeowners Association  
19 violated its Bylaws, Article IV, Section 2c, and its Covenants, Conditions, and Restrictions  
20 (CC&Rs), Article V section 1 and Article VI section 1a by failing to remove a bottle tree  
21 located on community property near Petitioner's residence and paying for the damage to  
22 her property resulting from the root system.

23       3.       On October 12, 2021, Respondent returned its ANSWER to the Department  
24 whereby it denied all complaint items in the petition.

25       4.       Per the NOTICE OF HEARING, the Department referred this matter to the  
26 Office of Administrative Hearings (OAH), an independent state agency, for an evidentiary  
27 hearing, regarding the following issue:

28       **The dispute between Petitioner and Respondent arises from**  
29 **community documents Covenant Conditions and Restrictions (CCRs)**  
30 **ARTICLE V Section 1, ARTICLE VI Section 1a and from Bylaws Article**  
**IV Section 2c, Petitioner states "The La Vida HOA is in violation of**

Article V Section 1 and Article VI Section 1A by not removing or maintaining the trees responsible for the damage to my property. They are also in violation of Bylaw Article IV Section 2c for the same reason”

#### THE PARTIES AND GOVERNING DOCUMENTS

5. Respondent is a homeowners’ association whose members own properties in a residential real estate development located in Scottsdale, Arizona. Membership for Respondent is compromised of the La Vida subdivision.

6. Petitioner is a La Vida subdivision property owner and member of Respondent.

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

8. On or about April 3, 2012, Respondent’s Amended and Restated CC&Rs were recorded with the Maricopa County Recorder’s Office.

9. Respondent’s CC&Rs Article V, Maintenance Obligations, provides, in pertinent part, as follows:

Section 1. Maintenance of Common Area by Association. The Association shall maintain the Common Area. This maintenance obligation shall include the installation and subsequent maintenance of landscaping in an attractive and viable condition . . . . The Association may, at its option, accomplish such maintenance obligations with the Association’s own employees and equipment or contract with another party to accomplish the maintenance obligations.

10. Respondent’s CC&Rs Article VI, Duties and Powers of the Association, provides, in pertinent part, as follows:

Section 1. Duties and Powers. The Association shall have the duties and powers enumerated below:

a. Common Area. Maintain and otherwise manage and provide security and utility services for the Common Area and all facilities,

improvements and landscaping thereon, and all property that may be acquired by the Association. The Association shall also pay all real and personal property taxes and other charges assessed against the Common Area.

11. Respondent's Bylaws Article IV, Directors, provides, in pertinent part, as follows:

Section 2. Powers and Duties. The affairs of the Association shall be managed by its Board of Directors. The Board shall have all the powers and duties necessary for the administration of the affairs of the Association and may do all such acts and things that are not required by the Declaration, statute or these Bylaws to be exercised or done by the Members. In addition to the powers and duties granted and imposed by statute and the Governing Documents, the powers and duties of the Board of Directors shall include, but are not limited to, the following:

...

(C) To own, improve, maintain and otherwise manage all the Common Area and all facilities, improvements, and landscaping thereon . . . .

#### HEARING EVIDENCE

12. Petitioner testified on her own behalf and presented the testimony of Santos Diaz, Area Manager with CareScape, Respondent's landscaper; Gabrielle Sherwood, Community Manager with City Property; Debbie Duffy, Board Secretary; Ed Humston, Contractor; and Lawrence Oliva, Board President. Petitioner submitted a packet of unlabeled exhibits.

13. Respondent did not present the testimony of any witnesses or exhibits. The Department's electronic file was also admitted into the record. The substantive evidence of record is as follows:

- a. Petitioner has owned residential property in the La Vida community since 2015. Petitioner purchased the home from her parents, who were not the original homeowners.
- b. At some point after Petitioner's home was built, a bottle tree and five eucalyptus trees were planted on the Common Area property along the edge of Petitioner's property. The parties all presumed that the bottle tree

1 and five eucalyptus trees were planted by the original homeowner more  
2 than 30 years ago.

- 3 c. Since the trees were planted, Respondent cared for the trees by trimming  
4 them.
- 5 d. Possibly as soon as they were planted, the irrigation system from  
6 Petitioner's property watered the six trees that were on the Common Area  
7 near her property.
- 8 e. Respondent had a landscaping contract with CityScape. CityScape  
9 maintained the trees by trimming them since it was awarded the contract.
- 10 f. Mr. Diaz, a landscaper for CityScape, knew that bottle trees had a large  
11 canopy and that the root system could grow up to 100 feet away from the  
12 tree. Mr. Diaz stated that the bottle tree was "a good tree," but  
13 acknowledged it depended on where it was planted. Mr. Diaz testified that  
14 he would not plant a bottle tree anywhere close to a structure on his property  
15 because the roots spread out at least 25 feet and up to 100 feet.
- 16 g. Petitioner had tenants leasing the property from the time of her purchase  
17 until March 2021. After they moved out, she consulted with Mr. Humston, a  
18 contractor, regarding a remodel of the home. Upon an initial inspection, Mr.  
19 Humston noted that the floor in the living area had a noticeable heave and  
20 was concerned as to the cause. Mr. Humston suspected it was because of  
21 a root intrusion, but he waited to see what the civil engineers discovered.  
22 The civil engineers reported that the heaving was the result of a water leak  
23 under the building, Mr. Humston disagreed.
- 24 h. On or about June 17, 2021, Mr. Humston tore up a section of the concrete  
25 slab approximately 14' by 22' in size. Under the concrete slab was a  
26 substantial web of roots from the bottle tree that had come in under the patio  
27 and a window and were causing the heaving in the floor.
- 28 i. At that time, Mr. Humston provided an estimate that it would cost \$8500.00  
29 to repair the concrete slab and \$4500.00 to repair the patio.  
30

- 1 j. On or about June 21, 2021, Petitioner filed a maintenance request with City  
2 Property regarding the root intrusion and damage. Petitioner was advised  
3 that the matter needed to be discussed and voted on in an open meeting of  
4 the Board. Petitioner was given permission to cut the roots off at the point  
5 they entered her home and remove them.
- 6 k. On or about June 25, 2021, Mr. Humston poured a new concrete slab.
- 7 l. At some later time, Petitioner and Mr. Humston noted that at one place  
8 where the new slab abutted the existing slab, the new slab heaved  
9 approximately ¼ inch.
- 10 m. Mr. Oliva, President of the Board, offered to Petitioner that she pay to  
11 remove the bottle tree “because it was [her] problem” and the Board would  
12 pay to remove the other trees. The Board paid \$2800.00 to remove the five  
13 eucalyptus trees. Petitioner paid \$550.00 to remove the bottle tree.

14 14. In closing, Respondent argued that its duty to maintain the landscaping in  
15 the Common Areas, including next to Petitioner’s property, had been fulfilled based on  
16 CityScape’s maintenance schedule. Respondent further argued that because it did not  
17 know or have reason to know of the root intrusion, Respondent was not negligent in its  
18 maintenance of the landscaping. Respondent also maintained that Petitioner failed to  
19 establish her purported damages, especially as it related to the patio. Respondent  
20 asserted that Petitioner’s predecessor planted and watered the trees and Petitioner  
21 continued to water the trees during her ownership of the property. Respondent offered  
22 the “olive branch” of reimbursing Petitioner the \$550.00 she paid to remove the bottle tree.

23 15. In closing, Petitioner argued that Respondent was negligent in its  
24 maintenance of the bottle tree on the Common Area next to her property. Petitioner  
25 further argued that it was Respondent’s responsibility to be aware of the type of plants that  
26 were on the Common Areas and to what issues may exist with those plants. Petitioner  
27 asserted that “maintenance” included more than just trimming the trees. Petitioner denied  
28 knowing who originally planted and watered the trees. Petitioner maintained that, as of  
29 the date of the hearing, her total damages consisted of \$8,497.00 to repair the floor,  
30

1 \$550.00 to remove the tree, \$1,000.00 to grind down the new floor heave, and \$14,000.00  
2 to repair the patio.

### 3 **CONCLUSIONS OF LAW**

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

10 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),  
11 32-2199.02, and 41-1092 *et seq.* OAH has the authority to hear and decide the contested  
12 case at bar. OAH has the authority to interpret the contract between the parties.<sup>1</sup>

13 3. In this proceeding, Petitioner bears the burden of proving by a  
14 preponderance of the evidence that Respondent violated a community document.<sup>2</sup>

15 4. "A preponderance of the evidence is such proof as convinces the trier of fact  
16 that the contention is more probably true than not."<sup>3</sup> A preponderance of the evidence is  
17 "[t]he greater weight of the evidence, not necessarily established by the greater number of  
18 witnesses testifying to a fact but by evidence that has the most convincing force; superior  
19 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable  
20 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than  
21 the other."<sup>4</sup>

22 5. Based upon a review of the credible and relevant evidence in the record,  
23 Petitioner sustained her burden of proof.

24 6. Here, the material facts are clear. Respondent's duty to maintain the  
25 Common Area did not end at the boundary line of the Common Area. A tree in  
26 Respondent's Common Area caused damage to Petitioner's property. Despite  
27 Respondent's contract with CityScape for regular arbor maintenance, the bottle tree's

---

28 <sup>1</sup> See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

29 <sup>2</sup> See ARIZ. ADMIN. CODE R2-19-119.

30 <sup>3</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

<sup>4</sup> BLACK'S LAW DICTIONARY 1220 (8<sup>th</sup> ed. 1999).

1 roots caused lifting and heaving of Petitioner's patio and concrete slab. But for the bottle  
2 tree being situated where it was and in the state it was in, there would not be roots coming  
3 onto Petitioner's property to such an extent that caused any amount of damage or harm.

4 7. Therefore, the undersigned Administrative Law Judge concludes that,  
5 because Petitioner established a violation of Article V section 1 and Article VI section 1a of  
6 the CC&Rs and Article IV, Section 2c of the Bylaws, her petition must be granted.

7 **ORDER**

8 Based on the foregoing,

9 **IT IS ORDERED** granting Petitioner's petition.<sup>5</sup>

10 **IT IS FURTHER ORDERED** that Respondent pay Petitioner her filing fee of  
11 \$500.00, to be paid directly to Petitioner within thirty (30) days of this Order.

12 **NOTICE**

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

18 Done this day, March 2, 2022.

19 /s/ Tammy L. Eigenheer  
20 Administrative Law Judge  
21

22 Transmitted by either mail, e-mail, or facsimile March 2, 2022 to:

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

29 <sup>5</sup> Because this Tribunal has no statutory authority to grant Petitioner declaratory or injunctive relief, this  
30 decision is expressly issued to order Respondent to abide by provisions of the planned community  
documents specified. No civil penalty shall be imposed as a result of this ORDER.

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

4 Nancy L Pope  
5 422 N 4th Ave.  
6 Bozeman, MT 59715  
7 popenancyl@gmail.com

8 Erik J. Stone  
9 Jones, Skelton & Hochuli, P.L.C.  
10 40 N Central Ave., Suite 2700  
11 Phoenix, AZ 85004  
12 estone@jshfirm.com

13  
14 By: Miranda Alvarez  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30