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1. The Department is authorized by statute to receive and to decide petitions for hearings from members of homeowners' associations and from homeowners' associations in Arizona.

2. On or about August 16, 2021, Petitioner filed a single-issue petition with the Department which alleged that the Association violated Article 6.7 of the Association's Master Declaration by modifying plans to renovate the Association's Activity Center's coffee bar to include the sale of alcoholic beverages, sans a vote from the Members.¹ Petitioners further alleged that the Association's modification converted a portion of the residential common area to a restricted commercial bar under the regulation of the Arizona Department of Liquor License and Control, without the approval of its Members.² Petitioner did not indicate on his petition what remedy, if any, he sought from the Department.³

3. On August 19, 2021, Petitioner tendered a \$500.00 filing fee to the Department for his petition.⁴

4. On September 13, 2021, Respondent returned its ANSWER to the Department whereby it denied all complaint items in the petition.⁵

5. On September 22, 2021, the Department referred this matter to the Office of Administrative Hearings (“OAH”), an independent state agency, for an evidentiary hearing on November 22, 2021.⁶ Per the NOTICE OF HEARING regarding the following issue:

Whether Respondent is in violation of Community Document 5th Amended Master Declaration Article 6.7 for substantially changing use of a portion of the Common Area without approval of at least 60% of Members voting on the matter.⁷

THE PARTIES AND GOVERNING DOCUMENTS

¹ See Department's electronic file at HO21-21011 Petition.pdf.

² *Id.*

³ *Id.*

⁴ See Department's electronic file at HO21-21011 Payment.pdf.

⁵ See Department's electronic file at HO21-21011 Response Petition.pdf.

⁶ See Department's electronic file at HO21-21011_HeatingScheduled.pdf. Notably, the matter was continued on December 29, 2021, whereby it was heard, and set for further hearing on March 01, 2021, whereby the matter was concluded.

⁷ See Department's electronic file at HO21-21011 Notice Hearing.pdf.

6. Respondent is a 55+ homeowners' association whose members own properties in a residential real estate development located in Oro Valley, Arizona. Membership for the Association is comprised of the Sun City Oro Valley subdivision.

7. Petitioners are Sun City Oro Valley subdivision property owners and members of the Association.

8. The Association is governed by its CC&Rs, Bylaws, [Amended] Master Declaration, and overseen by a Board of Directors ("Board"). The governing documents empower the Association 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 governing documents and agrees to be bound by their terms. Thus, the all of the governing documents form an enforceable contract between the Association and each property owner.

9. On or about March 23, 2021, the 5th Amended Master Declaration was adopted via vote of the Membership of the Association.⁸ Article 6, Easements and Common Area, provides, in pertinent part, as follows:

6.7 Change in Use of Common Area. There shall be no substantial change in use of any portion of Common Area unless approved by at least sixty percent (60%) of Members voting on the matter. For purposes of this Section, a “substantial change in use” is one that changes the character and nature of the way in which the Common Area is used, including, but not limited to, changing natural open space to business use.⁹

HEARING EVIDENCE

10. Petitioner testified on his own behalf, called Diane Paton as a witness, and submitted Exhibits 6-9, 13, 15-18, and 22-24 into the record. Respondent presented the testimonies of Mark Wade, Randall James Mitchell, and Randy Trenary, and submitted Exhibits 1-12 and its Prehearing Memorandum into the record. The Department's electronic file was also admitted into the record. The substantive evidence of record is as follows:

⁸ See Department's electronic file at HO21 21011 Attachments.pdf.

⁹ *Id.*

- 1 a. The Association is a large scale senior community sprawling approximately
2 22,000 square feet that boasts numerous amenities for residents, including
3 a 1,400 square foot Activity Center that offers a multitude of services for
4 members as well as a coffee bar, Navajo meeting room, and Kiva Patio.
5 i. The Activity Center is approximately 34 years old.
- 6 b. On June 14, 1977, the Arizona Department of Liquor License and Control
7 (“DLLC”) issued License No. 06100022 to the Association for Views
8 Restaurant. The license is currently active and is set to expire on September
9 30, 2022.
- 10 c. On or about May 15, 1990, DLLC approved the Association’s request to
11 permanently extend its liquor service area to the patio and Social Hall.¹⁰
- 12 d. For the last few years the Association has been renovating the Activity
13 Center. The purpose of the renovation is to update and improve the existing
14 building and aesthetics.
- 15 e. In order to assist the Board with the task, an Activity Center Renovation
16 Committee (“Committee”) was created to provide a recommendation to the
17 Board, which would then be presented before Membership for a vote to
18 expend proposed project funds, pursuant to the Association’s Bylaws.¹¹
- 19 f. About 34 open Committee meetings were held with Membership between
20 early-2018 and mid-2021, whereby the Committee conducted surveys, held
21 Resident forums, and interviewed over 55 clubs.¹² During that time, it was
22 suggested that a wine bar be included as part of the renovation.
- 23 g. An early schematic of the proposed renovation prepared by Highton
24 Architects included an early rendering of the Activity Center’s coffee bar
25 updated into a modernized café wine bar, including indoor and outdoor
26 seating.¹³

27
28 ¹⁰ See Respondent Exhibit 12; see also Petitioner Exhibit 13.

29 ¹¹ See Respondent Exhibit 2.

30 ¹² See Respondent Exhibit 10; see also Petitioner Exhibits 15 and 17.

¹³ See Respondent Exhibit 6; see also Petitioner Exhibit 8.

- 1 h. In November 2020, the Committee completed a recommendation
2 presentation for the Board's consideration setting forth its proposed plan for
3 the renovation, including a proposed drawing of the coffee/wine bar.¹⁴
4
5 i. Ultimately, the Board accepted the recommendations from the Committee.
6 In early 2021, the Association published materials for Membership to
7 review.¹⁵ These materials were made available via an explanative video on
8 the Association's website for the Membership to access.¹⁶
9
10 j. On March 23, 2021, a vote by the Membership was held regarding the
11 renovation project.¹⁷ Out of the 1,715 Members who voted, 1,121 (65%)
12 voted in favor of the renovation.¹⁸ Only 859 votes were required to pass.
13
14 k. The Board has not taken any action, beyond speculation and gauging
15 Membership interest, regarding submitting a request to DLLC to extend its
16 liquor license into the meeting rooms, patio, or grassy outdoor area(s). The
17 Association has not submitted a new application to DLLC to extend its liquor
18 service area for any proposed renovated common area. Thus, Membership
19 has not had the opportunity to vote on those nonexistent propositions.
20
21 l. As of the date of the hearing, no construction or structural modification of the
22 Activity Center; including the coffee bar, Navajo Room, and Kiva Patio, has
23 taken place.
24
25 m. Once the new café wine bar has been constructed, minors will have to be
26 accompanied by an adult 21 years of age or older. Also, Members will not be
27 permitted to bring off-site alcoholic beverages into the premises.

28 11. In closing, Respondent argued that the addition of a wine bar to the Activity
29 Center's coffee bar did not constitute a substantial change of use in the common area at
30 issue, as all prior services offered before the renovation would still be available to
residents after construction was completed. Respondent argued further that because its

¹⁴ See Respondent Exhibit 7.

¹⁵ See Respondent Exhibits 8-9.

¹⁶ See Respondent Exhibit 3.

¹⁷ See Respondent Exhibits 4 and 11.

¹⁸ *Id.*

1 Membership overwhelmingly voted in favor of its proposed renovations, any and all
2 arguments regarding “substantial change of use” were moot and irrelevant.

3 12. In closing, Petitioner argued that the addition of an alcohol component to the
4 Activity Center’s coffee bar amounted to a substantial change in use of a portion of the
5 affected common area because minors would not be permitted in the area
6 unaccompanied by an adult of age. Petitioner also argued that Respondent’s current
7 liquor license does not cover the proposed service area. Petitioner concluded by
8 requesting an order requiring the Board to hold a vote regarding the submission of any
9 application to DLLC regarding the renovation project, and a directive that Respondent
10 comply with Article 6.7 of the amended Master Declaration.

11 **CONCLUSIONS OF LAW**

12 1. This matter lies within the Department’s jurisdiction pursuant to ARIZ. REV.
13 STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a
14 planned community association. The owner or association may petition the department
15 for a hearing concerning violations of community documents or violations of the statutes
16 that regulate planned communities as long as the petitioner has filed a petition with the
17 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

18 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
19 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested
20 case at bar. OAH has the authority to interpret the contract between the parties.¹⁹

21 3. In this proceeding, Petitioner bears the burden of proving by a
22 preponderance of the evidence that Respondent violated a community document.²⁰

23 4. “A preponderance of the evidence is such proof as convinces the trier of fact
24 that the contention is more probably true than not.”²¹ A preponderance of the evidence is
25 “[t]he greater weight of the evidence, not necessarily established by the greater number of
26 witnesses testifying to a fact but by evidence that has the most convincing force; superior
27 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable

28 ¹⁹ See *Tierra Ranchos Homeowners Ass’n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

29 ²⁰ See ARIZ. ADMIN. CODE R2-19-119.

30 ²¹ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”²²

5. Based upon a review of the credible and relevant evidence in the record, Petitioner has not sustained his burden of proof.

6. Here, the material facts are clear.

7. Petitioner’s argument is not ripe.

8. There is no real grievance, yet. While it is true that the Membership of the Association did vote to renovate the Activity Center, including upgrading the existing coffee bar to a café wine bar, no construction has taken place. The crux of Petitioner’s is theoretical and predicated on action(s) that have yet to occur. None of the potentially negatively impacted minors Petitioner referenced are members of the Association. The record reflects that any adult age 21 plus would have to accompany them to the café wine bar post construction. Therefore, it cannot reasonably be concluded that the Association substantially changed the use of a portion of a common area. Notably, the undersigned cannot make any determinations about whether the Association’s proposed voter-approved construction would alter the character and nature of the common area to such an extent that it would create a “substantial change of use” to the area. Based on Petitioner’s arguments in closing, it is apparent that he is seeking injunctive and/or declaratory relief that is unavailable for litigants in the administrative hearing process in the State of Arizona.

9. Therefore, the undersigned Administrative Law Judge concludes that, because Petitioner did not establish a violation of Article 6.7 of the Association’s 5th Amended Master Declaration by a preponderance of the evidence, his petition must be denied.

ORDER

Based on the foregoing,

IT IS ORDERED that Petitioners’ petition is denied.

²² BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

NOTICE

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

Done this day, March 21, 2022.

Office of Administrative Hearings

/s/ Jenna Clark
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile March 21, 2022, to:

Louis Dettorre, Commissioner
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DGardner@azre.gov

John Balaco, Petitioner
Balaco@sbcglobal.net

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