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ADMINISTRATIVE LAW JUDGE DECISION

ADMINISTRATIVE LAW JUDGE: Thomas Shedden

6. Mr. Archer previously requested approval for a one-story garage with a flat roof. After the Association denied final approval of the one-story design, a hearing was

1 conducted on August 12, 2019 (docket number 19F-H1919063-REL). In a Decision
2 dated September 3, 2019, the ALJ in that matter concluded that the Association had not
3 violated the statute, at least in part because the architectural rules ("ARs") show that
4 pitched roofs should predominate and Mr. Archer's roof would extend above a nine-foot
5 wall making it visible from neighboring properties.

6 7. In January 2020 Mr. Archer submitted to the Association his request for
7 approval of the two-story garage at issue in this matter. The proposed addition is
8 located at the northeast corner of the house, which is at the back of the house. The
9 proposed addition will be built behind an existing one-story garage that is part of his
10 two-story house. The lot is elevated above the road, so only a relatively small part of the
11 proposed addition will be observable from the road. There is a nine foot wall along the
12 north side of the house that will screen from view the first floor of the addition. The back
13 yard abuts the mountain preserve and the proposed addition will be visible from the
14 preserve.

15 8. The parties dispute whether there are trails in the portion of the preserve
16 behind the house, with the Association asserting that there are and Mr. Archer testifying
17 that the Park's Department's Claire Miller informed him that these are not official trails
18 recognized by the City.

19 9. The proposed addition could be visible from trails across the street to the
20 northwest of the house, but Mr. Archer presented evidence to show that this will no
21 longer be the case once a house is built on an empty lot across the street to the
22 northwest of his house.

23 10. Mr. Archer's exhibit at page PDF 3 is a photograph of the front of his
24 house looking from the west to the east. Page 5 is a photograph of essentially the same
25 view with Mr. Archer on the existing garage roof holding a board at about the level that
26 the proposed new roof will come to. Page 23 is a photograph showing an existing slab
27 on which the proposed addition would be built (looking toward the northeast). Page 9 is
28 a photograph of a model showing how the proposed addition's roof would appear in
29 relationship to the roof on the existing one-car garage and the existing roof on the two-
30

1 story house (looking toward the east-northeast from behind the house). Pages 10, 11,
2 12 and 13 are architectural elevation drawings showing the proposed addition.

3 11. The proposed roof will be at the same pitch as the existing roofs.

4 12. Mr. Archer's request was denied, but no written basis was provided. Mr.
5 Archer filed a petition on May 27, 2020 in which he alleged a violation of section 33-
6 1817(B)(3). A hearing was conducted on November 13, 2020 (docket number 20F-
7 H2020063-REL). In a Decision dated December 3, 2020, the ALJ in that matter
8 determined that the Association had violated its CC&Rs and section 33-1817(B)(3)
9 because it did not provide Mr. Archer with a written reason for denying preliminary
10 approval. The ALJ noted however that the Decision was not a finding that the
11 Association was required to approve the proposed design.

12 13. The following Findings of Fact are taken from the December 3, 2020 ALJ
13 Decision:

14 10. On or about February 5, 2020, the [Architectural
15 Committee] held meeting at Petitioner's home that was
16 deemed to be the Pre-Design Meeting. Generally, Pre-Design
17 Meetings are held in advance of plans being drawn up or
18 extensive work being done by the homeowner. However,
19 Petitioner had the professional renderings of the proposed
20 addition, so those were reviewed at the Pre-Design Meeting.
21 After review, the AC requested additional changes to the
22 plans and one member requested a model of the proposed
23 addition.

24 11. On or about April 6, 2020, Petitioner set up a table at
25 the end of his driveway with all the plans and some
26 demonstrable samples to allow community members to
27 review the proposal. This presentation was intended to serve
28 as the Preliminary Submittal.

29 12. On or about April 10, 2020, the AC conducted a
30 conference call during which the members discussed
Petitioner's proposal as its Preliminary Review. At the outset
of the discussion, at least two members expressed their
concerns with how Petitioner was planning to use the new
addition. Specifically, the members were concerned

Petitioner was going to accumulate more “junk”. Two of the members expressing concerns ultimately voted against Petitioner’s proposal. Another member of the AC questioned Petitioner’s plan to paint the new roof tile to match his existing roof tile and how that would look on the home. The AC members also expressed a concern that Petitioner did not intend to tie the new roof into the existing roof. Ultimately, the majority of the members of the AC voted to deny Petitioner’s proposal as it was submitted.

13. Following the Preliminary Review, neither the decision nor the basis of the decision was communicated to Petitioner. Petitioner was on the call during the discussion, but he was not provided a written explanation of the reason for the denial.

14. On December 30, 2020, in response to the December 2020 ALJ Decision, the Association/AC produced a written Response to Mr. Archer’s January 2020 request for approval of the two-story garage providing its bases for denying Mr. Archer’s proposal.

15. The Response includes two sets of bullet points: one set of three bullets providing “Several reasons your Submittal was denied relate to the following:” and the second set of six bullets providing “[t]he following comments are provided to assist you in amending your plans for resubmittal:”

16. At the hearing, Mr. Kauffman testified that the second set of bullets was advisory only, which was not clear to Mr. Archer until the hearing.¹ Nevertheless, of the Association’s three reasons for denying Mr. Archer’s request, the second and third are also included in the second set of bullet points that Mr. Kauffman testified were advisory only.

17. Mr. Kauffman’s testimony did not occur until after Mr. Archer had provided his own initial testimony and that of his witnesses. As such, Messrs. Hancock’s and Earlie’s opinions were based on the mistaken impression that all nine bullets were reasons for the Association’s denial.

¹ The confusion stems from the fact that the second set of bullets includes a statement that the addition “**will be** limited to a single story” and because two of the ostensible reasons for denial are listed in both sets of bullets. (Bolding added.)

1 18. The three reasons set out in the first set of bullets can be summarized as:
2 (1) the addition did not harmonize with the existing structure nor enhance the
3 community as outlined in AR section 1.1, and members were concerned that Mr. Archer
4 was attaching a large box to his home without incorporating it into the current structure;
5 (2) painted roof tiles are not acceptable and are not identified as an option in AR section
6 4.4; and (3) there is a need to add architectural elements and architectural expression
7 as set outlined in AR section 4.2.

8 19. Regarding the Association's first basis for denying Mr. Archer's proposal,
9 AR section 1.1 shows that improvements are to harmonize with the community, "rather
10 than to dominate and/or contrast sharply with it."

11 20. There was no substantial evidence adduced showing that Mr. Archer's
12 proposed addition will dominate or sharply contrast with the community.

13 21. At the hearing, regarding the first basis for denial, Mr. Kauffman testified
14 that the proposed addition would not look like part of the original structure because the
15 roof would not blend into the existing roof and because the addition would be attached
16 to the existing house at only two points. Although Mr. Kauffman and Ms. Zigler testified
17 that there were better ways to attach the addition, the Association did not present
18 evidence to what these were, but rather Mr. Kauffman's testimony was that Mr. Archer
19 had not worked with the Architectural Committee on this point.

20 22. Mr. Archer testified that the proposed roof does tie into the existing
21 structure and as to his opinion that staggered roof lines add aesthetic appeal. He also
22 testified that tying the proposed roof into the existing roof on the two-story portion of the
23 house will not work aesthetically.

24 23. That the proposed roof does not tie into the existing second-story roof was
25 explicitly set out in the second set of bullets that is advisory only.

26 24. The evidence shows that several of the houses, including Mr. Archer's, are
27 constructed with more than one roof line and there was no substantial evidence to show
28 why the proposed roof should be required to tie into the existing second-story roof.

29 25. Regarding the Association's second basis for denial, the proposal to paint
30 the roof tiles, this issue is also included in the second set of bullets that is advisory only.

1 Mr. Archer presented evidence showing that painting roof tiles is no different than
2 painting stucco as both are cement-based products.

3 26. Mr. Kauffman testified that AR section 4.4 does not show that painted tiles
4 are acceptable, therefore these are not acceptable, but one must also look at AR
5 section 4.5 to reach that conclusion.

6 27. AR section 4.4 requires tiles to be barrel and flat concrete and it requires
7 the colors to be approved by the Architectural Committee. Section 4.4 does not provide
8 any prohibition on painting roof tiles, but does explicitly prohibit certain roof-styles. Other
9 sections of the ARs also explicitly prohibit use of certain materials. For example, section
10 4.5 prohibits vinyl siding.

11 28. Mr. Archer proposed painting the roof tiles because he had been unable to
12 locate tile to match his existing roof. As of the hearing dates, Mr. Archer believed he had
13 located enough tile and would not be required to paint the roof.

14 29. Mr. Archer has previously painted tiles on his roof that had been added to
15 replace wind-damaged tiles.

16 30. Regarding the Association's third basis for denial, the need for
17 architectural expression and elements, this issue is also included in the second set of
18 bullets that is advisory only.

19 31. As seen in the elevation drawings, Mr. Archer's proposed addition will
20 include features such as stucco pop-outs, inset windows, an eye-brow ridge or ridges,
21 and details under the soffits that provide expression. Many of these elements are also
22 seen in the existing structure.

23 32. Mr. Kauffman and Ms. Zigler each testified to the effect that the proposed
24 addition's windows were not appropriate because these were not the same size as
25 other windows in the house. But the evidence shows that the window sizes in Mr.
26 Archer's house vary, as do the sizes of the windows in other houses.

27 33. Mr. Hancock is in the building industry, having built an estimated 25,000 to
28 30,000 homes in about 200 subdivisions. He has known Mr. Archer for twenty-six years
29 or so. He looked at the proposed plans and the neighborhood itself, but not the ARs. His
30 opinion was to the effect that the proposed addition is not non-harmonious.

1 34. Dr. Zach lives across the street from Mr. Archer and is not opposed to the
2 proposed addition.

3 35. Mr. Earlie spent about forty-seven years in the homebuilding business and
4 has served on HOA boards until the associations were turned over to the residents. He
5 is acquainted with Mr. Archer through the home-building industry. He reviewed the
6 proposed drawings and looked at the house. He has seen many similar issues from
7 both sides, and was of the opinion that Mr. Archer went overboard in an effort to
8 harmonize the addition. He acknowledged that each situation is different.

9 36. Mr. Kauffman explained that the approval process is envisioned as being
10 collaborative in which the Association and homeowner work together to come up with
11 an acceptable design.

12 37. In this case, the parties had no discussions after the April 10, 2020
13 conference call, and Mr. Archer's hearing evidence included information that had not
14 been provided to the Association prior to the hearing.

15 38. This evidence included a sealed Affidavit by registered architect Thomas
16 Bragg who had reviewed the proposed addition plans and the ARs and had been to the
17 site. Mr. Bragg concluded that the proposal was in compliance with the ARs. He noted
18 that the proposed second floor matched the existing architecture and that the "lowered
19 roof height is stepped below the existing second floor roof line...." And that "[t]he design
20 is varied and does not present any large unbroken wall areas with the blended details."
21 Mr. Archer paid Mr. Bragg \$500 for his work.

22 39. AR section 1.1 shows that what is appropriate for one house may not
23 necessarily be appropriate and approved in a different house.

24 **CONCLUSIONS OF LAW**

25 1. In his petition, Mr. Archer alleges that the Association has violated ARIZ.
26 REV. STAT. section 33-1817(B)(3). Consequently, the Department of Real Estate has
27 authority over this matter. ARIZ. REV. STAT. Title 32, Ch. 20, Art. 11.

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

1 3. A preponderance of the evidence is:

2 The greater weight of the evidence, not necessarily established
3 by the greater number of witnesses testifying to a fact but by
4 evidence that has the most convincing force; superior
5 evidentiary weight that, though not sufficient to free the mind
6 wholly from all reasonable doubt, is still sufficient to incline a fair
7 and impartial mind to one side of the issue rather than the other.
8 BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

9 4. The CC&Rs and related ARs are a contract between the parties and they
10 are required to comply with its terms. *See Johnson v. The Pointe Community*
11 *Association*, 205 Ariz. 485, 73 P.3d 616 (App. 2003).

12 5. ARIZ. REV. STAT. section 33-1817(B)(3) provides that "Approval of a
13 construction project's architectural designs, plans and amendments shall not
14 unreasonably be withheld."

15 6. The Association's reasons for denial are arguably not clear because it
16 included two of its three reasons in a portion of the denial notice that was advisory only.
17 Nevertheless, Mr. Archer presented sufficient evidence to show that none of the three
18 reasons is reasonable.

19 7. Regarding the first basis for denial, Mr. Archer presented evidence
20 showing that his proposed addition is in harmony with the community and there is no
21 evidence to show that the proposed addition will "dominate and/or sharply contrast with"
22 the community. Because the proposed roof is at the same pitch as the existing two roofs
23 on the house and there are other houses with more than one roof line, the proposed
24 addition will not sharply contrast with the community even though its roof will not be tied
25 into the second-story roof.

26 8. Regarding the second basis for denial, the preponderance of the evidence
27 shows that the Association acted outside its scope of authority because the ARs do not
28 include a prohibition on painting tiles. If any painted tiles were to violate provisions of
29 the ARs, the Association could then require Mr. Archer to rectify the situation.

30 9. Regarding the third basis for denial, Mr. Archer provided credible evidence
 showing that the proposed addition will provide architectural expression as required by
 AR section 4.2.

10. Consequently, the Association should grant preliminary approval for Mr. Archer's proposed addition and allow Mr. Archer to make a final submittal in conformity with the ARs. The Association also must pay to Mr. Archer his \$500 filing fee. ARIZ. REV. STAT. § 32-2199.02(A).

ORDER

IT IS ORDERED that Marc Archer is the prevailing party in this matter and that the Association should approve his preliminary design;

IT IS FURTHER ORDERED that the Association must pay to Mr. Archer Petitioner his filing fee of \$500.00 within thirty days of this Order.

NOTICE

Pursuant to ARIZ. REV. STAT. section 32-2199.02(B), this Order is binding on the parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. section 32-2199.04. Pursuant to ARIZ. REV. STAT. section 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 30, 2022.

/s/ Thomas Shedden
Thomas Shedden
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile March 30, 2022 to:

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