

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Sam & Pipper O' Shaughnessy Stangl,

No. 22F-H2221009-REL-RHG

4 Petitioners,
5 vs.

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 Sabino Vista Townhouse Association,
7
8 Respondent.

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10 **HEARING:** April 4, 2022

11 **APPEARANCES:** Petitioners Sam & Pipper O' Shaughnessy Stangl appeared
12 on behalf of themselves. Nathan Tennyson, Esq. appeared on behalf of Respondent
13 Sabino Vista Townhouse Association

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

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16 **FINDINGS OF FACT**

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

20 2. Respondent Sabino Vista Townhouse Association (Respondent or the
21 Association) is a homeowners' association whose members own townhomes in the
22 Sabino Vista Townhouse subdivision (Sabino Vista).

23 3. Petitioners own a townhome unit in Sabino Vista and are members of
24 Respondent.

25 4. On or about August 6, 2021, Petitioners filed a single-issue petition with
26 the Department alleging that Respondent had violated Article 6 of its Covenants,
27 Conditions, and Restrictions (CC&Rs) by failing to maintain and otherwise manage all
28 property up to the exterior lines and patio enclosures.

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

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

3 7. A hearing was held on November 8, 2021.

4 8. On November 29, 2021, the Administrative Law Judge issued a decision
5 and found Petitioners to be the prevailing party.

6 9. Respondent filed a request for re-hearing with the Department.

7 10. The re-hearing request was granted by the Department and the matter
8 was set for re-hearing on April 4, 2022.

9 11. A re-hearing was held on April 4, 2022.

10 12. Article 6 of Respondent's CC&Rs concerns Common Maintenance.
11 Article 6 of the CC&Rs provides, in relevant part, as follows:

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

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

1 13. At the re-hearing, Mr. O' Shaughnessy Stangl testified on behalf of
2 himself. Respondent presented the testimony of John Polasi, a member of
3 Respondent's Board and the Chairman of the Landscaping Committee.

4 14. At the re-hearing, Petitioners raised a new allegation that Respondent
5 failed to maintain a drainage channel. See Exhibit J.

6 15. The evidence presented at hearing shows that Respondent determined
7 that it would not maintain the desert area within the Common Area. Mr. Polasi explained
8 that the desert area is located about 35-40 feet away from the back patio walls of the
9 homeowners' lots.

10 16. Mr. Stangl contended at hearing that Respondent is required under Article
11 6 of the CC&RS to maintain the Common Area and remove all rubbish, including the
12 desert area.

13 17. Mr. Polasi explained that Respondent does not maintain the desert area.
14 Mr. Polasi stated that the desert area serves as a natural buffer to keep animals on the
15 other side from coming onto the property of homeowners. Mr. Polasi also stated that the
16 natural desert area prevents bikers and hikers from wandering into the neighborhood.

17 18. Respondent plans to trim the trees in the desert area. However, Mr. Polasi
18 stated that Respondent does not currently have the budget required to do so. Mr. Polasi
19 explained that Respondent hires a company called "Mr. Pack Rat" to visit once a quarter
20 and survey the association for snakes or pack rat issues.

21 19. In support of its case, Respondent submitted into evidence Board Minutes
22 from 2020 that show that the Board determined that any area outside of the "inside of
23 west wall which is at the entrance, inside of north wall, inside east boundary wall
24 denoted by fence and south section denoted 35 feet to south of southern homeowner
25 rear wall" is designated maintained natural desert landscape." See Exhibit C.

26 **CONCLUSIONS OF LAW**

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

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

6 3. "A preponderance of the evidence is such proof as convinces the trier of
7 fact that the contention is more probably true than not."⁴ A preponderance of the
8 evidence is "[t]he greater weight of the evidence, not necessarily established by the
9 greater number of witnesses testifying to a fact but by evidence that has the most
10 convincing force; superior evidentiary weight that, though not sufficient to free the mind
11 wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one
12 side of the issue rather than the other."⁵

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

22 5. Petitioners have failed to establish by a preponderance of the evidence
23 that Respondent failed to maintain a drainage channel and thereby violated its CC&Rs.

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

26 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
27 Ariz. 369, 372, 249 P.2d 837 (1952).

28 ³ See A.A.C. R2-19-119(B)(2).

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

30 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).

6. It is undisputed that the Respondent has not maintained the area designated as natural desert area that lies within its Common Area. Although the Board determined that it would not maintain the natural desert, the Board does not have authority under its CC&Rs to refuse to maintain any of the area of its property up to the exterior building lines. The Administrative Law Judge concludes that the CC&Rs require that the Association maintain and remove all rubbish within its property up to the exterior building lines, including the natural desert area. If the Association does not want to maintain any area within its property up to the exterior building lines, the Association should amend its CC&Rs.

ORDER

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

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

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

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

NOTICE

This administrative law judge order, having been issued as a result of a rehearing, is binding on the parties. A.R.S. § 32-2199.02(B). A party wishing to appeal this order must seek judicial review as prescribed by A.R.S. § 41-1092.08(H) and title 12, chapter 7, article 6. Any such appeal must be filed with the superior court within thirty-five days from the date when a copy of this order was served upon the parties. A.R.S. § 12-904(A).

Done this day, April 25, 2022.

/s/ Velva Moses-Thompson
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile April 25, 2022 to:

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