

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Camelback Del Este Homeowners
Association, Inc.

4 Petitioner,

5
6 vs.

7 Green Elephant Development LLC
8 Respondent.

No. 22F-H2222036-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

9 **HEARING:** April 27, 2022 at 1:00 PM.

10 **APPEARANCES:** Robert Chiffelle appeared on behalf of Camelback Del Este
11 Homeowners Association, Inc. ("Petitioner" and "Association"). Ron Huser, Esq.
12 appeared on behalf of Green Elephant Development LLC ("Respondent") with Reggie
13 Martinez, Bryant Alass, Cody Sperber, and Garrett Schmidt as witnesses. Jeremy
14 Lyons, Missy Lopez, and Paul Scott observed.

15 **ADMINISTRATIVE LAW JUDGE:** Jenna Clark.

16
17 After review of the hearing record in this matter, the undersigned Administrative
18 Law Judge makes the following Findings of Fact and Conclusions of Law, and issues this
19 ADMINISTRATIVE LAW JUDGE DECISION.

20 **FINDINGS OF FACT**

21 **PROCEDURE AND BACKGROUND**

22 1. The Arizona Department of Real Estate ("the Department") is authorized by
23 statute to receive and to decide petitions for hearings from members of homeowners'
24 associations and from homeowners' associations in Arizona.

25 2. On or about February 21, 2022, Petitioner filed a single-issue petition with
26 the Department.¹

27 a. On February 23, 2022, Petitioner tendered a \$500.00 petition fee to the
28 Department.²

29 ¹ See Department's electronic hearing file H022-22036_Petition.pdf.

30 ² See Department's electronic hearing file H022-22036_Payment.pdf.

1 3. On or about March 03, 2022, the Department received Respondent's reply
2 whereby Respondent did not expressly deny the alleged violation(s). Instead, Respondent
3 noted that it "Strictly followed City of Phoenix's & Zoning Department regulations for
4 building's planning & construction."³ Respondent also alleged that "The CDE Deed
5 Restrictions were created before the most current updates to the City of Phoenix's setback
6 ordinances were adjusted. Therefore, the CDE Deed Restrictions are out-dated [sic], and
7 conflict with the City's requirements for setback restrictions."⁴

8 4. Per the March 14, 2022, NOTICE OF HEARING, the Department referred this
9 matter to the Office of Administrative Hearings ("OAH"), an independent state agency
10 unaffiliated with either party, for an evidentiary hearing on May 05, 2022,⁵ regarding the
11 following issue:

12 **Whether [Respondent] violated Community Document Conditions,**
13 **Covenants, and Restrictions Section 5.⁶ Specifically, whether**
14 **Respondent violated the Deed Restriction's 7ft and 20ft setbacks on**
15 **the side and front of the property at issue.**

16 5. On April 20, 2022, a duly executed Subpoena Duces Tecum was served on
17 Petitioner. In relevant part, Petitioner was asked to provide documentation establishing
18 the ownership of property (i.e. the existence of common areas, easements, duties to
19 maintain roadways, etc.), community documents, including amendments, filed with the
20 Maricopa County Recorder's Office, and tax-related documentation from the Maricopa
21 County Treasurer's Office. Petitioner did not comply.

22 **THE PARTIES AND GOVERNING DOCUMENTS**

23 6. Petitioner is a homeowners' association whose members own properties in
24 a residential real estate development located in Phoenix, Arizona. Membership for the
25 Association is compromised of the single-family residences located within the parameters
26 of the Camelback Del Este subdivision.

27 ³ See Department's electronic hearing file H022-22036_ResponseForm_Completed.pdf.

28 ⁴ See Department's electronic hearing file H022-22036_ResponseForm_Letter.pdf.

29 ⁵ On April 13, 2022, pursuant to a joint request of the parties at the close of a scheduled Prehearing
30 Conference, the Office of Administrative Hearings continued the hearing and reset it for April 27, 2022.

31 ⁶ See Department's electronic hearing file H022-22036_Notice_Hearing.pdf.

7. Respondent is a Camelback Del Este subdivision property owner and is therefore a member of the Association.

8. The Association did not record any Covenants, Conditions, and Restrictions (“CC&Rs”). Instead, the Association is governed by a DECLARATION OF RESTRICTIONS (“DECLARATION”), which was recorded with the Maricopa County Recorder’s Office on March 01, 1957,⁷ and overseen by a Board of Directors (“the Board”). Sections 4 and 12 of the DECLARATION were amended by the Board on July 08, 2021.⁸

9. The DECLARATION empowers the Association to control certain aspects of property use within the development. When a party buys a residential unit in the development, they are supposed to receive a copy of the DECLARATION, at which time they agree to be bound by its terms. Generally, the DECLARATION forms an enforceable contract between the Association and each property owner.

10. Section 5 of the DECLARATION states, in pertinent part, as follows:

The lines of the walls nearest the front property line of any dwelling house or any garage incident thereto, built on any lot, shall not be closer than twenty (20) feet to the front property line and twenty-five (25) feet to the rear property line, and the side walls thereof shall not be closer than seven (7) feet to the side lot line on interior lots, and on corner lots the walls of any such structure shall not be closer than ten (10) feet to the side street line of such lot.⁹

HEARING EVIDENCE

11. Robert Chiffelle testified on behalf of Petitioner and submitted Exhibits 1, 4-5, 7, and 9. Respondent declined to present any witnesses, but did submit Exhibits D and I. The substantive evidence of record is as follows:

a. The subdivision of Camelback Del Este is located in Phoenix, Arizona.¹⁰ The Association does not own any property within the Camelback Del Este subdivision, and therefore does not hold any easements or pay taxes on land.¹¹ The Board does not have the authority to levy assessments (i.e.

⁷ See Petitioner Exhibit 1.

⁸ *Id.*

⁹ See Department's electronic hearing file H022-22036 Notice Petition.pdf.

¹⁰ See Respondent Exhibit I.

¹¹ See Petitioner Exhibit 4.

1 dues) to Members. All monies collected from homeowners are voluntarily
2 given. Membership in the Association is voluntary. All Board Members, save
3 Mr. Chiffelle, live in the Camelback Del Este tract.

- 4 b. In July 2021, Respondent purchased a single-family residence in the
5 subdivision located at 4802 N. 38th St. Phoenix, Arizona 85018. Respondent
6 was not provided a copy of the DECLARATION.
- 7 c. On October 20, 2021, the City of Phoenix approved Respondent's plans to
8 renovate and make additions to the property.¹² On or about that date,
9 Respondent erected a secured construction barricade around the property
10 which obscured the view of the residence.
- 11 d. Respondent neither submitted a copy of the City's approved plans to the
12 Association's Architectural Review Committee, nor submitted a request for
13 permission to make improvements upon the premises on 38th St.
- 14 e. On November 06, 2021, Mr. Chiffelle was duly elected as the Board's
15 President.
- 16 f. On January 03, 2022, the Association issued a letter to Respondent to
17 advise that the build at issue did not "conform to the Deed Restrictions for
18 the Camelback Del Este subdivision."¹³ The letter alleged, in pertinent part,
19 as follows:

20 The Camelback Del Este subdivision is subject to a set of Covenants
21 Conditions & Restrictions ("CC&R's"), which is a recorded document
22 containing legally enforceable restrictions on an owner's use of the
23 property. These deed restrictions have been in place since 1957 and
24 are more restrictive than the City of Phoenix building codes. As such,
25 they take precedent over the City codes. Pursuant to the CC&R's for
26 Camelback Del Este, no construction may be commenced on a home
27 without the approval of the Committee. You must submit plan plans
28 for your proposed construction project to the Committee for its
29 consideration and approval.

30 The Association concluded with a request that Respondent cease all
construction until the Architectural Committee reviewed plans and the site.

¹² See Petitioner Exhibit 9.

¹³ See Petitioner Exhibit 7.

1 g. On January 18, 2022, Mr. Chiffelle entered the 38th St. site through an
2 unlocked gate and surveyed the build. Although no measurements were
3 taken, Mr. Chiffelle opined, and reported back to the Board, that
4 Respondent was in violation of Deed Restrictions that require a 7ft setback
5 to the side and a 20ft setback to the front of the property.

6 h. On January 24, 2022, the Association issued a letter to Respondent to
7 advise that Respondent was in violation of Sections 5 and 11 of the
8 DECLARATION.¹⁴ The letter alleged, in pertinent part, as follows:

9 [Y]our property is governed by a Declaration of Restrictions, Articles
10 of Incorporation, Bylaws, and Rules and Regulations (collectively
11 "Governing Documents"). The terms in the Governing Documents
12 are contractual and cannot be waived or abandoned. When you
13 purchased your home within the Association, you were put on notice
14 of restrictions and rules.

15 12. At the close of Petitioner's Case-in-Chief, Respondent made a Motion for
16 Judgment as a Matter of Law. Petitioner was permitted to provide a counter argument.

17 **CONCLUSIONS OF LAW**

18 1. This matter falls outside the Department's jurisdiction pursuant to ARIZ. REV.
19 STAT. §§ 32-2102 and 32-2199 *et seq.*, regarding a dispute between an owner and a
20 planned community association.

21 2. In this proceeding, Petitioner bears the burden of proving by a
22 preponderance of the evidence first that this matter is properly before the OAH and then
23 that Respondent violated Section 5 of the DECLARATION.¹⁵

24 3. "A preponderance of the evidence is such proof as convinces the trier of fact
25 that the contention is more probably true than not."¹⁶ A preponderance of the evidence is
26 "[t]he greater weight of the evidence, not necessarily established by the greater number of
27 witnesses testifying to a fact but by evidence that has the most convincing force; superior
28 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable

29 ¹⁴ See Petitioner Exhibit 5.

30 ¹⁵ See ARIZ. ADMIN. CODE R2-19-119. Petitioner's pleading is incorrect in that it identifies a violation of
CC&Rs, though through the presentation of evidence conceded that the alleged underlying violation
stemmed from Section 5 of the DECLARATION.

¹⁶ 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.”¹⁷

4. ARIZ. REV. STAT. § 33-1802(4) defines a “planned community,” in pertinent part, as follows:

a real estate development that includes real estate owned and operated by or real estate on which an easement to maintain roadways or a covenant to maintain roadways is held by a nonprofit corporation or unincorporated association of owners, that is created for the purpose of managing, maintaining or improving the property and in which the declaration expressly states both that the owners of separately owned lots, parcels or units are mandatory members and that the owners are required to pay assessments to the association for these purposes.

5. Here, there is fundamental substantial evidence missing from the record. Most significantly, no evidence was submitted to establish that the Association is a “planned community” as defined in ARIZ. REV. STAT. § 33-1802(4). Petitioner failed to present any evidence that it owns and operates any real estate, or that it has an easement or covenant to maintain roadways.

6. Additionally, the record does not reflect that a contractual agreement between the parties exists,¹⁸ that Petitioner provided Respondent with a copy of the DECLARATION in July 2021, or that any construction has factually taken place at 4802 N. 38th St. which exceeds the DECLARATION’S 7ft side setback and 20ft front setback property requirements. Also, the DECLARATION itself does not expressly or implicitly state that Camelback Del Este subdivision property owners are mandatory members of the Association.

7. Because the evidence failed to establish, at a minimum, that the Association is a planned community, OAH does not have any authority to consider a dispute between the Association and Respondent pursuant to ARIZ. REV. STAT. §§ 32-2199(2) and 41-1092.¹⁹

¹⁷ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

¹⁸ See *Tierra Ranchos Homeowners Ass’n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

¹⁹ While additional factors may provide further basis upon which the motion for Judgement as a Matter of Law may be granted, it is not necessary for the tribunal to consider them as Petitioner failed to establish it was a “planned community” under the applicable statutes.

8. Therefore, pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(D), 32-2199.02, 41-1092, and ARIZ. REV. CODE R2-19-111(4) and R2-19-119, Respondent's Motion for Judgment as a Matter of Law must be granted.

ORDER

Based on the foregoing,

IT IS ORDERED that Petitioner's petition be denied.

IT IS FURTHER ORDERED that Respondent's motion for a Judgment as a Matter of Law is granted.

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 thirty (30) days of the service of this ORDER upon the parties.

Done this day, April 29, 2022.

Office of Administrative Hearings

/s/ Jenna Clark
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile April 29, 2022, to:

Louis Dettorre, Commissioner
Arizona Department of Real Estate
100 N. 15th Ave., Ste. 201
Phoenix, AZ 85007
AHansen@azre.gov
vnunez@azre.gov

Camelback Del Este Homeowners Association, Petitioner
c/o Robert Chiffelle, President

1 4718 N. 33rd Pl.
2 Phoenix, AZ 85018
3 Camelbackdelestehoa@gmail.com
4 rchiffelle@cox.net

5 Ronald E. Huser, Esq.
6 Huser Law Firm, Counsel for Respondent
7 1801 W. Queen Creek Rd., Ste. 2
8 Chandler, AZ 85248
9 ron@huserlawfirm.com

10 By: Miranda Alvarez
11 Legal Secretary
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30