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ADMINISTRATIVE LAW JUDGE DECISION

ADMINISTRATIVE LAW JUDGE: Kay A. Abramssohn

3. On November 8, 2021, Association filed with the Department its blanket response denying the allegations. Additionally, Association filed a Motion to Dismiss for

1 failure to state a claim upon which relief may be granted or, alternatively, for failure to
2 remit the proper filing fee for an alleged multiple issue petition.¹

3 4. The Department did not dismiss the Petition and the parties failed to resolve the
4 matter informally.

5 5. On or about November 22, 2021, the Department issued its Notice of
6 Hearing to the parties notifying them that an administrative hearing regarding the Petition
7 would be conducted by the Office of Administrative Hearings ("Tribunal").

8 6. On November 24, 2021, Association filed a Motion to Dismiss with the
9 Tribunal, reiterating its earlier arguments to the Department.

10 7. The Tribunal's authority is limited to rule on the Petition and its alleged
11 violations. The issue for consideration is whether the Association, through actions of
12 Committee, violated the Association's adopted Guidelines when Committee granted a
13 variance to Lot 19 Owners regarding the side-yard setback requirements in violation of the
14 Guideline Section 1, Items 1 and 32 requirements and the Section 5, Item 12 requirements.

15 BACKGROUND

16 8. The Stone Canyon lots were drawn in various configurations. See Exhibit
17 26.

18 9. Petitioners own Lot 20, which abuts, in part, both Lot 19 and Lot 24. See
19 Exhibits 3, 4, 12² and 14.³ The home on Lot 20 was built in 2002; Petitioners purchased
20 the home in 2012.⁴

21 10. The home on Lot 19 was built in 2003.⁵

22 11. Lot 24 is currently vacant land.

23 12. The Guidelines were amended, effective November 5, 2019. Guideline
24 Section 5, Item 32 now states as follows:

25 ¹ Association's Motion to Dismiss did not present position statements regarding the substantive allegations
26 raised in the Petition.

27 ² Exhibit 12 depicts an aerial view of Lot 19 existing home at the top/middle of the photograph and Lot 20
28 Petitioners' home at the bottom/middle of the photograph.

29 ³ Exhibit 14 depicts an aerial view of the walled back patio at Petitioner's Lot 20 home (at right side in
30 photograph); the side/back of the existing garage of Lot 19 home (to the left in photograph) is the closest
structure to Lot 20.

⁴ See Exhibit 6.

⁵ *Id.*

1 The Building Envelope and all improvements therein shall have a minimum
2 30-foot setback from the front property line and from any abutting streets,
3 which shall remain in an undisturbed state except for access drives, mailbox
4 installation *and landscape enhancement as herein described*. The side
5 yard setback for the Building Envelope and all improvements shall be a
6 minimum of 15 feet and 25 feet in the rear, which shall remain in undisturbed
7 states. *Variances must be approved first by the Town of Oro Valley and*
8 *then by the DRC.*

9 *All building Structures shall comply with the above outlined setback*
10 *distances. Modifications to the above outlined setback distances will be*
11 *considered on a case-by-case basis for secondary improvements such as*
12 *grading, landscaping, driveways, site walls, etc.*⁶

13 13. In 2021, the new Lot 19 Owners determined to remodel the existing home,
14 proposing to add approximately 2,500 square feet of living space and to add an RV
15 garage of approximately 1,200 square feet to the existing garage. The proposed location
16 of the RV garage and its expanded driveway approach precipitated objections from
17 Petitioners. See Exhibits 4 and 14.

18 14. Lot 19 Owners submitted a February 2021 Preliminary Design proposal to
19 Association/Committee. See Exhibit 20. As a part of the proposal process, Lot 24
20 owner(s) had agreed to sell a portion of the lot to enable, for Lot 19, an ostensibly larger
21 south/west side-yard setback area to accommodate the new garage addition.⁷ See
22 Exhibit 3.

23 15. On May 6, 2021, through their Architect, Lot 19 Owners submitted a
24 revised Preliminary Design proposal. See Exhibit 5.

25 16. Petitioners reviewed the May Lot 19 proposal and, on May 23, 2021, filed a
26 letter to the Committee outlining their objections to the “new driveway on the west side of
27 the [proposed] structure which will provide access to the proposed new RV garage.”
28 Petitioners noted that, currently, they could not see any portion of the existing driveway
29 from their home/back patio. Petitioners posited that an owner’s right to improve their
30

⁶ The italicized text shows the amendments. Jerry Young, Consulting Architect for the Association, testified about the amendments to Item 32 and further indicated that the second paragraph of Item 32, regarding “modifications,” was an amendment added at or about the time of a change in ownership.

⁷ Petitioners had, at that time, raised concerns with regard to that transaction as a possible violation of the Associations’ CC&Rs. *Id.*

1 property does not allow that owner to, thereby, diminish the value of another lot within the
2 community, arguing that the Lot 19 proposal would not result in a desirable view and
3 would be an eyesore. Petitioners also argued that, with the resulting new elevation
4 difference between the lots, neither a screening wall nor additional landscaping would
5 remedy the situation.

6 17. On May 25, 2021, the Committee denied the May Lot 19 proposal⁸ and, by
7 letter to the Architect, dated June 2, 2021, the Committee set forth its exceptions to
8 several aspects of the May proposal. See Exhibit 9. The Committee stated that the new
9 RV garage would maintain the applicable 15' minimum side set back but that other
10 proposed secondary improvements along the side of that RV garage would be located
11 within the 15' side set back. The Committee noted that the Guidelines, Section 1, Item 32
12 stated, as to the applicable 15' side set back distance, that modifications " ... will be
13 considered on a case-by-case basis for secondary improvements such as grading,
14 landscaping, driveways, site walls, etc." Committee further noted that the proposal had
15 not included a Guideline variance request for the proposed "secondary improvements,
16 indicating that the Guidelines, Section 5, Item 12 stated that a deviation from the
17 Guidelines could be considered "... if following the criteria or requirements would create
18 an unreasonable hardship or burden for an Owner."

19 18. On June 16, 2021, Architect appealed the Committee's denial of the May
20 Lot 19 proposal and requested a Section 5, Item 12 variance as follows:⁹

21 We received the review comment letter dated June 2, 2021. We feel there
22 is additional information that was not presented and variances needed for
23 secondary improvements that were not requested in accordance with the
24 design guidelines.

25 This property was purchased by Martin Coe and Lydia Roos with the
26 understanding that a new garage and bedroom addition could be built on
27 this property. The current house has a small two car garage with narrow
28 doorways. The owners needed additional bedrooms and garage spaces for
29 their family.

30 The west addition has been redesigned to fit within the existing property
line and setbacks. *The front corner of the existing garage is right on the 15'
building setback line. This requires the driveway to access the new garage*

⁸ See Exhibit 24.

⁹ See Exhibit 10.

1 *to be built in the setback.* There is no other area for a new a garage addition
2 *and no other way to provide access to the new garage.* We request a
3 *variance to allow a portion of the driveway and grading in the setback area*
4 *extending to the property line.* There are several existing trees on lot 24 that
5 will provide screening of the new driveway along the property line[.]
6 Additional trees and vegetation will be provided. This driveway is in an area
7 far back from the building area for lot 24 that will have minimal impact to any
8 future development. An aerial photograph is attached to illustrate the
9 proposed improvements.

10 There is a 5-foot high cmu and stone veneer screen wall for the
11 mechanical equipment and garbage cans shown on the south wall of the
12 garage in the setback approximately 8' from the property line. We feel this is
13 a best location for equipment yard. It will provide some visual relief to the
14 south wall of the garage. We request a variance to allow the wall and
15 grading in the setback.

16 The finished floor of the new garage is a few feet above grade with a stem
17 wall to match the house wall. We propose a 2' to 3' boulder retaining wall in
18 the setback around the garage to provide a "plant bench" next to the garage
19 to reduce the exterior height of the garage wall. The remaining area to the
20 property line will be restored and revegetated. We request a variance to
21 allow this grading in the setback.

22 This addition is located adjacent to the far rear portion of lot 24, well away
23 from the lot 24 building envelope and not visible from the street. The
24 addition and the secondary improvements in the setback will not impact any
25 future home on this lot. The views for this lot are to the east to the Catalina
26 mountains and not toward lot 19. This area has been previously graded with
27 a rip-rap slope, is unattractive and has minimal vegetation (see photos).¹⁰
28 We will provide mature vegetation along the south property line, on the plant
29 bench next to the garage, and along the driveway.¹¹ This will greatly
30 increase the quality of the interface between the properties, enhance and
improve the existing graded area, and provide additional screening of the
existing house, the new addition and the driveway as viewed from the future
homes on Lot 23, 24 and the existing home on lot 20. A landscape plan will
be provided with the final construction plan submittal for review.

We respectfully request these variances be approved to allow some
grading and driveway in the setback area and to improve the conditions
along the south property line.

Emphasis added here.

¹⁰ Exhibit 15 documents the rip-rap.

¹¹ Exhibit 11 details some proposed landscaping,

1 19. At its June 29, 2021, meeting, the Committee approved the revised
2 proposal on a preliminary design basis and moved the matter forward for final design
3 stage.¹² See Exhibit 17. In its meeting minutes, the Committee stated, in pertinent part:

4 Discussion ensued on the merit of the project and whether or not it was
5 reasonable to grant a variance to allow secondary improvements to be
6 located in the side setback.

7 In conclusion, the Committee determined it would grant the variance
8 request to allow the proposed secondary improvements (grading,
9 mechanical enclosure site walls, and driveway extension) to be located in
10 the side setback. This variance is subject to the project including significant
11 landscaping installed in the remaining side setback area. The specifics of
12 such (quantities, types, sized, and locations of trees and shrubs) to be
13 determined as part of the final design submittal review.

14 20. On August 4, 2021, Petitioners filed a document, noted to be “Legal
15 Objections,” regarding the Committee’s June 29, 2021 approval. See Exhibit 18.
16 Petitioners claimed that any variances must first be approved by the Town of Oro Valley
17 (“Town”) pursuant to Guidelines, Section 1, Item 32.¹³ Petitioners argued that the
18 Committee had not found there to be an “unreasonable hardship or burden” to Lot 19
19 Owners to support a deviation from the side-yard setback requirements pursuant to
20 Guidelines, Section 5, Item 12. Petitioners acknowledged that Section 5, Item 12
21 provided no specific “criteria” for making such a determination. Petitioners further argued
22 that the meeting minutes had not reflected anything suggesting that the Committee had
23 considered whether the Section 5, Item 12 variance request had been supported by
24 adequate evidence of an unreasonable hardship or burden. Overall, Petitioners argued
25 that the Committee had failed to exercise its discretion reasonably and, thus, the granting
26 of the variance(s) was invalid.

27 ¹² The minutes list the Committee Chair and four Committee members in attendance as well as the
28 Association’s Consulting Architect (Mr. Young) and two persons from Associated Asset Management (the
29 Association’s management company); no Committee member is noted to be absent. See Exhibit 17; *cf.*
30 Exhibit 24.

¹³ See Exhibit 19. In the absence of Guideline criteria, Petitioners further argued that the Committee should
look to the Town’s variance standards, *i.e.*, five factors generally regarding special circumstances,
preservation of rights and privileges of other such properties with no granting of special privileges to the
subject property, and no material detriment to adjacent property, neighborhood or public welfare.

1 21. Within the objections, Petitioners further argued that that the granting of the
2 variances by the Committee had created a “situation that is materially detrimental to our
3 adjacent property ... namely a diminution in value and marketability due to the creation of
4 unfavorable driveway and structure views from our house and back yard.” Finally,
5 Petitioners state:

6 [A]dmittedly, our objection to the proposed Lot 19 plan is based on the
7 adverse economic and aesthetic consequences to us, but the more altruistic
8 objective is to ensure that the committee adheres to the guidelines and legal
9 requirements. The Stone Canyon community relied on the DRC to exercise
10 its discretion in a fair and just manner, in accordance with the established
11 requirements that apply to all. ... Stone Canyon must maintain its high
12 standards that prioritize wide-open spaces, and the quality of life of its
13 residents.

14 22. By letter dated August 15, 2021, counsel for Association notified
15 Petitioners that Association would not be rescinding the variances granted to Lot 19
16 Owners. See Exhibit 25. Therein, in “explaining” the Association’s position, Association
17 noted, in part:

18 [T]he front corner of the proposed garage extends near the building setback,
19 and, with respect to the placement of the proposed structure, there is no
20 other way to provide access to it without granting the variance at issue.
21 Accordingly, this evidence clearly indicates a hardship and/or burden upon
22 the Owner of Lot 19 and DRC properly granted the variance request as a
23 result, pursuant to Section 5.12 of the Design Guidelines. The DRC’s
24 decision clearly met the requirements contained with the Design Guidelines
25 and meets the “reasonableness test” prescribed by Arizona law.

26 Additionally, it should be noted that the recently approved plans for the Lot
27 19 garage (including the variance) are the result of a significant amount of
28 discussion between the Association and the Owner of Lot 19. The
29 Association has not simply “rubber stamped” any of the Owner’s
30 submissions, but has rather considered the Association’s governing
documents along with neighbor concerns at each step. Based on the DRC’s
careful consideration of this matter, the Owner of Lot 19 was required to
resubmit different plans and eventually agree to the compromise that
currently exists. If this case were litigated, an Arizona court would likely
agree that the DRC in this matter acted reasonably at every step and
behaved in manner consistent with and expressly condoned by the Court in

1 *Tierra Ranchos*.¹⁴

2 23. On September 28, 2021, the Committee approved the Lot 19 addition and
3 remodel project and authorized the project to move forward to pre-construction phase.
4 See Association Exhibit 5.

5 24. By letter dated October 11, 2021, the Committee notified Architect of the
6 pre-construction phase requirements.

7
8 25. Petitioners' submitted their hearing memorandum on March 13, 2022.

9 26. Association submitted its pre-hearing memorandum on March 15, 2022.

10 27. At hearing, Petitioners argued that the Association, through Committee,
11 had acted in violation of Guidelines, Section 1, Items 1 and 32 and Guideline Section 5,
12 Item 12 by granting a variance to Lot 19 Owners in the absence of sufficient evidence of an
13 unreasonable hardship or burden and, thus, resulting in Lot 19 violating the community's
14 15' side-yard setback requirement and in diminution of Lot 20 value and marketability.

15 28. At hearing, Association reiterated its primary dismissal argument and
16 requested that the hearing be limited to its urged issue regarding CC&R Section 11.3, the
17 "creation" of Guidelines, which *had* been created, and, therefore, there could be no
18 violation of CC&R Section 11.3.

19 29. Alternatively, Association next argued, that the Committee's minutes did
20 not reflect that a "variance" had been granted and, thus, a "variance" had not been
21 granted.¹⁵

22 30. The Association's position is that the Guidelines Section 1, Item 32 setback
23 "variance" statement applies only to possible changes in building structure setbacks
24 within the building envelope similar to the Town's variance provisions being applicable to
25 structures.¹⁶ The Association's position is that, while all building structures must comply

26 ¹⁴ *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195 (App. 2007), regarding whether that HOA
27 had "acted reasonably" in the exercise of its discretionary design-control authority.

28 ¹⁵ This positional statement is in direct conflict with the hearing record, which indicates that, at the June
29 29, 2021 meeting, the Committee granted a "variance" to allow secondary improvements to be located
30 within the 15' side-yard setback. See Exhibit 17.

¹⁶ Jerry Young testimony; Mr. Young also indicated that the Association had set a higher standard for the
side-yard setback at 15' while the Town setback requirement was lower. However, based on information

1 with the minimum 15' side-yard setback, the Committee and Association may permit
2 "modifications" to setback distances for purposes of secondary improvements, described
3 as "grading, landscaping, driveways, site walls, etc." pursuant to Section 1, Item 32.

4 31. Semantics are at play in this matter, in that: (a) Guidelines Section
5 1, Item 32 discusses "variances" in the context of building structures within the building
6 envelope, but also discusses "modifications" in the context of "secondary improvements"
7 such as grading, landscaping, driveways (*i.e.* non structures); and, (b) Guidelines Section
8 5, Item 12 is entitled "Variances" and discusses the Committee's discretion to deviate
9 from the its own Guidelines in "extenuating" circumstances if following the Guidelines
10 "would create an unreasonable hardship or burden for an owner."

11 32. The hearing record demonstrates that, based on the minutes of the
12 Committee's June 29, 2021 meeting, Association supported the Committee's
13 determination that needing access to the new RV garage which itself was being built
14 within the building envelope in compliance within the 15' side-yard setback, met the
15 criteria of "extenuating" circumstances pursuant to Guidelines, Section 5, Item 12 for
16 purposes of granting a "variance" for the new driveway to be placed and necessary
17 grading to occur within the 15' side-yard setback.¹⁷ The hearing record further
18 demonstrated that, on this case-by-case basis, the Committee determined that the
19 secondary improvements of grading and a driveway were appropriate to be placed, *i.e.*,
20 occurring, within the 15' side-yard setback.

21 **CONCLUSIONS OF LAW**

22 1. The Department has jurisdiction to receive petitions, to hear disputes
23 between a property owner and a planned community association, and to take other
24 actions pursuant to Arizona Revised Statutes ("A.R.S."), Title 33, Chapter 16.

25 2. The Arizona Office of Administrative Hearings (Tribunal) is a separate state
26 agency authorized by statute to hear and decide agency-referred contested matters
27 through the conduct of an administrative hearing and issuance of a written decision.

28 regarding a prior 2019 variance request to Town from a Lot 251 owner, it appeared that the Town side-
29 yard setback was 20'. See Exhibit 21. Thus, the Administrative Law Judge was unable to clarify the
30 Town setback requirement using the hearing record.

¹⁷ See Exhibit 25.

1 3. In this proceeding, pursuant to Arizona Administrative Code (“A.A.C.”) R2-
2 19-119, Petitioners bear the burden of proving by a preponderance of the evidence that,
3 as alleged, Association through actions of Committee had violated Guidelines Section 1,
4 Items 1 and 32 requirements and Section 5, Item 12 requirements when Committee
5 granted a variance to Lot 19 for secondary improvements in the 15’ side-yard setback.

6 4. A preponderance of the evidence is “[e]vidence which is of greater weight or
7 more convincing than the evidence which is offered in opposition to it; that is, evidence which
8 as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW
9 DICTIONARY 1182 (6th ed. 1990).

10 5. Guidelines, Section 1, Item 1 provides:

11 All buildings and structures erected within Stone Canyon and the use and
12 appearance of all land within Stone Canyon shall comply with all applicable
13 local zoning and code requirements as well as the [CC&Rs] and these
14 Design Guidelines.

15 6. Guidelines, Section 1, Item 32 provides:

16 The Building Envelope and all improvements therein shall have a minimum
17 30-foot setback from the front property line and from any abutting streets,
18 which shall remain in an undisturbed state except for access drives, mailbox
19 installation and landscape enhancement as herein described. The side
20 yard setback for the Building Envelope and all improvements shall be a
21 minimum of 15 feet and 25 feet in the rear, which shall remain in undisturbed
22 states. Variances must be approved first by the Town of Oro Valley and
23 then by the DRC.

24 All building Structures shall comply with the above outlined setback
25 distances. Modifications to the above outlined setback distances will be
26 considered on a case-by-case basis for secondary improvements such as
27 grading, landscaping, driveways, site walls, etc.

28 7. Guideline, Section 5, Item 12 provides:

29 At its discretion, the [Committee] has the authority to deviate from the
30 requirements in these Design Guidelines in extenuating circumstances if
following the criteria or requirements would create an unreasonable
hardship or burden for an Owner. An affirmative vote of a majority of the
members of the [Committee] must be gained for a variance to be granted.

1 8. The Administrative Law Judge concludes that the hearing record
2 demonstrates that Committee exercised reasonable discretion under its authority to grant,
3 to the Lot 19 Owners, a Section 5, Item 12 deviation, *i.e.*, a variance, to the Guidelines to
4 allow the proposed/approved secondary improvements to be placed within the 15' side-
5 yard setback.

6 9. Therefore, based on the hearing record, the Administrative Law Judge
7 concludes that Petitioners have not established, as alleged, any violation by Association
8 of the alleged referenced provisions.

9 10. As a result, the Administrative Law Judge concludes that Petitioners'
10 Petition shall be dismissed.

11 **ORDER**

12 IT IS ORDERED that Petitioners' Petition is dismissed.

13 IT IS FURTHER ORDERED that Petitioners bears their \$500.00 filing fee.

14 **NOTICE**

15 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties**
16 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04.**

17 **Pursuant to A.R.S. § 41-1092.09, a request for rehearing in this matter must**
18 **be filed with the Commissioner of the Department of Real Estate within 30 days of**
19 **the service of this Order upon the parties.**

20 ORDERED this day, August 5, 2022.

21 /s/ Kay Abramsohn
22 Administrative Law Judge

23 Transmitted by e-mail August 5, 2022 to:

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By Miranda Alvarez
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