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No. 22F-H2222062-REL

ADMINISTRATIVE LAW JUDGE DECISION

V.

Respondent.

APPEARANCES: Petitioners Dennis Anderson and Mary Scheller appeared on their own behalf. Lisa Marx and Renee Snow appeared on behalf of Respondent Tara Condominiums Association.

FINDINGS OF FACT

1. Tara Condominium Association (“Respondent”) is a condominium unit owners’ association whose members own the condominiums in the Tara Condominium development in Sun City, Arizona.

2. Petitioners Dennis Anderson and Mary Scheller own a condominium located at 13661 North Newcastle Drive in Sun City, and they are members of Respondent.

3. On or about June 9, 2022, Petitioner Dennis Anderson filed a single-issue Petition with the Arizona Department of Real Estate (“Department”) alleging that Respondent had violated its Covenants, Conditions and Restrictions (“CC&Rs”) Section 11 by “unfairly, arbitrarily, and capriciously” rejecting Petitioners’ Architectural Change Form for the construction of a storage shed on Petitioners’ patio. Petitioners

1 alleged that Respondent rejected the request based upon a “non-existent rule (shed must
2 not be higher than patio wall).”

3 4. Respondent, through its Board, filed a written Answer to the
4 Petition, denying that it had violated any CC&Rs by failing to approve Petitioners’
5 Architectural Change Form.

6 5. The Department referred the Petition to the Office of Administrative
7 Hearings, an independent State agency, for an evidentiary hearing.

8 6. A hearing was held on August 4, 2022. Administrative Notice was
9 taken of the Agency Record. Petitioners testified on their own behalf and submitted eight
10 exhibits into evidence. Lisa Marx, Chairperson and Secretary of Respondent’s Board,
11 and Renee Snow, Treasurer of Respondent’s Board, testified on behalf of Respondent
12 and submitted three exhibits into evidence.

13 **REFERENCED CC&RS**

14 7. Section 11 of the CC&Rs provides in relevant part as follows:

15 No exterior additions, or alterations to any building, nor changes in fences,
16 hedges, walls and other structures including, but not limited to color thereof,
17 shall be commenced, erected or maintained until the plans and
18 specifications showing the nature, kind, shape, height, materials, location
19 and approximate cost of same, shall have been submitted to and approved
20 in writing as to conformity and harmony of external design and location with
21 existing structures in the property by an architectural committee composed
22 of the Board of Management, or by a representative designated by the
23 Board of Management. The members of such committee shall not be
24 entitled to compensation for services performed pursuant to this paragraph.
25 No such additions or alterations shall be permitted by any owner until the
26 initial Board of Management has been established.

27 **HEARING EVIDENCE**

28 8. On January 3, 2022, Mr. Anderson constructed a shed on his patio.

29 9. On January 29, 2022, Respondent sent Petitioners a letter that
30 informed them that during a routine walk-through of the community, Respondent became
aware that a shed was built on the patio of Petitioners’ unit. See Exhibit B. The January

1 29, 2022 letter cited to CC&R Section 11 and requested that Petitioners correct the matter
2 "immediately." *Id.*

3 10. On or about February 2, 2022, Petitioners submitted a Request for
4 Approval of Architectural Change to Respondent for a "storage unit for tools." See Exhibit
5 8.

6 11. On February 6, 2022, Respondent notified Petitioners that the
7 Board "disapproved the Request for Architectural Change" ("Denial Letter"). See Exhibit
8 C.

9 12. The February 6, 2022 Denial Letter advised Petitioners that Board
10 members became aware of the existence of Petitioners' shed and took photographs of the
11 shed. The Denial Letter quoted CC&R Section 11 as set forth above. The Denial Letter
12 requested that Petitioners "correct this matter immediately" and requested that all
13 specifications for the shed be submitted in writing. The Denial Letter also advised that the
14 shed could not be attached to the condominium and must be below the block wall line by
15 three inches.

16 13. On March 2, 2022, Respondent sent another letter to Petitioners
17 stating that during a routine property inspection on February 26, 2022, it was observed
18 that the shed was still on the property and "was found to be in non-compliance. . . ." The
19 March 2, 2022 letter again referenced CC&R Section 11.

20 14. On March 21, 2022, an attorney hired by Petitioners sent a letter to
21 Respondent that stated in pertinent part, "[Mr. Anderson] is now aware that such
22 improvement was made without prior consent by the architectural committee of
23 [Respondent] Board."

24 15. Mr. Anderson thereafter filed the Petition in this matter.

25 16. During the hearing, Mr. Anderson testified that he moved into the
26 community in 2021, and asked Ms. Scheller, who had been President of Respondent's
27 Board, if he could construct a shed on the patio. Mr. Anderson testified that Ms. Scheller
28 said, "No problem." Mr. Anderson testified that he noticed that other units in the
29 community had sheds, and so he proceeded to build his shed on January 3, 2022.
30

1 17. Ms. Scheller was out of state when Mr. Anderson constructed the
2 shed. When she returned she completed the Architectural Change Form for Mr.
3 Anderson. Mr. Anderson asserted that at the time of construction of the shed, he was
4 unaware of the requirement to submit an Architectural Change Form prior to commencing
5 construction.

6 18. Mr. Anderson submitted photographs into evidence and testified as
7 to what those photographs depict. Mr. Anderson's photographs depict his shed, as well
8 as other structures in the community that are higher than the block wall, including a sun
9 shade and other sheds. See Exhibits 1-7.

10 19. Mr. Anderson acknowledged that he violated CC&R Section 11 by
11 failing to obtain approval from Respondent prior to constructing the shed. However, Mr.
12 Anderson argued that other sheds were built above the block wall height, and he feels he
13 is being treated unfairly.

14 20. Ms. Scheller testified that the Board will not approve the shed
15 because it is built over the wall height, however there is no provision in the CC&Rs that
16 precludes the construction of a structure above the wall height. Ms. Scheller
17 acknowledged that approval should have been obtained prior to construction, and testified
18 that she was unaware that Mr. Anderson was going to construct the shed before she
19 returned to Arizona and could submit the Architectural Change Request.

20 21. Ms. Marx testified that on January 14, 2022, Respondent became
21 aware during a routine walk-through that Mr. Anderson constructed the shed without prior
22 approval. Ms. Marx submitted into evidence a photograph of the shed taken during the
23 January 14, 2022 walk-through. See Exhibit A. Ms. Marx testified regarding the above-
24 delineated procedural history, including Petitioners' submittal of the Architectural Change
25 Form on February 2, 2022, and the Denial Letter dated February 6, 2022.

26 22. Ms. Marx testified that the shed needed to be approved prior to
27 construction, however further asserted that the shed could not be attached to the unit and
28 must be at least three inches below the wall height. Ms. Marx testified that Ms. Scheller,
29 while President of the Board, informed her "numerous times" that no structure could be
30 constructed without submitting an Architectural Change Form, that no structure could be

1 attached to the unit, and that all structures had to be at least three inches below the wall
2 height. Ms. Marx testified that this is the “standard in Sun City.” Ms. Marx acknowledged
3 that the specifications she referenced as the “standard in Sun City” are not in writing.

4 23. Ms. Marx testified regarding a meeting that the Board had with Mr.
5 Anderson in May 2022. Ms. Marx testified that the Board explained to Mr. Anderson that it
6 was concerned with the weight of the shed and it being attached to the exterior of the unit.
7 Ms. Marx testified that the Board asked Mr. Anderson to remove an interior shelf from the
8 shed, and modify the shed to be free-standing and three inches below the wall height. Ms.
9 Marx testified that at the meeting, Mr. Anderson agreed to make the modifications to the
10 shed by the end of May 2022.

11 24. Mr. Anderson did not modify the shed, and instead filed the instant
12 Petition.

13 **CONCLUSIONS OF LAW**

14 1. A.R.S. § 32-2199.01 permits a condominium unit owner to file a petition with
15 the Department for a hearing concerning the condominium association’s alleged
16 violations of the Condominium Act set forth in Title 33, Chapter 9. This matter lies within
17 the Department’s jurisdiction. That statute provides that such petitions will be heard
18 before the Office of Administrative Hearings.

19 2. Petitioner bears the burden of proof to establish that Respondent violated
20 applicable statutes, CC&Rs, and/or Bylaws by a preponderance of the evidence. See
21 A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249
22 P.2d 837 (1952). Respondent bears the burden to establish affirmative defenses by the
23 same evidentiary standard. See A.A.C. R2-19-119(B)(2).

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.” MORRIS K. UDALL, ARIZONA LAW OF
26 EVIDENCE § 5 (1960). A preponderance of the evidence is “[t]he greater weight of the
27 evidence, not necessarily established by the greater number of witnesses testifying to a fact
28 but by evidence that has the most convincing force; superior evidentiary weight that, though
29 not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a
30

1 fair and impartial mind to one side of the issue rather than the other.” BLACK’S LAW
2 DICTIONARY at page 1220 (8th ed. 1999).

3 4. Section 11 of the CC&Rs provides that “[n]o exterior additions, or alterations
4 to any building, . . . and other structures . . . shall be commenced, erected or maintained
5 *until* the plans and specifications . . . *shall have been submitted to and approved in writing*
6 . . . by an architectural committee composed of the Board of Management, or by a
7 representative designated by the Board of Management.” (Emphasis added.)

8 5. While Petitioner has the right to enforce the requirements of the above
9 provision, Petitioner is also required to abide by the same provision. In this case,
10 Petitioner constructed the shed *prior* to submitting an Architectural Change Form and
11 obtaining approval.

12 6. Therefore, based on a review of the credible and relevant evidence on the
13 record, it is held that Petitioner failed to establish by a preponderance of the evidence that
14 Respondent violated the provisions of Section 11 of the CC&Rs.

15 **ORDER**

16 **IT IS ORDERED** that no action is required of Respondent in this matter and that the
17 Petition is dismissed.

18 **NOTICE**

19 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties**
20 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04.**
21 **Pursuant to A.R.S. § 41-1092.09, a request for rehearing in this matter**
22 **must be filed with the Commissioner of the Department of Real Estate**
23 **within 30 days of the service of this Order upon the parties.**

24 Done this day, August 10, 2022.

25 /s/ Sondra J. Vanella
Administrative Law Judge

26 Transmitted by either mail, e-mail, or facsimile August 24, 2022 to:

27 Louis Dettorre, Commissioner
28 Arizona Department of Real Estate
29 100 N. 15th Avenue, Suite 201
30 Phoenix, Arizona 85007

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Legal Secretary