

1 **Final agency action regarding decision below:**

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3 **ALJFIN ALJ Decision final by statute**

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5 **STATE OF ARIZONA**
6
7 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

8 CHRIS GELB,

9
10 Petitioner,

11 vs.

12 CASA CONTENTA HOMEOWNERS
13 ASSOCIATION,

14 Respondent.
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No. 08F-H088012-BFS

**ADMINISTRATIVE LAW JUDGE
DECISION**

18 **HEARING:** June 10, 2008

19 **APPEARANCES:** Petitioner Chris Gelb was represented by her attorney Frederick
20 Aspey. Respondent Casa Contenta Homeowners Association was represented by its
21 attorney, Mark Sahl, Esq.

22 **ADMINISTRATIVE LAW JUDGE:** Michael G. Wales
23

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25 Based upon the evidence of record, the Administrative Law Judge makes the following
26 Findings of Fact, Conclusions of Law and Order:

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28 **FINDINGS OF FACT**

29 1. Chris Gelb ("Petitioner") is the owner of record of lot 191 in the Casa Contenta
30 subdivision ("the Community") in Sedona, Arizona. The ownership of the lot, also known as a
"building envelope" is subject to the Deed Restrictions and certain planned community

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007
(602) 542-9826

1 governing documents recorded by, or promulgated by, Respondent Casa Contenta
2 Homeowners Association, Inc. ("Respondent Association" or "Association"). An owner of a
3 building envelope in the Community automatically becomes a member of the Respondent
4 Association, and is bound by the governing documents of the Association, by virtue of being a
5 purchaser of, or subsequent purchaser of, any building envelope within the Community.

6 2. On or about October, 2006, Respondent Association, through its Board of Directors,
7 applied a ground cover consisting of crushed red rock to the common area and transitional
8 area in front of Petitioner's home.

9 3. Petitioner took issue with the application of the crushed rock to the common area
10 and transitional area and, on March 13, 2008, filed a Petition, pursuant to A.R.S. §41-
11 2198.01(B), with the Arizona Department of Fire, Building and Life Safety ("the Department")
12 alleging, in a single count, that the Respondent Association had violated the following
13 governing documents, sections of the Restatements of Law, and state statutes:

- 14 a. Article XII, Section 3 of the Amended and Restated Covenants, Conditions and
15 Restrictions dated May 21, 2005 ("CC&Rs");
- 16 b. Sections 6.13 and 6.14 of Restatement (3d) Property: Servitudes (2000); and
- 17 c. A.R.S. §10-3830 and §10-3842.

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20 4. On March 27, 2008, Respondent Association filed a Response to the Petition
21 denying Petitioner's allegations and the matter was set for hearing before the Office of
22 Administrative Hearings.

23 5. At hearing, the parties were informed that A.R.S. §41-2198 only confers jurisdiction
24 on the Office of Administrative Hearings to hear evidence regarding alleged violations of an
25 Association's governing documents or violations of the statutes governing planned unit
26 developments or condominiums. Thus, Petitioner's allegations of violations of the
27 Restatements (3d) and allegations of violations of A.R.S. §10-3830 and §10-3842 were
28 dismissed by this tribunal. Petitioner's sole remaining claim alleged that Respondent violated
29 Article XII, Section 3, of the CC&Rs.
30

1 6. Article XII, Section 3 of the CC&Rs, entitled Equal Treatment of Owners, states
2 “Except as otherwise provided herein, these restrictions shall be applied to all Owners without
3 discrimination.”

4 7. In support of her claim, Petitioner alleged that the Association applied the
5 crushed rock to the common area and transitional area in front of her home, and by applying
6 crushed rock to the common area and transitional area in front of her home, but not requiring
7 that such rock be placed on all common and transitional areas throughout the subdivision, the
8 Association discriminated against her.

9 8. From the evidence elicited at the hearing, the following salient facts are important
10 to note:

11 a. The CC&Rs for the Community define four distinct areas of real property for
12 which separate and distinct rights and obligations exist for the Petitioner and Respondent.
13 Those definitions are summarized as follows:

14 (i.) *The Dwelling Unit* – the area within the walls of Petitioner’s home.

15 (ii.) *The Building Envelope* – the area owned by Petitioner and designated as
16 a plot of land upon which the owner may construct the dwelling unit. In the case at hand,
17 Petitioner’s dwelling unit was approximately 3,100 liveable square feet on a 4,500 square foot
18 building envelope.

19 (iii.) *The Transitional Area* – that area between common area/building
20 envelope line and the walls of the dwelling unit and which is visible from other building
21 envelopes or common area. This area is owned by Petitioner, but maintained by the
22 Association.

23 (iv.) *The Common area* – all other area outside of the building envelope lines.
24 This area is owned by, and maintained by, the Association.

25 b. Article V, Section 1 (second subsection (b)) requires the Association to maintain
26 “the landscaped areas of the Common Areas and other areas to be maintained by the
27 Association, including the Transitional Areas.”

28 c. Article VI, Section 4 requires that the “Association shall maintain the portion of
29 the landscaping of the exterior yard areas of each building envelope lying outside the private
30 porches, courtyards, front patios, and Private Areas of each Building Envelope, and which are

1 referred to herein as Transitional Areas...” The same section gives the Design Review
2 Committee sole discretion as to the manner in which the areas are to be maintained.

3 d. As discussed above, Article XII, Section 3 of the CC&Rs, entitled Equal
4 Treatment of Owners, states “Except as otherwise provided herein, these restrictions shall be
5 applied to all Owners without discrimination.” The word “restrictions” is defined in Article I,
6 Section 25 of the CC&Rs as follows: “Restrictions shall mean the covenants, conditions,
7 restrictions, assessments, easements and liens set forth in this Declaration.” The definition
8 does not include restrictions or conditions set forth in the Design Guidelines.

9 e. The word “Declaration” is defined in Article I, Section 13 of the CC&Rs as follows:
10 “Declaration shall mean this Declaration of Covenants, Conditions and Restrictions for Casa
11 Contenta, as the same may be amended or supplemented from time to time.” By reference,
12 however, the Declaration incorporates the conditions and restrictions set forth in the
13 Association’s Design Guidelines.

14 f. In 2004, Petitioner sought Association approval to construct a home within the
15 building envelope which defined the area of land of which she had ownership. Pursuant to the
16 Design Guidelines, in order for approval to be granted architectural plans setting forth the
17 requested construction, and landscape plans setting forth the anticipated appearance of the
18 landscaping within the building envelope and on the transitional and common areas, were
19 required to be submitted to the Design Review Committee for approval.

20 g. The evidence at hearing established that Petitioner did submit landscape plans
21 setting forth her intended landscaping. Preliminary approval was granted to Petitioner.
22 Petitioner, however, failed to provide evidence at hearing of final approval by the Design
23 Review Committee. The evidence presented established that during the last stages of
24 construction, before final approval was granted, the Association took the position that Petitioner
25 would be required to apply a crushed rock ground cover to the common area and transitional
26 area in order to obtain final approval. When Petitioner objected, the Association applied the
27 crushed rock at its own expense.

28 h. The Design Guidelines require the Owner to landscape the transitional areas and
29 common areas upon completion of construction. The Association then takes over maintenance
30 as discussed in the Design Guidelines under the heading Site Development, subsection

1 Landscaping; as discussed in Article V, Section 1, of the CC&Rs; and as discussed in Article
2 VI, Section 4, of the CC&Rs. Pursuant to these sections, such landscaping is subject to the
3 sole discretion of Respondent Association.

4 i. Nothing in the Design Guidelines or the CC&Rs prohibits the Association from
5 applying a ground cover of its choosing to transitional areas or common areas whether
6 previously landscaped by a homeowner or not.

7 j. Respondent exercised its authority, pursuant to the sections of the CC&Rs
8 described above, to place the crushed rock ground cover, at the Association's expense, but
9 over objection by Petitioner, in the common areas and transitional area in front of Petitioner's
10 home.

11 k. The evidence at hearing established that there are some common areas and
12 transitional areas in the community that have not had an application of crushed rock installed,
13 or need additional crushed rock applied to ensure conformity in crushed rock applications. The
14 Association presented testimony that it is in the process of trying to apply crushed rock to all
15 common area.

16 **CONCLUSIONS OF LAW**

17 1. Pursuant to A.A.C. R2-19-119(B), Petitioner has the burden of proof in this matter.
18 This burden of proof requires proof by a preponderance of the evidence. A.A.C. R2-19-119(A).
19 Proof by a "preponderance" means that "the evidence is sufficient to persuade the finder of fact
20 that the proposition is more likely true than not." In re Arnold and Baker Farms, 177 B.R. 648
21 (9th Cir. BAP (Ariz.) 1994). See also, Culpepper v. State of Arizona, 187 Ariz. 43, 930 P.2d 508
22 (App. 1996). It is "evidence which is of greater weight or more convincing than the evidence
23 which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought
24 to be proved is more probable than not." *Black's Law Dictionary* 1182 (Rev. 6th ed. 1990).

25 2. To establish discriminatory application of either a condition or restriction of the
26 Association's CC&Rs, Petitioner's burden is two-fold. First, Petitioner must show that a
27 specific restriction or specific condition, contained in the CC&Rs, was imposed upon Petitioner.
28 If it is shown that the specific restriction or specific condition was imposed upon Petitioner, then
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1 Petitioner must show the restriction or condition was imposed upon her and not imposed upon
2 the other owners.

3 3. In the case at hand, Petitioner failed to point to any specific restriction or
4 condition in the CC&Rs that was imposed on her. Furthermore, even if this tribunal was to
5 accept the Petitioner's creative argument that requiring a crushed rock ground cover is
6 somehow a specific condition set forth in the CC&Rs, the evidence does not establish that the
7 restriction or condition was imposed upon *Petitioner*. The Association's application of crushed
8 rock to the common area and transitional area adjacent to Petitioner's home is neither a
9 restriction, nor a condition, and even it is was, it is certainly not a condition or restriction
10 *imposed on Petitioner*. The crushed rock was applied to common area and transitional area,
11 areas under the Association's control and authority.¹

12 4. As mentioned above, there are some common areas and transitional areas that
13 have not had an application of a crushed rock ground cover installed as of yet, or need
14 additional crushed rock applied to ensure conformity in crushed rock applications. However, in
15 light of the fact that Petitioner failed to establish that application of crushed rock to transitional
16 areas or common area is a condition (or restriction) set forth in the CC&Rs; or that the
17 restriction or condition she alleges was imposed upon her, rather than upon an area under
18 Association control, the Association's failure to apply, or require application of, crushed rock on
19 other areas is not, by any means, a discriminatory act by Respondent.

20 5. Petitioner failed to sustain her burden of proof that Respondent applied a
21 restriction or condition to Petitioner and not to other homeowners. As such, Respondent
22 Association did not violate Article XII, section 3 as alleged by Petitioner.

23 6. Respondent is the prevailing party in this matter. Therefore, Petitioner is not
24 entitled to an award of his \$550.00 filing fee. A.R.S. § 41-2198.02.

25 7. Respondent Association, as prevailing party, has requested that it be awarded its
26 attorneys' fees. This tribunal declines to award attorneys' fees to Respondent. *Semple v. Tri-*
27 *City Drywall, Inc.*, 172 Ariz. 608, 838 P.2d 1369 (App.1992), precludes an award of fees under
28 A.R.S. §§ 12-341.01(A) (relating to an "action arising out of a contract") and 33-1807(H)

29 ¹ Petitioner also implied that Respondent exceeded its authority under the Site Development landscape
30 maintenance provisions of the Design Guidelines when it applied the crushed rock. However, no violation of any
governing documents was alleged in the petition other than Article XII, Section 3, the anti-discrimination clause,
and as, such, this tribunal does not decide claims that were not alleged in the petition.

1 (relating to an “action brought under this section”). In *Semple*, the Court of Appeals held that
2 “we do not believe that an administrative agency can be characterized as a court so that a
3 proceeding before it could be called an ‘action’ for purposes of A.R.S. section 12-341.01” and
4 that “there is no indication that the legislature intended section 12-341.01 to apply to attorney’s
5 fees incurred by the prevailing party in an administrative proceeding.”² Additionally, Article XII,
6 Section 1 allows the Association to collect attorneys’ fees only if it is the prevailing party in an
7 enforcement action against an owner. Article XII, Section 1 does not authorize an award of
8 attorneys’ fees in the instant action.

9
10 **ORDER**

11 **IT IS ORDERED** that the Petition filed in Case No. HO 08-8/012 is hereby **dismissed**.

12 Pursuant to A.R.S. §41-2198.04(A), this Order is the final administrative decision and it
13 is not subject to a request for rehearing.

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15 Done this day, June 30, 2008.

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17 Office of Administrative Hearings

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20 _____
21 Michael G. Wales
22 Administrative Law Judge

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26 Copy mailed this ____ day of
27 _____, 2008 to:

28
29 Robert Barger, Director
30 _____

² 172 Ariz. at 611-12, 838 P.2d at 1372-73.

1 Department of Fire Building and Life Safety - H/C
2 ATTN: Debra Blake
3 1110 W. Washington, Suite 100
4 Phoenix, AZ 85007

5 Frederick M. Aspey, Esq.
6 Aspey, Watkins & Diesel, P.L.L.C.
7 123 N. San Francisco Street, Suite 300
8 Flagstaff, AZ 86001
9 Attorney for Petitioner

10 Mark K. Sahl, Esq.
11 Carpenter, Hazlewood, Delgado, & Wood, PLC
12 1400 E. Southern Ave., Suite 400
13 Tempe, AZ 85282
14 Attorney for Respondent

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16 By _____
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