

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

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3 **ALJFIN ALJ Decision final by statute**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 John Shields,
8 Petitioner,

9 v.

10 Will Rogers Equestrian Ranch,
11 Respondent.

No. 17F-H1717034-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

14 **HEARING:** September 27, 2017, at 10:00 a.m.

15 **APPEARANCES:** John Shields (“Petitioner”) appeared on his own behalf; Will
16 Rogers Equestrian Ranch (“Respondent”) was represented by Maria R. Kupillas, Esq.,
17 Law Offices of Farley Choate & Bergin.

18 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

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20 **FINDINGS OF FACT**

21 **PETITIONER’S CLAIM**

22 1. Respondent is a homeowners’ association whose members own homes and
23 lots in the Will Rogers Equestrian Ranch development in Queen Creek, Arizona.

24 2. Petitioner owns a home at 20431 E. Bronco Drive in Will Rogers Equestrian
25 Ranch and is a member of Respondent.

26 3. On or about May 3, 2017, Petitioner filed a single-issue petition with the
27 Arizona Department of Real Estate (“the Department”) alleging that Respondent had
28 violated § 6.2(A) of its Covenants, Conditions, and Restrictions (“CC&Rs”) by approving
29 an approximately 5’ long x 6’ high common block wall extension that Petitioner’s next-
30 door neighbor, Joe Johnson, had built between their properties because Petitioner had
not approved the wall.

1 4. Respondent filed a written answer to the petition, denying all complaint items.

2 5. The Department referred the matter to the Office of Administrative Hearings,
3 an independent state agency, for an evidentiary hearing.

4 6. A hearing was held on September 27, 2017. Petitioner submitted one exhibit,
5 testified on his own behalf, and presented the testimony of Dean Kabanuk,
6 Respondent's board's president, for whose testimony Petitioner had a subpoena issued.
7 Respondent submitted four exhibits and presented the testimony of four witnesses: (1)
8 Brenda Campbell, Respondent's community manager; (2) Kristi Hancock, an attorney
9 who since November 2016, has served as Respondent's board's vice president; (3) A.J.
10 Denardo, who is not a member of Respondent but lives with his girlfriend in a house
11 near Petitioner's; and (4) Sandy Johnson, Mr. Johnson's wife who is also Petitioner's
12 next-door neighbor.

13 **REFERENCED CC&Rs**

14 7. CC&R § 6.2 concerns fences as party walls. Section 6.2(A) provides in
15 relevant part as follows:

16 Fences constructed upon the back of any Lot (which do not
17 adjoin any other Lot or Common Area) by the Developer
18 shall be maintained and repaired at the cost and expense of
19 the Lot Owner on whose Lot (or immediately adjacent to
20 whose Lot) the fence is installed. Such Party Walls and
21 Fences shall not be altered, or changed in design, color,
22 material or construction from the original installation made by
23 the Developer without [the] approval of the adjoining
24 Owner(s), if any, and the [Architectural Control] Committee
25 [(“the Committee”)]. . . .¹

26 8. CC&R § 7.2 concerns review by the Committee. Section 7.2 provides in
27 relevant part as follows:

28 No . . . fences . . . shall be commenced [or] erected . .
29 . until the plans and specifications showing the same shall
30 have been submitted to and approved by the Committee.
Approval shall not be unreasonably withheld. However, the
Committee shall have the right to refuse to approve any
Alteration which is not suitable or desirable in their opinion
for aesthetic or other reasons, and they shall have the right

¹ Respondent's Exhibit A at 21. This document was attached to Respondent's Prehearing statement filed on September 20, 2017. See pdf page 26 of 49.

1 to take into consideration (i) the suitability of the proposed
2 Alteration; . . . (iv) the harmony thereof with the surroundings
3 (including color and quality of materials and workmanship);
4 and (v) the effect of the Alteration as planned on the
adjacent or neighboring property (including visibility and
view). . . .

5 The Committee's approval of Alterations shall not be
6 interpreted or deemed to be an endorsement or verification
7 of . . . compliance with applicable laws or building
8 ordinances of the Alterations and the Owner and/or its
agents shall be solely responsible therefor. . . .²

9 9. CC&R § 8.1 concerns the effect of Declaration and Remedies. Section 8.1
10 provides in relevant part as follows:

11 In the event of any violation or attempted violation of these
12 [CC&Rs], they may be enforced by an action brought by
13 [Respondent], the Committee or by the Owner or Owners
14 (not in default) of any Lot or Lots in the Project, at law or in
equity, in addition to [Respondent's] remedies in Sections
15 3.3 and 4.10. . . .³

16 **HEARING EVIDENCE**

17 10. Mr. Johnson had the wall built on or about October 13, 2016, without
18 obtaining the Board's or the Committee's approval. On or about October 16, 2016,
19 Petitioner expressed his disapproval of the wall to Mr. and Mrs. Johnson.

20 11. Petitioner denied that he had ever approved or told anyone that he
21 approved the wall, although he acknowledged that before October 13, 2016, he had
22 been privy to Mr. Johnson's discussions about building the wall. Petitioner submitted a
23 photograph of the wall that he took from his front porch⁴ and testified that the block wall
24 extension "looked like crap."
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27 ² Respondent's Exhibit A at 224-25. This document was attached to Respondent's Prehearing statement
28 filed on September 20, 2017. See pdf pages 29-30.

29 ³ Respondent's Exhibit A at 26. This document was attached to Respondent's Prehearing statement filed
30 on September 20, 2017. See pdf page 31. Section 3.3 provides that Respondent shall enforce the
CC&Rs, but also that Respondent has the additional rights and remedies set forth at § 8.1. Section 4.10
provides Respondent's remedies for members' nonpayment of assessments and charges.

⁴ See Petitioner's Exhibit 1.

1 12. Petitioner argued that since he had not approved the wall, Respondent
2 was responsible for enforcing CC&R § 6.2 by requiring Mr. Johnson to tear the wall
3 down.

4 13. Mr. Denardo testified that he had been privy to conversations at which
5 Petitioner had been present on at least three occasions before October 13, 2016, at
6 which Mr. Johnson had discussed extending the common wall to hide his RV. Mr.
7 Denardo testified that Petitioner did not voice any objection to Mr. Johnson's plan to
8 extend the wall and that, immediately after Petitioner watched the wall being built on
9 October 13, 2016, he stated that the wall looked good.

10 14. Mrs. Johnson testified that Petitioner had been present at least ten times
11 when her husband discussed building the wall extension but had never voiced any
12 disapproval of the wall and had sometimes nodded, apparently indicating his approval
13 of the wall extension. Mrs. Johnson testified that her husband first informed her that
14 Petitioner was upset with the wall on October 16, 2016, two days after the wall had
15 been built. Mrs. Johnson testified that she and her husband never would have built the
16 wall if they had known Petitioner did not approve of it and that this dispute has ruined
17 the close friendship that she and her husband previously had enjoyed with Petitioner.

18 15. On or about November 2, 2016, Mr. Johnson submitted plans for the block
19 wall extension to the Committee for its approval.⁵

20 16. Respondent held its annual general membership meeting on November
21 16, 2016, and elected new board members, including Mr. Kahanuk as president and
22 Ms. Hancock as vice president. Immediately after the annual general membership
23 meeting, the newly elected board members met as the Committee⁶ to consider any
24 plans that had been submitted for its approval, including Mr. Johnson's plan for the wall
25 extension between his and Petitioner's lots. The Board verbally approved Mr.
26 Johnson's block wall but advised him that "he will need to seek neighboring property
27 owner's approval."⁷

28 ⁵ See Respondent's Exhibit B. This document was attached to Respondent's Prehearing statement filed
29 on September 20, 2017. See pdf pages 43-45.

30 ⁶ On or about February 2016, the board decided to have three of its members act as the Committee to
provide consistency for and to expedite consideration of plans submitted for approval.

⁷ Respondent's Exhibit C. This document was attached to Respondent's Prehearing statement filed on
September 20, 2017. See pdf page 47.

1 17. Petitioner denied having received notice of the November 16, 2016 board
2 meeting and accused the board of meeting in secret. As noted above, the petition that
3 Petitioner filed with the Department was a single-issue petition that only alleged a
4 violation of CC&R § 6.2.

5 18. Ms. Campbell testified that Respondent's board conducts an open meeting
6 on the third Monday of every month, among other things for the board sitting as the
7 Committee to consider applications for approval of planned structures. Ms. Campbell
8 testified that Respondent's annual membership meeting and board meeting that were
9 held on November 16, 2016, were noticed and that after the annual membership
10 meeting, members were informed that the new board would conduct its monthly
11 meeting.

12 19. Ms. Campbell testified that she was present for Respondent's board's
13 discussion of Mr. Johnson's block wall extension on November 16, 2016. Ms. Campbell
14 testified that although the board may issue a fine for a violation if a structure has been
15 built without the Committee's approval, if the Committee subsequently approves the
16 structure, the board typically does not impose a fine.

17 20. At Respondent's board's December 2016 meeting, it went into executive
18 session to obtain legal advice regarding enforcement issues.

19 21. Mr. Johnson's block wall extension was explicitly placed on the agenda for
20 Respondent's board's January 18, 2017 meeting. At the January 18, 2017 meeting,
21 Respondent's board's meeting minutes reflect that it "RESOLVED to ratify the
22 unanimous written consent received outside this regular meeting" of Mr. Johnson's
23 common wall extension.⁸

24 22. Ms. Hancock testified that in granting its approval of the wall extension,
25 Respondent's board acting as the Committee considered only whether the block wall
26 extension that Mr. Johnson had built was esthetically pleasing and consistent with other
27 wall extensions that had been built in the Will Rogers Equestrian Ranch development
28 under CC&R § 7.2.

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⁸ Respondent's Exhibit D. This document was attached to Respondent's Prehearing statement filed on
September 20, 2017. See pdf page 49.

1 23. Ms. Hancock testified that although Respondent's board knew that
2 Petitioner objected to Mr. Johnson's block wall extension after it was built, the board
3 was less sure about whether Petitioner had actually or tacitly approved the block wall
4 extension before it was built because at least four witnesses had stated that they heard
5 Petitioner either actually approve of or fail to state an objection to the block wall
6 extension while Mr. Johnson was discussing having the block wall extension built in
7 Petitioner's presence.

8 24. Ms. Hancock stated that CC&R § 8.1 did not require Respondent to take
9 an enforcement action against a member who had built a structure that arguably
10 violated Respondent's CC&Rs, but instead allowed Respondent some discretion. Ms.
11 Hancock testified that Respondent's board determined that it was not their job to decide
12 who was telling the truth about Petitioner's actual or tacit approval of Mr. Johnson's
13 block wall extension before it was built.

14 **CONCLUSIONS OF LAW**

15 1. A.R.S. § 32-2199.01 permits an owner or a planned community organization
16 to file a petition with the Department for a hearing concerning violations of planned
17 community documents or violations of statutes that regulate planned communities. That
18 statute provides that such petitions will be heard before the Office of Administrative
19 Hearings.

20 2. Petitioner bears the burden of proof to establish that Respondent violated
21 applicable statutes or CC&Rs by a preponderance of the evidence.⁹ Respondent bears
22 the burden to establish affirmative defenses by the same evidentiary standard.¹⁰

23 3. "A preponderance of the evidence is such proof as convinces the trier of fact
24 that the contention is more probably true than not."¹¹ A preponderance of the evidence is
25 "[t]he greater weight of the evidence, not necessarily established by the greater number of
26 witnesses testifying to a fact but by evidence that has the most convincing force; superior
27 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable

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29 ⁹ See A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952).

30 ¹⁰ See A.A.C. R2-19-119(B)(2).

¹¹ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather
2 than the other.”¹²

3 4. CC&R § 6.2(A) requires the adjoining property owner’s approval before a
4 block wall extension may be built. CC&R § 7.2 only requires Respondent’s board,
5 acting as the Committee, to consider whether the block wall extension is esthetically
6 pleasing and consistent with other block wall extensions that have been built in the Will
7 Rogers Equestrian Ranch development, not whether the adjoining neighbor has
8 approved the block wall extension.

9 5. CC&R § 8.1 provides that Respondent’s board *may* take an enforcement
10 action to enforce the CC&Rs. “[The] use of the word ‘may’ generally indicates
11 permissive intent . . . while ‘shall’ generally indicates a mandatory provision.”¹³
12 Therefore, CC&R § 8.1 allowed but did not require Respondent to bring an enforcement
13 action against Mr. Johnson for his possible violation of CC&R § 6.2(A) in building the
14 block wall extension without Petitioner’s unequivocal approval. Given the evidence from
15 numerous witnesses that Petitioner at least tacitly approved the block wall extension
16 before Mr. Johnson built it, Respondent did not abuse its discretion by declining to bring
17 an enforcement action against Mr. Johnson for his extension of the block wall between
18 his and his wife’s and Petitioner’s properties.

19 6. Petitioner is not without a remedy in this matter because CC&R § 8.1 also
20 authorizes Petitioner to file an action against Mr. and Mrs. Johnson for their alleged
21 violation of CC&R § 6.2(A).

22 **RECOMMENDED ORDER**

23 In view of the foregoing, it is ORDERED that no action is required of Respondent
24 in this matter and that the petition is dismissed.

25 *In the event of certification of the Administrative Law Judge Decision by the*
26 *Director of the Office of Administrative Hearings, the effective date of the Order will be*
27 *five days from the date of that certification.*

28 Done this day, October 11, 2017.

29 /s/ Diane Mihalsky

30 ¹² BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

¹³ *Walker v. Wilkinson*, 198 Ariz. 431, 432, ¶ 7, 10 P.3d 1218, 1219 (App. 2000).

Administrative Law Judge

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Transmitted electronically to:
Judy Lowe, Commissioner
Arizona Department of Real Estate