

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

2
3 **ALJFIN ALJ Decision final by statute**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 William P. Lee,

8 Petitioner,

9 vs.

10 Greenlaw Townhouses Unit Two
11 Homeowners Association,

12 Respondent.

No. 19F-H1918019-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

13
14 **HEARING:** December 13, 2018

15 **APPEARANCES:** Mark K. Sahl, Esq. and Timothy D. Butterfield, Esq. appeared
16 on behalf of Respondent Greenlaw Townhouses Unit Two Homeowners Association.

17 **ADMINISTRATIVE LAW JUDGE:** Velva Moses-Thompson

18
19 **FINDINGS OF FACT**

20 **BACKGROUND AND PROCEDURE**

21 1. The Arizona Department of Real Estate (“Department”) is authorized by statute
22 to receive and to decide petitions for hearings from members of homeowners’
23 associations in Arizona.

24 2. Petitioner William P. Lee owns a townhouse in Greenlaw Unit Two, and is a
25 member of Greenlaw United Two Homeowners Association (“Greenlaw”).

26 3. On or about September 12, 2018, Mr. Lee filed a single-issue petition with the
27 Department which contained an allegation that Greenlaw had violated amendments 1,
28 2, and 3 of its Covenants, Conditions, and Restrictions (“CC&Rs”), and Greenlaw’s
29
30

1 Rules and Regulations when it banned all parking on Greenlaw streets and contracted
2 with a towing company to boot vehicles parked on Greenlaw streets.

3 4. Greenlaw filed a timely answer to the petition.

4 5. The Department referred the petition to the Office of Administrative Hearings,
5 an independent state agency, for an evidentiary hearing.

6 6. On October 22, 2018, the Department issued a Notice of Hearing setting the
7 above-captioned matter for hearing on December 13, 2018.

8 7. The October 22, 2018 Notice of Hearing provided that the issue set
9 for determination was Mr. Lee's allegation that Greenlaw "violated Community
10 Document CC&Rs amendments 1, 2, & 3 and Association Rules and Regulations in a
11 single issue petition when it banned all parking on the association streets and
12 contracted with a towing service to boot vehicles."

13 8. A hearing was held on December 13, 2018.

14 9. Mr. Lee testified on behalf of himself, and submitted exhibits H1 through H6.
15 Greenlaw did not provided no testimony or evidence.

16 10. On or about July 2, 1999, Greenlaw Declaration of CC&Rs was recorded at the
17 Coconino County Recorder.¹

18 11. Owners agree to be bound by the CC&Rs.²

19 12. Section (l)(b) of the CC&Rs concerns Ownership. Section (l)(b) provides:

20 The areas designated on the plat of record of the subject
21 property (Tract A as depicted on said plat) shall be
22 considered common area nad shall be owned by the
23 Greenlaw Townhouses Unit Two Homeowners Association,
24 an Arizona corporation (here-after "Association".) in trust for
25 the benefit of the lot owners pursuant to the terms of the
26 bylaws of the Association. Said By-laws and Articles of
27 Incorporation are fully incorporated herein. Each lot owner
28 shall be a beneficiary of an equal undivided interest in said
29 trust. Its maintenance and use shall be controlled by the
30 Association but the Association shall not allow any structure
to be erected in such open space except as necessary for
maintenance activity or playground and sports activities
(excluding bleachers, restrooms, snack bars or any structure
not required for the activity itself).

¹ Respondent's Exhibit 1 at 1.

² See Respondent's Exhibit 4 at 4 (§ 4).

1 13. Amendments 1, 2, and 3 of Greenlaw CC&Rs provide:

2 Amendment #1

3
4 Article II, PERMITTED USES, is amended by adding a
5 new paragraph (n) as follows:

6 The Association, after conferring with the office of the
7 Fire Marshal, City of Flagstaff, shall cause signs to be
8 placed and curbs painted red to designate fire lanes for
9 access of emergency vehicles. No parking shall be
10 permitted in such designated fire lanes and violations
11 will be enforced by citation as with other fire lane
12 violations on private property.

13 APPROVED: Yes 39, No 6.

14 Amendment #2

15 Article II, PERMITTED USES, is amended by adding a
16 new paragraph (o) as follows:

17
18 It shall be a violation of these Covenants, Conditions and
19 Restrictions for any resident or visitor to park on roads
20 of the Greenlaw Townhouses Unit II Subdivision during
21 periods of snow removal. At the direction of the
22 Association, violators will be towed at the expense of the
23 owner of the vehicle.

24 APPROVED: Yes 39, No 6.

25 Amendment #3

26 Article II, PERMITTED USES, is amended by adding a
27 new paragraph (p) as follows: Vehicles parked at curb
28 side in an obvious state of disrepair for a period of
29 seventy-two (72) hours shall be considered abandoned
30

1 and towed from the property at the expense of the
2 owner of the vehicle

3 APPROVED: Yes 42, No 6. Section 7(B) of the CC&Rs concerns
4 Alterations, Additions and Improvements and provides in relevant part that
5 “[n]o alterations of any Limited or General Common Elements or any
6 additions or improvements thereto shall be made by any Owner without
7 the prior written approval of the Board. . . .”³

8 14. Section 8 of Greenlaw’s current Rules and Regulations ban parking on any
9 association street as follows:

10 Parking is not allowed on any association street or alleyway
11 at any time. Eva, Heidi and Jeffrey Loops are not city
12 streets. They are owned and maintained solely by the HOA.
13 Under city code, the streets are considered “Private Fire
14 Access Lanes.” Consequently, cars parked in violation may
15 be booted and/or towed by a contracted independent towing
16 company.

17 15. In May of 2018, Greenlaw revised its Rules and Regulations. The Rules and
18 Regulations were adopted by email.

19 16. On July 6, 2018, Greenlaw sent a copy of the May 2018 revised Rules and
20 Regulations to its members by electronic mail (“e-mail”) in the form of an attachment
21 entitled, “Greenlaw II Townhomes Rules and Regulations – May 2018.pdf”.

22 17. Mr. Lee received the July 5, 2018 e-mail and the May 2018 Revised Rules and
23 Regulations.

24 18. Mr. Lee contended that he did not receive an e-mail which explained that the
25 Rules and Regulations had been changed or revised in May of 2018. Mr. Lee
26 contended that the 2003 Greenlaw Revised Rules and Regulations allowed parking on
27 the association streets. Mr. Lee argued that Greenlaw has never prohibited parking on
28 the streets. Mr. Lee argued that even if the May 2018 revised Rules and Regulations
29 were controlling, Greenlaw violated the 2003 Revised Rules and Regulations when it
30 booted vehicles on Greenlaw streets in 2017.

³ *Id.* at 8.

1 19. Greenlaw argued that because it has control over the maintenance and use of
2 Greenlaw streets through section (l)(b) of the Greenlaw CC&Rs, it has the authority to
3 ban parking on Greenlaw streets and to contract with a towing company to boot vehicles
4 parked on Greenlaw streets.

5 20. Greenlaw further contended that the May 2018 Rules and Regulations are not
6 in conflict with amendments 1, 2, and 3 of the CC&Rs. Amendments 1, 2, and 3 of the
7 CC&Rs do not authorize parking, but prohibit parking on Greenlaw streets in specific
8 scenarios. Greenlaw argued that any purported violation of the prior version of the
9 Rules and Regulations was cured with the adoption of the May 2018 revised Rules and
10 Regulations.

11 **CONCLUSIONS OF LAW**

12 1. ARIZ. REV. STAT. "A.R.S." § 32-2199(B) permits an owner or a planned
13 community organization to file a petition with the Department for a hearing concerning
14 violations of planned community documents under the authority Title 33, Chapter 16.⁴
15 This matter lies with the Department's jurisdiction.

16 2. Mr. Lee bears the burden of proof to establish that Greenlaw violated
17 amendments 1, 2, and 3 of the CC&Rs, and the Greenlaw Rules and Regulations by a
18 preponderance of the evidence.⁵ Greenlaw bears the burden to establish affirmative
19 defenses by the same evidentiary standard.⁶

20 3. "A preponderance of the evidence is such proof as convinces the trier of fact
21 that the contention is more probably true than not."⁷ A preponderance of the evidence is
22 "[t]he greater weight of the evidence, not necessarily established by the greater number of
23 witnesses testifying to a fact but by evidence that has the most convincing force; superior
24 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
25 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather
26 than the other."⁸

27 ⁴ See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce
the development's CC&RSs

28 ⁵ See A.R.S. § 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74
29 Ariz. 369, 372, 249 P.2d 837 (1952).

⁶ See A.A.C. R2-19-119(B)(2).

⁷ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁸ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

1 4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give
2 effect to the intent of the parties.⁹ “Restrictive covenants must be construed as a whole
3 and interpreted in view of their underlying purposes, giving effect to all provisions
4 contained therein.”¹⁰

5 5. Mr. Lee failed to establish by a preponderance of the evidence that
6 Greenlaw’s decision to ban parking on Greenlaw streets and to contract with a towing
7 company to boot vehicles parked on Greenlaw streets, violated amendments 1, 2, and 3
8 of the Greenlaw CC&Rs. Amendments 1, 2, and 3 of the Greenlaw CC&Rs do not allow
9 parking on the streets, but rather, provide specific scenarios in which parking on the
10 streets is banned.

11 6. Mr. Lee failed to establish by a preponderance of the evidence that
12 Greenlaw’s decision to ban parking on Greenlaw streets and contract with a towing
13 company to boot vehicles parked on Greenlaw streets violated its Rules and
14 Regulations. Mr. Lee failed to establish that the 2003 Rules and Regulation referenced
15 in Mr. Lee’s petition were the controlling Rules and Regulations at the time that he filed
16 the petition. The weight of the evidence presented at hearing shows that Greenlaw’s
17 Rules and Regulations were revised in May of 2018 and are Greenlaw controlling Rules
18 and Regulations. Although Mr. Lee provided testimony that Greenlaw booted vehicles
19 which were parked on the Greenlaw streets, Greenlaw has in effect cured any purported
20 previous violation through the enactment of the May 2018 Revised Rules and
21 Regulations.

22 **ORDER**

23 IT IS ORDERED that Petitioners’ petition is denied because he has not
24 established that Greenlaw Townhouses Unit Two Homeowners Association violated
25 Amendments 1, 2, and 3 of its CC&Rs, nor Greenlaw Rules and Regulations, when it
26 banned all parking on association streets and contracted with a towing company to boot
27 vehicles.

28
29 ⁹ See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

30 ¹⁰ *Lookout Mountain Paradise Hills Homeowners’ Ass’n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. App. 1993) (quoted in *Powell*, 211 Ariz. at 557 ¶ 16, 125 P.3d at 377).

NOTICE

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

Done this day, December 31, 2018.

/s/ Velva Moses-Thompson
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate

Transmitted U.S. Mail to:

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