

1 3. On or about December 04, 2019, the Association returned its ANSWER to the
2 Department whereby it denied all of the complaint items in the petition.² Specifically, the
3 Association noted that the Board of Directors (“Board”) made the decision to offer
4 pickleball as an additional recreation feature, to satisfy growing interests by its owners,
5 renters, and guests.³ In June 2019, the Association added pickleball stripes on one of two
6 tennis court to support pickleball play. The Association argued that the underlying
7 improvement was done on the tennis courts, a Common Area, for the benefit of the
8 Association as permitted by Article II section 1 of the CC&Rs. Tennis play was not
9 restricted, as both courts remained available for reservation seven days a week on a first
10 come first served basis. Tennis remained available on one court at all times, while tennis
11 and pickleball required competing reservations on the other court. The Association
12 affirmed that no changes were made to the reservation system.

13 4. Per the NOTICE OF HEARING, the Department referred this matter to the
14 Office of Administrative Hearings (“OAH”), an independent state agency, for an
15 evidentiary hearing on January 31, 2020, regarding the following issue:

16 **Whether Canyon Mesa Townhouse Association violated community
17 documents CC&Rs Article III, sec. 1.⁴**

18 **THE PARTIES AND GOVERNING DOCUMENTS**

19 5. The Association is a townhouse association whose members own
20 properties in the Canyon Mesa residential real estate development located in Sedona,
21 Arizona. Membership for the Association is compromised of the Canyon Mesa townhouse
22 owners.

23 6. Petitioner is a Canyon Mesa townhouse owner and a member of the
24 Association.

25 7. The Association is governed by its CC&Rs⁵ and overseen by the Board. The
26 CC&Rs empower the Association to control certain aspects of property use within the
27 development. When a party buys a residential unit in the development, the party receives

28 ² See Department's electronic file at HO20-19026_Responde_Petition_WithForm.pdf.

29 ³ *Id.*

30 ⁴ See Department's electronic file at HO20-19026_Notice_Hearing.pdf.

⁵ See Department's electronic file at HO20-19026_CanyonMesa_CCR.pdf.

1 a copy of the CC&Rs and agrees to be bound by their terms. Thus, the CC&Rs form an
2 enforceable contract between the Association and each property owner.

3 8. The Association is also regulated by Title 33, Chapter 16, Article 1 of the
4 Arizona Revised Statutes ("ARIZ. REV. STAT.")

5 9. The Association's Restated Declaration of CC&Rs were recorded with the
6 Yavapai County Recorder's Office on June 08, 2015.

7 10. The Association's Bylaws were adopted by the Board on July 23, 1985.⁶ On
8 January 15, 2002, the Bylaws were officially amended.⁷

9 11. CC&Rs Article III, section 1, states as follows:

10 Declarant hereby grants to Association, and to each and every Member
11 thereof, a nonexclusive perpetual easement of use and enjoyment in and to
12 the Common Areas which easement is appurtenant to and shall run with the
13 title to each and every Townhouse, for the mutual benefit and protection of
14 all Owners of the Townhouses. Such right and easement of use and
15 enjoyment shall be subject to reasonable rules and regulations as may be
16 promulgated from time to time by the Board, including but not being limited
17 to (a) the right of the Association to limit the number of guests of Members,
18 and (b) the right of the Association to charge reasonable admission or other
19 fees for the use of any recreational or other common facilities situated upon
20 the Common Areas.

21 **HEARING EVIDENCE**

22 12. Petitioner testified on his own behalf. The Association called Charles
23 Mitchell and Arland Averell as a witness, and submitted 2 exhibits into the record.
24 The Department's electronic file and NOTICE OF HEARING were also admitted into the
25 record.

26 Charles Mitchell's testimony

27 13. Charles Mitchell ("Director Mitchell") is the current Director of the
28 Association's Board.

29 14. CC&Rs Article II, section 1, grants the Board authorization to maintain
30 Common Areas, including the tennis courts, and does not require a Member vote.⁸

⁶ See Department's electronic file at HO20-19026_CanyonMesa_Bylaws.pdf.

⁷ *Id.*

⁸ CC&Rs Article II, section 1, states "Canyon Mesa Townhouse Association, a non-profit Arizona corporation, is a property owner's association for the general welfare and benefit of the Owners. The Association, through its Board of Directors and Officers, shall take the appropriate action to manage,

1 15. CC&Rs Article III, section 1, states that all members have an easement and
2 keys to access Common Areas. Common Areas, including the tennis courts are
3 accessible at any time.

4 16. CC&Rs Article VI requires the Board to maintain, manage, and otherwise be
5 responsible for the Common Areas, including the recreational facilities. The tennis courts
6 are recreational facilities that the Board maintains and has authorization to paint. The
7 Board was authorized to paint pickleball lines on one of the tennis courts and is required to
8 provide proper care and maintenance for those painted lines.

9 17. The Association's Articles of Incorporation also authorize the Board to
10 manage and improve Common Areas.⁹

11 18. The CC&Rs speak to the Common Areas, and do not specifically address
12 tennis or pickleball courts.

13 19. Both tennis courts have fixed tennis nets.¹⁰ The pickleball court has portable
14 nets which must be attached for use and detached at the end of play.¹¹

15 20. There is no pickleball at night because there are no lights on the court.

16 21. Tennis is still played on both courts.

17 22. Petitioner has never been denied access to the tennis courts at issue at any
18 time.

19 23. If and when a tennis court is occupied and Petitioner desires to play two
20 singles matches on both courts, Petitioner will either have to wait his turn to use both
21 courts or play a game of doubles on one court, just like any other player.

22 Arland Averell's testimony

23 24. Arland Averell has been an Owner and Association Member of Canyon
24 Mesa for thirty-one years. Mr. Averell has served on the Board for the past twenty years.

25
26
27 maintain, repair, replace and improve the Common Areas, together with all improvements located thereon, to
28 perform related activities, and to perform all other functions and duties assigned to the Association by this
29 Declaration or properly delegated to it by its Members.”

28 ⁹ See Respondent Exhibit 3.

29 ¹⁰ See Respondent Exhibit 4.

30 ¹¹ *Id.*

1 25. The tennis court have white lines painted on them to denote game boundary
2 lines.¹² One of the tennis courts also has blue lines painted on it to denote game boundary
3 lines for pickleball.¹³

4 26. In 2015, the Association had a pickleball court that was damaged
5 approximately 4 months after the lines were taped.

6 27. In April 2019, the Board decided to reestablish the pickleball court with
7 painted lines after several families requested they do so. The Board determined that
8 restoration of the pickleball court could also be used as a means to generate additional
9 revenue. By June 05, 2019, the pickleball lines were painted.

10 28. Pickleball is generally only played by the previously referenced families, and
11 they typically play on Saturday mornings.

12 29. When pickleball is in play, the other tennis court is always available for first
13 come first served play.

14 Petitioner's testimony

15 30. Petitioner is a self-described "snowbird," otherwise known as an out-of-state
16 retiree who resides in Arizona during winter months.

17 31. In November 2019, Petitioner purchased his Canyon Mesa townhouse.

18 32. The crux of Petitioner's complaint is the possible conflict between his
19 personal interest of wanting to play two singles matches on both tennis courts, and up to
20 sixteen "outsiders" playing a raucous game of pickleball on the other designated tennis
21 court.

22 33. Petitioner has not played tennis in "years." As such, Petitioner has not yet
23 found himself facing any such actual conflict.

24 34. Petitioner has not observed contemporaneous tennis and pickleball games
25 being played. However, Petitioner argued that during contemporaneous play, tennis balls
26 could inadvertently run across the adjacent tennis court, resulting in inconvenience or
27 injury.

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29 ¹² *Id.*

30 ¹³ *Id.*

1 35. Petitioner accused the Association of “creating a new class of people” who
2 could access the pickleball court, creating competition on a first come first served basis
3 against would-be tennis players.

4 36. Petitioner argued that the Association created a situation where “Members
5 have the right to play tennis unless pickleball is in play” which “constitutes an infringement
6 of tennis players’ right of use and enjoyment.” Petitioner also argued that pickleball play
7 resulted in only one tennis court being available for use which amounts to “an impediment
8 of enjoyment rights.”

9 37. Petitioner beseeched the tribunal to find the Association in violation of
10 Article III section 1 of the CC&Rs and issue an order requiring the Association to
11 designate the tennis courts for tennis playing only.

12 **CONCLUSIONS OF LAW**

13 1. This matter lies within the Department’s jurisdiction pursuant to ARIZ. REV.
14 STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a
15 planned community association. The owner or association may petition the department
16 for a hearing concerning violations of community documents or violations of the statutes
17 that regulate planned communities as long as the petitioner has filed a petition with the
18 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

19 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
20 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested
21 case at bar. OAH has the authority to interpret the contract between the parties. See
22 *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App.
23 2007).

24 3. In this proceeding, Petitioner bears the burden of proving by a
25 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1243.¹⁴

26 4. “A preponderance of the evidence is such proof as convinces the trier of fact
27 that the contention is more probably true than not.”¹⁵ A preponderance of the evidence is
28 “[t]he greater weight of the evidence, not necessarily established by the greater number of

29 ¹⁴ See ARIZ. ADMIN. CODE R2-19-119.

30 ¹⁵ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 witnesses testifying to a fact but by evidence that has the most convincing force; superior
2 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
3 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
4 the other.”¹⁶

5 5. “In applying a statute . . . its words are to be given their ordinary meaning
6 unless the legislature has offered its own definition of the words or it appears from the
7 context that a special meaning was intended.”¹⁷ Each word, phrase, clause, and
8 sentence must be given meaning so that no part of the legislation will be void, inert, or
9 trivial.¹⁸ Legislation must also be given a sensible construction that avoids absurd
10 results.¹⁹ If the words do not disclose the legislative intent, the court will scrutinize the
11 statute as a whole and give it a fair and sensible meaning.²⁰

12 6. Here, the material facts are clear.

13 7. It is clear that the Association’s governing documents authorize the Board to
14 maintain, manage, and otherwise be responsible for the Common Areas, including the
15 tennis courts which are recreational facilities. It is also clear that the Association had the
16 authority to paint pickleball lines on one of the tennis courts without voter input from
17 Members. Moreover, it is clear that all members, including Petitioner, have an easement
18 and keys to access Common Areas, including the tennis courts, which are accessible at
19 any time.

20 8. What the evidence of record reflects is that Petitioner’s easement rights
21 have not been violated by the Association because the Board painted blue pickleball lines
22 on one of two tennis courts. The pickleball nets are detachable and one tennis court
23 remains available for use at all times.

24 9. Petitioner’s argument regarding the reality that “Members have the right to
25 play tennis unless pickleball is in play constitutes an infringement of tennis players’ right of
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27 ¹⁶ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

28 ¹⁷ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

29 ¹⁸ *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 204, ¶ 17 (App. 2007).

30 ¹⁹ *State v. Gonzales*, 206 Ariz. 469, 471, ¶ 12 (App. 2003).

²⁰ *Luchanski v. Congrove*, 193 Ariz. 176, 178, ¶ 9.

1 use and enjoyment” is unfounded. Petitioner’s additional argument that the availability of
2 only one court amounting to an impediment of enjoyment rights is also without merit.

3 10. No violation of Article III section 1 exists.

4 11. Based upon a review of the credible and relevant evidence in the record,
5 Petitioner has failed to sustain his burden of proof.

6 12. Therefore, the undersigned Administrative Law Judge concludes that
7 because Petitioner failed to sustain his burden of proof that the Association violated
8 Article III section 1 of the CC&Rs, his petition must be denied.

9 **ORDER**

10 Based on the foregoing,

11 **IT IS ORDERED** that Petitioner’s petition be denied.

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

15 **NOTICE**

16 **Pursuant to ARIZ. REV. STAT. §32-2199.02(B), this Order is binding on the parties**
17 **unless a rehearing is granted pursuant to ARIZ. REV. STAT. § 32-2199.04. Pursuant**
18 **to ARIZ. REV. STAT. § 41-1092.09, a request for rehearing in this matter must be filed**
19 **with the Commissioner of the Arizona Department of Real Estate within 30 days of**
20 **the service of this Order upon the parties.**

21 Done this day, February 20, 2020.

22
23 /s/ Jenna Clark
24 Administrative Law Judge

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26 Transmitted electronically to:

27 Judy Lowe, Commissioner
28 Arizona Department of Real Estate
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Werner A Reis, Petitioner
47 Mesa Grande
Sedona, AZ 86351
wernerr@warshafsky.com

Canyon Mesa Townhouse Association, Respondent
c/o Arland C. Averill
500 Jacks Canyon Rd
Sedona, AZ 86351
llehman@hoamco.com