

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

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

4
5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 Susan E Abbass
8 Petitioner,

9 vs.

10 10000 North Central Homeowners
11 Association,
12 Respondent

No. 20F-H2020057-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

13 **HEARING:** July 28, 2020

14 **APPEARANCES:** Susan E. Abbas, Petitioner, appeared via Google Meet.
15 Ronald Pick appeared as a witness for Petitioner via Google Meet. Respondent was
16 represented by Blake Johnson, Esq. via Google Meet and Robert Kersten, the property
17 manager, appeared as a witness for Respondent via Google Meet.

18 **ADMINISTRATIVE LAW JUDGE:** Adam D. Stone

19
20 **FINDINGS OF FACT**

21 **BACKGROUND AND PROCEDURE**

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

25 2. On or about May 5, 2020, Petitioner filed a single-issue petition against the
26 Association with the Department.¹ Petitioner tendered \$500.00 to the Department with her
27 petition.²

28
29 ¹ See HOA_Form_DisputePetitionForm_Rev. 12.2019.pdf.

30 ² *Id.*

1 3. On or about January 12, 2019, the Association filed its ANSWER with the
2 Department whereby it denied all complaint items in the petition.³

3 4. Per the NOTICE OF HEARING, the Department referred this matter to the
4 Office of Administrative Hearings (“OAH”), an independent state agency, for an
5 evidentiary hearing on July 29, 2020, regarding the following issues based on Petitioner’s
6 petition:

7 **Whether 10,000 North Central Homeowners Association violated the**
8 **CCR’s Article XII, Section 6 & Article XIII, Section 1(d) & 4.**

9 **THE PARTIES AND GOVERNING DOCUMENTS**

10 5. Respondent is a homeowners’ association whose members own properties
11 in a residential real estate development located in Phoenix, Arizona.

12 6. Petitioner is a property owner and a member of the Association.

13 7. The Association is governed by its Covenants, Conditions, and Restrictions
14 (“CC&Rs”), and overseen by a Board of Directors (“the Board”). The Association is also
15 regulated by Title 33, Chapter 16, Article 1 of the Arizona Revised Statutes (“ARIZ. REV.
16 STAT.”)

17 **HEARING EVIDENCE**

18 8. Petitioner had Ronald Pick testified on her behalf and submitted two
19 exhibits. Respondent called Robert Kersten as a witness. The Agency Record from the
20 Department and NOTICE OF HEARING were also admitted into the evidentiary record.

21 Ronald Pick’s testimony

22 9. Mr. Pick, who resides with Petitioner, testified that on or about November
23 14, 2019, he noticed that the carpet in the home office was completely soaked with water.

24 10. He further testified that he and Petitioner took all necessary actions to
25 remedy the leak and to determine the source of the same. Ultimately, he determined that
26 there was a problem with the drainage coming from the neighboring property.
27
28

29

³ See Agency File.

1 11. Mr. Pick testified that when he contacted his insurance company all they
2 could do was repair and/or replace any damage to the house, but could not fix any piping if
3 the leak was not coming from their residence.

4 12. Mr. Pick testified that he then tried to work with the neighbor to gain access
5 to her property to allow for inspection of the same, but that she would not cooperate upon
6 advice from her insurance company.

7 13. Mr. Pick then sought the help of Mr. Kersten and Respondent to allow for
8 third party access to the neighboring property to inspect the source of the leak and
9 hopefully find a solution to resolve the issue.

10 14. Mr. Pick testified that Respondent required specific proof as to the source of
11 the leak, before allowing access to the neighboring property.

12 15. Mr. Pick then testified that he provided all of the evidence that was available
13 including a report from the City of Phoenix, to Respondent for review, but to date, no
14 access has been granted.

15 16. Mr. Pick testified that upon his knowledge, a notice of violation was
16 forwarded to the owner of the neighboring property, but no further action has occurred.

17 17. Further, Mr. Pick testified he believed that the neighbors plantings somehow
18 changed the drainage and that every time it rains, they have some water damage.

19 18. Mr. Pick testified that Respondent violated the CCR's Article XII, Section 6
20 and Article XIII Sections 1(d) and 4, as Respondent had an obligation to allow access to
21 the neighboring property as this was an emergency situation.

22 19. Mr. Pick testified that Petitioner chose this course of action as they thought it
23 would provide a quicker resolution to this matter without involving the neighbor.⁴

24 20. At the close of his testimony, Mr. Pick testified that he would pay for a
25 geotechnical engineer to evaluate and determine the source of the leak. Petitioner prayed
26 for an ORDER to be issued in Petitioner's favor which required the Association to allow
27 access to the property.

28 ⁴ There is currently an action pending in Maricopa County Superior Court where Respondent is seeking an
29 injunction against Petitioner as Petitioner seeks to enforce a provision of the CC&R's concerning Alternative
30 Dispute Resolution. Because this matter is a single issue petition and only one filing fee was paid, this
Decision will not include any discussion of that section.

1 Robert Kersten's testimony

2 21. Mr. Kersten testified that at all times relevant to the matter at bar he was the
3 Community Manager of the Association and had been in that position since 2015.

4 22. Mr. Kersten testified that in November 2019, he was contacted by Petitioner
5 about the leaking issue. He further testified that pursuant to the information provided, he
6 sent a violation notice to Petitioner's neighbor.

7 23. Mr. Kersten testified that per the CC&R's, the manager cannot authorize
8 entrance onto another's property "whenever they feel like it", and there has to be
9 reasonable justification along with some type of proof to allow for access.

10 24. Mr. Kersten testified that there was not enough information provided by
11 Petitioner to allow the right to enter. He further testified that if it was an emergency
12 situation, Petitioner would have provided more evidence or proof/pictures of the leak.

13 25. In addition, Mr. Kersten testified that he did not recall seeing any of the
14 photographs provided to him by Petitioner.

15 26. Finally, Mr. Karsten testified that in January 2020, the Board informed him
16 they would now handle the matter and that he "stood down" and ceased his interaction
17 with Petitioner.

18 **CONCLUSIONS OF LAW**

19 1. This matter lies within the Department's jurisdiction. Pursuant to ARIZ. REV.
20 STAT. §§ 32-2102 and 32-2199 et al., regarding a dispute between an owner and a
21 planned community association, the owner or association may petition the department for
22 a hearing concerning violations of community documents or violations of the statutes that
23 regulate planned communities as long as the petitioner has filed a petition with the
24 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

25 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(D), 32-2199.02,
26 and 41-1092, the Office of Administrative Hearings has the authority to hear and decide
27 the contested case at bar.

28 3. In this proceeding, Petitioner bears the burden of proving by a
29 preponderance of the evidence that Respondent violated the CC&R's
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1 4. "A preponderance of the evidence is such proof as convinces the trier of fact
2 that the contention is more probably true than not."⁵ A preponderance of the evidence is
3 "[t]he greater weight of the evidence, not necessarily established by the greater number of
4 witnesses testifying to a fact but by evidence that has the most convincing force; superior
5 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
6 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
7 the other."⁶

8 5. Article XII Section 6 of the CC&R's states:

9 Easement in Favor of Association. The Lots are hereby made
10 directors, officers, agents, employees and independent contractors:

11 a. For inspection of the Lots in order to verify the performance
12 by Owners of all items of maintenance and repair for which they are
13 responsible;

14 b. For inspection, maintenance, repair and replacement of the
15 Areas of Association Responsibility accessible only from such Lots,
16 or to performs maintenance over those Lots, or to perform
17 maintenance over those Lots for which Optional Maintenance
18 Assessments are assessed;

19 c. For correction of emergency conditions in one or more Lots;

20 d. For the purpose of enabling the Association, the Board the
21 Architectural Committee, or any other committees appointed by the
22 Board, to exercise and discharge their respective rights, powers and
23 duties under the Project Documents.⁷

24 6. Article XIII Section 1(d) of the CC&R's states:

25 1. The rights of the respective parties with respect to the use of
26 individual yards and patios, which may abut a wall of the residential
27 unit on the adjoining Lot (abutting residential unit) herein, shall be as
28 follows:

29

30 d. If the Patio areas or yards have been graded to allow
drainage to flow, nothing shall be erected, planted or maintained to
impede or interrupt said or normal drainage flow.⁸

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

⁶ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

⁷ See Exhibit 2.

⁸ See *Id.*

1 7. Article XIII Section 4 of the CC&R's states:

2 Each owner shall keep his Lot and Patio and all improvements
3 therein or thereon in good order and repair and free of debris,
4 including, but not limited to, the seeding, watering and mowing of all
5 lawns and the pruning and cutting of all trees and shrubbery, all in a
6 manner and with such frequency as is consistent with good property
7 management. In the event an Owner shall fail to maintain his Lot and
8 Patio and the improvements located thereon as provided herein, the
9 Association, after notice to the Owner and approval by vote of the
10 Board of Directors, shall have the right to enter upon said Lot or Patio
11 to correct drainage and to repair, maintain and restore the Lot, Patio,
12 fences and any other improvements erected thereon....⁹

13 8. The material facts in this matter are not in dispute.

14 9. Petitioner notified the property management company about the source of
15 the water leak and the management company sent a violation letter to the neighboring
16 property. However, it is unclear as to why there has been no follow up on that violation.

17 10. Petitioner is incorrect that the Respondent has an "obligation" to enter the
18 property. The CC&R's give Respondent a *right* to enter property, but it has no obligation
19 to do the same.

20 11. Petitioner provided all of the information that he collected to Respondent.
21 Mr. Kersten testified that they need "some type of proof" and "reasonable justification" to
22 enter the property without consent of the owner. Respondent has determined that the
23 proof submitted does not meet that standard. Petitioner argues however, that she cannot
24 obtain more proof without entering the neighboring property, thus leaving this stalemate.

25 12. Respondent's counsel asserted that it could be responsible or held liable if it
26 were to allow access and something happened to a third party while on the neighboring
27 property and it was using its business judgment to not allow access to the property
28 without further proof of the source of the leak.

29 13. It appears that both sides want a resolution and that Petitioner is willing to
30 undertake the costs associated with providing the inspection, however this appears to be
31 a neighbor versus neighbor dispute as Respondent does not have an obligation to enter

⁹ See *Id.*

1 the property, only the right. Further, while Mr. Pick testified that every time it rains there
2 is water, he did not testify to the extent of that damage, and because it has been over
3 eight months since the first leak there appears to be no true emergency situation which
4 too would call for entry onto the neighboring property.

5 14. Petitioner failed to meet her burden of proof that Respondent violated a
6 provision of the CC&R's.

7 **ORDER**

8 **IT IS ORDERED** that Petitioner's petition in this matter be denied.

9 **NOTICE**

10 **Pursuant to ARIZ. REV. STAT. §32-2199.02(B), this ORDER is binding on the**
11 **parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. § 32-2199.04.**
12 **Pursuant to ARIZ. REV. STAT. § 41-1092.09, a request for rehearing in this matter**
13 **must be filed with the Commissioner of the Department of Real Estate within thirty**
14 **(30) days of the service of this ORDER upon the parties.**

15
16
17 Done this day, August 17, 2020.

18 /s/ Adam D. Stone
19 Administrative Law Judge
20

21 Transmitted electronically to:

22 Judy Lowe, Commissioner
23 Arizona Department of Real Estate

24 Susan E. Abbass
25 40 W Foothill Dr.
26 Phoenix, AZ 85021

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30 Tempe, AZ 85281