

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 Marc Archer,
8 Petitioner,
9 vs.
10 PMPE Community Association, Inc.,
11 Respondent.

No. 20F-H2020063-REL
ADMINISTRATIVE LAW JUDGE
DECISION

12 **HEARING:** November 13, 2020

13 **APPEARANCES:** Petitioner Marc Archer appeared on his own behalf.
14 Respondent PMPE Community Association, Inc. was represented by Nicholas Nogami.

15 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer

16 **FINDINGS OF FACT**

17 1. Respondent PMPE Community Association, Inc. (PMPE) is an association
18 of homeowners located in Glendale, Arizona.

19 2. Petitioner Marc Archer owns a residence in and is a member of PMPE.

20 3. In 2017 or 2018, Petitioner began the process of getting approval for his
21 plans to build a 12 foot high garage structure to be added onto the back of his house.

22 4. The Board issued a preliminary approval of Petitioner’s plans.

23 5. However, the Board did not issue a final approval of Petitioner’s plans after
24 the Board learned that Petitioner planned to construct a flat roof to the garage addition
25 which would be enclosed on all sides, with a height that would exceed the height of the
26 adjoining wall. Although Petitioner’s existing garage roof was pitched, Petitioner did not
27 want to construct a pitched roof on his garage addition.

28 6. As a result, the Board notified Petitioner that he could construct a flat roof on
29 his garage addition if the height of the roof was below the height of the adjacent wall, so

1 that the flat roof would not be visible to neighboring properties, pursuant to PMPE's
2 Covenant, Conditions, and Restrictions (CC&Rs).

3 7. On or about May 10, 2019, Petitioner filed a petition with the Arizona
4 Department of Real Estate (Department) alleging that PMPE had violated Arizona
5 Revised Statutes A.R.S. § 33-1817(B)(3) by unreasonably withholding approval of his
6 plan for a garage addition with a flat roof that would exceed the height of the adjacent wall.

7 8. The matter was referred to the Office of Administrative Hearings for an
8 evidentiary hearing. Following the hearing, Administrative Law Judge Velva Moses-
9 Thompson ruled in favor of PMPE.

10 9. Petitioner subsequently filed a new request with PMPE for a two-story
11 addition with a pitched roof. Petitioner obtained professional renderings of the plans and
12 submitted the request to the Architectural Committee (AC).

13 10. On or about February 5, 2020, the AC held meeting at Petitioner's home that
14 was deemed to be the Pre-Design Meeting. Generally, Pre-Design Meetings are held in
15 advance of plans being drawn up or extensive work being done by the homeowner.
16 However, Petitioner had the professional renderings of the proposed addition, so those
17 were reviewed at the Pre-Design Meeting. After review, the AC requested additional
18 changes to the plans and one member requested a model of the proposed addition.

19 11. On or about April 6, 2020, Petitioner set up a table at the end of his driveway
20 with all the plans and some demonstrable samples to allow community members to
21 review the proposal. This presentation was intended to serve as the Preliminary
22 Submittal.

23 12. On or about April 10, 2020, the AC conducted a conference call during
24 which the members discussed Petitioner's proposal as its Preliminary Review. At the
25 outset of the discussion, at least two members expressed their concerns with how
26 Petitioner was planning to use the new addition. Specifically, the members were
27 concerned Petitioner was going to accumulate more "junk". Two of the members
28 expressing concerns ultimately voted against Petitioner's proposal. Another member of
29 the AC questioned Petitioner's plan to paint the new roof tile to match his existing roof tile
30 and how that would look on the home. The AC members also expressed a concern that

1 Petitioner did not intend to tie the new roof into the existing roof. Ultimately, the majority of
2 the members of the AC voted to deny Petitioner’s proposal as it was submitted.

3 13. Following the Preliminary Review, neither the decision nor the basis of the
4 decision was communicated to Petitioner. Petitioner was on the call during the
5 discussion, but he was not provided a written explanation of the reason for the denial.

6 14. On or about May 27, 2020, Petitioner filed a Homeowners Association
7 (HOA) Dispute Process Petition alleging that PMPE had violated the provisions of A.R.S.
8 § 33-1817(B)(3). Specifically, Petitioner indicated “Petitioner has repeatedly tried to get
9 approval for a structure addition on his house and has been repeatedly denied by
10 Architectural committee even though previously requested details by committee have
11 been incorporated in the new design meeting the architectural guidelines as well as
12 committees requests.”

13 15. At hearing, Petitioner contended that the design plan for his proposed
14 addition was harmonious with the surrounding structures and incorporated all the
15 suggestions the AC made as to his single story proposal. Petitioner stated that he did not
16 tie in the roof of the addition because it was not financially reasonable to do so and the
17 design of the new addition did not require it to be tied in. Petitioner presented a
18 demonstrable exhibit to show that the painted tile was indistinguishable from the original
19 tile and stated that the only reason he was required to paint the new tile was because it
20 was not possible to purchase tile to match the existing tile. Petitioner argued the paint
21 technique employed was similar painting stucco in that it was specially formulated for
22 painting concrete. Petitioner also asserted that PMPE did not consistently enforce the
23 CC&Rs as to all homeowners, but required his strict compliance. Petitioner posited that
24 because his neighbor was influential, Petitioner was targeted when he proposed the
25 addition. Petitioner also noted that he had previously been cited for being in violation of
26 the CC&Rs as it related to his restoration of vehicles, but maintained he was not in
27 violation at the time of the AC meeting or at the time of the hearing. Petitioner argued that
28 his intended use of the addition should have no effect of the AC’s decision as to his
29 proposal. Petitioner maintained that the addition was approximately one tenth the size of
30 his house and represented a “minor addition”.

1 6. An association shall not unreasonably withhold approval of a construction
2 project's architectural plans. See A.R.S. § 33-1817(B)(3).

3 7. Article 5.10 of the PMPE CC&Rs provides, in relevant part, as follows:

4 The Board may appoint an Architectural Committee to perform certain
5 architectural control functions set forth in this Declaration. . . . The Board, or
6 the Architectural Committee if so appointed, may promulgate architectural
7 guidelines, standards and procedures to be used in rendering its decisions.
8 Such guidelines standards and procedures may include, without limitation,
9 provisions regarding: (i) architectural design, with particular regard to the
10 harmony of the design with the surrounding structures and topography.

11 17. Section 4.4 of the PMPE Architectural Rules provides, in relevant part, as
12 follows:

13 Since roofscapes will form an important part of the visual environment, they
14 must be carefully designed. It is intended that pitched roofs predominate.

15 8. The PMPE Architectural Rules outlines the review and approval process, in
16 pertinent part, as follows:

17 2.1 INTRODUCTION

18 In order to assist each Owner and/or Builder in the planning and
19 designing of his Residence to take full advantage of the unique
20 opportunities of his Lot, a comprehensive design review process
21 administered by the Committee has been established. In general, the
22 design review process is divided into five phases: The Pre-Design Meeting,
23 the Preliminary Submittal, the Final Submittal, the Construction Permit, and
24 the Final Inspection. . . .

25 The following is a procedural walk-through of the Review and
26 Approval Process.

27 2.2 PRE-DESIGN MEETING

28 To initiate the review and approval process prior to preparing any
29 drawings for a proposed Improvement, it is recommended that the Owner
30 and/or his Architect meet with a representative of the Committee to discuss
the proposed Residence and to explore and resolve any questions
regarding building requirements in Phoenix Mountain Preserve Estates or
interpretation of the Architectural Rules. . . .

 2.3 PRELIMINARY SUBMITTAL

 Preliminary drawings, including all of the exhibits outlined below,
must be submitted to the Committee before they will be considered for
review. The Preliminary Submittal shall include the following

 2.4 PRELIMINARY REVIEW

1 After any staking of the Lot that may be required, the Preliminary
2 Submittal will be deemed complete. *The Committee will then review the*
3 *submittal for conformance to these Architectural Rules and make its*
4 *recommendation which will provide a written response to the Owner.*

5 2.5 FINAL SUBMITTAL

6 After preliminary approval is obtained, the following documents are
7 to be submitted to the Architectural Committee for final approval

8 2.6 FINAL APPROVAL

9 Upon receipt of the complete Final Submittal, the Committee will
10 review the submittal for conformance to these Architectural Rules, and to
11 any preliminary approval stipulations and make its recommendation and will
12 provide a written response to the Owner, which may include stipulations or
13 requirements which must be complied with by Owner.

14 Emphasis added.

15 9. While Petitioner may have bypassed the Pre-Design Meeting prior to
16 developing plans, such a meeting was held on February 5, 2020. The Preliminary
17 Submittal was completed on April 6, 2020. The Preliminary Review was held during the
18 telephone conference on April 10, 2020. Following the Preliminary Review, the AC did not
19 provide a written response to Petitioner as required by the PMPE Architectural Rules.

20 10. The preponderance of the evidence provided at hearing established that the
21 AC reviewed the plans and specifications submitted by Petitioner for the construction of
22 an addition and made a preliminary determination that the proposal would be denied, but
23 failed to communicate that denial to Petitioner in a manner consistent with the CC&Rs and
24 PMPE Architectural Rules.

25 11. Without a written response regarding the preliminary review, it would be
26 considerably more difficult for Petitioner to amend his plans prior to the Final Submittal to
27 address the concerns of the AC in an effort to secure approval.

28 12. Upon consideration of all of the evidence presented at hearing, the
29 Administrative Law Judge concludes that Petitioner established by a preponderance of
30 the evidence that PMPE failed to comply with its own CC&Rs and the PMPE Architectural
Rules in a manner that constituted a violation of A.R.S. § 33-1817(B)(3).

13. Nothing in this decision should be construed to mean that Respondent is required to approve Petitioner's proposal. Rather, Respondent is required to follow the process set forth in the community documents.

ORDER

IT IS ORDERED that Petitioner be deemed the prevailing party in this matter.

IT IS FURTHER ORDERED that Respondent pay Petitioner his filing fee of \$500.00, to be paid directly to Petitioner within thirty (30) days of this Order.

No Civil Penalty is found to be appropriate in this matter.

NOTICE

Pursuant to A.R.S. § 32-2199.02(B), this Order is binding on the parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. section 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 3, 2020.

/s/ Tammy L. Eigenheer
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile this December 3, 2020, to:

Judy Lowe, Commissioner
Arizona Department of Real Estate
100 N. 15th Avenue, Suite 201
Phoenix, Arizona 85007
DGardner@azre.gov

Marc Archer, Petitioner
8619 N 17th Pl
Phoenix, AZ 85020
mdarcher@gmail.com
By f. del sol

PMPE Community Association
c/o Carlotta L Turman & Nicholas
Nogami
Carpenter, Hazelwood, Delgado & Bolen
1400 E Southern Ave, Ste. 400
Tempe, AZ 85282-5691
minuteentries@carpenterhazlewood.com