

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2 John D. Klemmer,  
3 Petitioner,  
4 v.  
5 Caribbean Gardens Association,  
6 Respondent.

**No. 21F-H2120009-REL-RHG**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

7 **REHEARING:** April 8, 2020

8 **APPEARANCES:** John D. Klemmer (“Petitioner”) represented himself. Nicole D. Payne, Esq., represented Respondent Caribbean Gardens Association (“Caribbean”).

9 **ADMINISTRATIVE LAW JUDGE:** Kay A. Abramsohn

10 **FINDINGS OF FACT**

11 1. The initial hearing in this matter was heard before the Office of Administrative Hearings on November 6, 2020.

12 2. The issue in the initial hearing in this matter was Petitioner’s allegation that the Caribbean Board is in violation of the Caribbean CC&Rs by refusing to “manage, operate, maintain and administer” one particular area within Caribbean, which area Petitioner argues is a “common area” or “common element.” Petitioner alleged Caribbean violations of CC&Rs Article 1, Sections 1.5 and 1.8; Article 3, Section 3.4; Article 4, Section 4.1; Article 8, Section 8.1; and, Article 12, Section 12.4.”<sup>1</sup>

13 3. An Administrative Law Judge Decision (“Decision”) was issued on December 17, 2020 finding no violations by Caribbean.

14 4. Thereafter, Petitioner submitted a HOMEOWNER’S ASSOCIATION (HOA) DISPUTE REHEARING REQUEST (“Request”) to the Arizona Department of Real Estate (“Department”).

15 5. In his Request, Petitioner argued that the Decision was not supported by the evidence, *i.e.*, the Declaration and the Plat. The Request focused on Petitioner’s disagreement with the Administrative Law Judge’s application of A.R.S. § 33-1212[A](4) as a determining factor that the specific disputed area was neither a “common area” nor a “common element” but was a balcony “designed to serve a single unit [*i.e.*, Unit 207], []

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29 <sup>1</sup> See Petitioner’s Initial Exhibit 1, [1973] Declaration of Covenants, Conditions and Restrictions of Caribbean Gardens (the Declaration or, colloquially, the CC&Rs).

1 located outside the unit's boundaries" and was *not* delineated in either the Declaration or  
2 Plat as an "Apartment," a "patio," a "balcony."

3 6. The Commissioner of the Department granted the Request and a rehearing  
4 was conducted on April 8, 2021.<sup>2</sup>

5 7. At the rehearing, Petitioner essentially argued that the Decision was  
6 incorrect in not finding that the Declaration and the Plat were, in fact, determinative of the  
7 designation of the specific disputed area as a common element because the Decision had  
8 ignored the exception clause of A.R.S. § 33-1212 which states "Except as provided by the  
9 Declaration." Petitioner argued that the Decision had not explained any "fault or  
10 insufficiency" in the Declaration or Plat such that A.R.S. § 33-1212[A](4) would apply.

11 8. Petitioner argued that the Plat, as part of the Declaration, does not "show"  
12 the specific disputed area as being a part of Unit 207 and only shows the Plat-designated  
13 second level balconies.

14 9. Petitioner maintained his original position that the specific disputed area is a  
15 "common area" or "common element" that is owned by all the unit owners, to whom  
16 Caribbean owes a duty to: (a) defend the Caribbean assets, one asset of which is/are all  
17 such areas in Caribbean; (b) claim ownership and maintain the area; and (c) not permit  
18 any one owner to possess to the exclusion of other owners.

19 10. The Plat documents two "balconies" on a typical second level unit; the  
20 balconies are denoted by lines surrounding a space which contains the letter "B."<sup>3</sup>  
21 Regarding Unit 207, those two Plat-documented "balconies" are located at the  
22 southeastern and northeastern corner portions of Unit 207, while the specific disputed  
23 area is at the northwestern corner of Unit 207. On the Plat document, the specific  
24 disputed area is not "drawn" as any particular feature at Caribbean but is simply a blank  
25 space between Unit 206 and Unit 207.

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27 <sup>2</sup> The Administrative Law Judge admitted to the rehearing record: (1) the background "rehearing"  
28 documents forwarded to the Tribunal from the Department; (2) the Caribbean-submitted rehearing  
29 proposed exhibits; and (3), incorporated by reference, the prior hearing record including both parties'  
30 admitted exhibits.

<sup>3</sup> See Petitioner's Initial Hearing Exhibit 7 is the Plat, which is "Exhibit B" to the Declaration.



1 as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW  
2 DICTIONARY 1182 (6th ed. 1990).

3 5. Article 1, Section 1.5 of the CC&Rs defines “Apartment” as follows:<sup>6</sup>

4 “Apartment” means a part of the Property, including one or  
5 more rooms situated in an Apartment Building comprising a  
6 part of the Property designated or intended for independent  
7 use as a dwelling unit, as so specified on the plat or survey  
8 attached as Exhibit “B”. Each Apartment shall consist of the  
9 space enclosed and bounded by the horizontal and vertical  
10 planes as shown on said Plat, and shall also include the patio  
11 and balcony areas identified with the Apartment by said Plat.

12 6. Article 1, Section 1.6 of the CC&Rs defines “Common Elements” as follows:

13 “Common Elements” means the “general common elements”  
14 as that term is defined in Section 33-551, Arizona Revised  
15 Statutes, together with the parking areas, yard areas, storage  
16 areas, swimming pool and swimming pool furniture and  
17 equipment, outside walks and driveways, landscaping, and all  
18 other portions of the Property except the Apartments.<sup>7</sup>

19 7. Article 1, Section 1.8 of the CC&Rs defines “Plat” as follows:

20 “Plat” means the plat of survey of the Property and of all  
21 Apartments submitted to this horizontal regime, said Plat  
22 being in two pages, attached hereto as Exhibit “B” and  
23 recorded simultaneously with the recording of this  
24 Declaration.

25 8. Article 3, Section 3.4 of the CC&Rs provides as follows:

26 The Common Elements shall be exclusively managed,  
27 operated, maintained and administered by the Association,  
28 acting through its Board, for the use and benefit of all Owners,  
29 and for such other purposes as determined from time to time  
30 by said Board. The Board shall have the exclusive right and  
power to establish and impose rules and regulations

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<sup>6</sup> See Exhibit 1. The CC&Rs were recorded in 1973.

<sup>7</sup> A.R.S. § 33-551, formerly a provision within the laws regarding “Horizontal Property Regimes” (originally enacted in Laws 1962, Chapter 89, Section 1) was repealed in Laws 1985, Chapter 192, Section 1, effective January 1, 1986. A.R.S. § 33-551 through § 33-561 dealt with definitions, declarations, interest in common elements, withdrawal from regime, individual apartments and common interests, tax and special assessments, levies, liens, limitation on partition, and management. Those statutory provisions were replaced with A.R.S. § 33-1201 through § 33-1270, Condominiums.

governing the use, maintenance and development of all and any part of the Common Elements, and any Owner, or any other person using any part of the Common Elements shall abide by such rules and regulations.

9. Article 4, Section 4.1 of the CC&Rs provides as follows:

Title to the Common Elements shall be vested in the Owners who, as among one another, shall own such Common Elements as tenants in common, with ownership of an undivided percentage interest in said Common Elements in accordance with their respective percentage interests in the Common Elements as set forth in Exhibit "C", provided, however, that no Owner shall exercise any right of partition with respect to his undivided percentage interest in said Common Elements, or bring any action for dissolution of the Association, so long as anyone of the restrictions or conditions stated in any part of Article III or this Article IV, remain in effect, it being agreed that these restrictions are necessary in order to preserve the rights of the Owners with respect to the operation and management of the Common Elements.

10. Article 7, Section 7.2 of the CC&Rs provides, in pertinent part, as follows:

Each Owner shall be entitled to the exclusive use of the interior surfaces (extending to the middle) of the perimeter walls including patio and balcony walls, doors, floors and ceilings and the surfaces of the patio and balcony floors within his Apartment ...

11. Article 8, Section 8.1 of the CC&Rs provides as follows:

If any portion of the Common Elements shall actually encroach upon any Apartment, or if any Apartment shall actually encroach upon any portion of the Common Elements, or if any Apartment shall actually encroach upon another Apartment, as the Common Elements and the Apartments are shown by the surveys comprising the Plat, there shall be deemed to be mutual easements in favor of the Owners of the Common Elements and the respective Owners involved to the extent of such encroachment so long as the same shall exist.

12. Article 9, Section 9.2 of the CC&Rs provides as follows:

1 The Common Elements shall be used only by the Owners  
2 residing therein, their guests and other authorized visitors and  
3 for such purposes as are incidental to the residential use of  
4 the Apartments or such other purposes as may be approved  
5 by the Board.

6 13. Article 12, Section 12.4 of the CC&Rs provides as follows:

7 Each grantee of Declarant, by the acceptance of a deed of  
8 conveyance, or each purchaser under any agreement of sale,  
9 accepts the same subject to all restrictions, conditions,  
10 covenants, reservations, liens and charges, and the  
11 jurisdiction, rights and powers created or reserved by this  
12 Declaration, and all rights, benefits and privileges of every  
13 character hereby granted, created, reserved or declared, and  
14 all impositions and obligations hereby imposed shall be  
15 deemed and taken to be covenants running with the land and  
16 equitable servitudes, and shall bind any person having at any  
17 time any interest or estate in said land, and shall inure to the  
18 benefit of such grantee or purchaser in like manner as though  
19 the provisions of this Declaration were recited and stipulated  
20 in full in each and every deed of conveyance or purchase  
21 contract.

22 14. A.R.S. § 33-1212, Unit Boundaries, provides as follows:<sup>8</sup>

23 Except as provided by the Declaration,

24 ...

25 4. Any shutters, awnings, window boxes, doorsteps, stoops,  
26 porches, balconies, entryways or patios, and all exterior doors  
27 and windows or other fixtures designed to serve a single unit,  
28 but located outside the unit's boundaries, are limited common  
29 elements allocated exclusively to that unit.

30 15. A.R.S. § 33-1218, Limited Common Elements, provides as follows:<sup>9</sup>

A. Except for the limited common elements described in § 33-  
1212, paragraphs 2 and 4, other than porches, balconies,  
patio and entryways, the declaration shall specify to which  
unit or units each limited common element is allocated. ...

16. CC&R Article 1, Section 1.5 defines Apartment as the part of the Property so delineated on the Plat document. However, the Plat document does not delineate the

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<sup>8</sup> This statutory provision was enacted in Laws 1985, Chapter 192, §3, effective January 1986.

<sup>9</sup> *Id.*

1 specific disputed area in any manner. The specific disputed area is not delineated on the  
2 Plat document as a part of the “Apartment” or as a “patio” or as a “balcony.” The parties  
3 did not dispute that access to the specific disputed area may only be gained through Unit  
4 207.

5 17. CC&R Article 1, Section 1.6 describes a Common Element with some  
6 specificity, but also includes “all other portions of the Property except the Apartments.”  
7 The Apartments are clearly delineated on the Plat document.

8 18. CC&R Article 9, Section 9.2 provides that Common Elements are used “for  
9 such purposes as are incidental to the residential use of the Apartments or such other  
10 uses as may be approved by the Board.” Caribbean’s position is that the disputed area is  
11 a “balcony” attached to Unit 207; however, there is no evidence of any particular Board  
12 approval determination reduced to writing and designating the disputed area as a  
13 “balcony.”

14 19. A.R.S. § 33-1212[A](4) provides that “[a]ny shutters, awnings, window  
15 boxes, doorsteps, stoops, porches, balconies, entryways or patios, and all exterior doors  
16 and windows or other fixtures designed to serve a single unit, but located outside the unit’s  
17 boundaries, are limited common elements allocated exclusively to that unit.”

18 20. Based on the hearing record, the Administrative Law Judge concludes that  
19 the Declaration and Plat fail to delineate the specific disputed area as an “Apartment,” a  
20 “patio,” or a “balcony.” Therefore, pursuant to A.R.S. § 33-1212[A](4), the specific  
21 disputed area must be considered to be a limited common element designed to serve a  
22 single unit but located outside the boundaries of that single unit and, thus, in this case, the  
23 specific disputed area is a limited common element allocated exclusively to Unit 207.

24 21. Therefore, based on the hearing record, the Administrative Law Judge  
25 concludes that Petitioner has not established, as alleged, any violation by Caribbean of  
26 the referenced CC&R provisions. As a result, the Administrative Law Judge concludes  
27 that Petitioner’s Petition shall be dismissed.

28 **RECOMMENDED ORDER**

1 IT IS ORDERED that Petitioner's Petition is dismissed as to the issue forwarded for  
2 rehearing.

3 IT IS FURTHER ORDERED that Petitioner continues to bear his \$500.00 filing fee.

4 **NOTICE**

5 **This administrative law judge order, having been issued as a result of**  
6 **a rehearing, is binding on the parties. A.R.S. § 32-2199.02(B). A party**  
7 **wishing to appeal this order must seek judicial review as prescribed**  
8 **by A.R.S. § 41-1092.08(H) and title 12, chapter 7, article 6. Any such**  
9 **appeal must be filed with the superior court within thirty-five days**  
10 **from the date when a copy of this order was served upon the parties.**  
11 **A.R.S. § 12-904(A).**

12 Done this day, April 28, 2021.

13 /s/ Kay Abramsohn  
14 Administrative Law Judge

15 Transmitted electronically to:

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By