

Final agency action regarding decision below:

ALJFIN ALJ Decision final by statute

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CAROLE JANE MCBEE,

Petitioner,

vs.

POINTE SOUTH MOUNTAIN,

Respondent.

No. 07F-H067004-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

HEARING: February 12, 2007

APPEARANCES: Melanie C. McKeddie, Esq. represented Petitioner Carole Jane McBee. Stephen D. Hoffman, Esq. represented Respondent Pointe South Mountain Residential Association.

ADMINISTRATIVE LAW JUDGE: Daniel G. Martin

Carole Jane McBee filed a petition with the Department of Fire, Building and Life Safety (the "Department") alleging that Pointe South Mountain Residential Association was responsible for property damage that she incurred as a result of three sewer backflows into her home. Based on the evidence of record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. Pointe South Mountain ("Pointe South Mountain" or "the subdivision") is a subdivision in Phoenix, Arizona comprised of residential lots and related common areas. Petitioner Carole Jane McBee is the owner of lot 1901.

2. Ms. McBee purchased her home in 1993. Blandford Homes ("Blandford") constructed Ms. McBee's home.

3. The sewer pipe on Ms. McBee's lot does not connect directly to the main sewer line; instead, it angles towards and onto her neighbor's property, where it

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connects with her neighbor's sewer line in a "Y" connection. A second sewer line connects the Y to the main sewer line.

1 4. Unbeknownst to Ms. McBee, the sewer line from her neighbor's home was
2 pushed too far into the Y connection at the time her neighbor's home was built. In
3 consequence of this error, the flow of sewage from Ms. McBee's home through the Y
4 connection was compromised.

5 5. For a period of approximately 10 years, Ms. McBee did not experience
6 any problems with her sewer line. However, on February 24, 2003, Ms. McBee's sewer
7 line backed up, and sewage overflowed into her home.

8 6. Ms. McBee hired Dobbs Plumbing, Inc. ("Dobbs") to snake the main sewer
9 line, which Dobbs completed on February 24, 2003. Dobbs' invoice reflects the
10 following notation: "Snake main drain. Clogged about 45' out by city tap." See Exhibit
11 A. Ron Dobbs advised Ms. McBee that plant roots were the likely cause of the
12 blockage.

13 7. Ms. McBee hired Servicemaster to remediate the water damage to her
14 home. See Exhibit C.

15 8. On May 21, 2004, Ms. McBee experienced a second backflow from her
16 sewer line. Again, she engaged Dobbs to snake the main sewer line, a task that Dobbs
17 completed that same day. Dobbs' invoice for that service reflects the following notation:
18 "Snake main drain [approximately] 45'. Roots at tap." See Exhibit D.

19 9. Ms. McBee hired Servpro to remediate the damage to her home. See
20 Exhibit E.

21 10. On July 3, 2004, Ms. McBee experienced a third backflow from her sewer
22 line. On this occasion, Ms. McBee hired Roto Rooter to snake the sewer line, as Dobbs
23 was not available. See Exhibit J.

24 11. Given the limited amount of time that had elapsed between the second
25 and third backflows, Ms. McBee suspected that the cause of the backflows was
26 attributable to something other than root growth. Therefore, she hired Detection
27 Specialties to perform a video inspection of her sewer line. That inspection, which was
28 performed on July 8, 2004, revealed a "stoppage" at 43 feet from the clean-out (on Ms.
29 McBee's neighbor's property at the Y connection), but was inconclusive as to the exact
30 nature of the stoppage. See Exhibits K and N.

1 12. Ms. McBee hired Servpro to remediate the third backflow, which had
2 caused significant damage to her home. Servpro extracted the water, applied
3 antimicrobial agent, and set up drying fans. Servpro also removed carpet, padding and
4 baseboards that had been damaged by the backflow. See Exhibit L. As of the hearing
5 date, Ms. McBee had not yet effected repairs to the damaged areas because she
6 lacked the funds necessary to complete the work fully, and did not wish to proceed on a
7 piecemeal basis.

8 13. Shortly after receiving the video from Detection Specialties, Ms. McBee
9 contacted City Property Management, the community's property management company,
10 for assistance. Ms. McBee spoke with Renee Gordon, who stated that she would speak
11 with Ms. McBee's neighbor about the problem, as the source of the blockage was on
12 the neighbor's property. That contact was unavailing, as Ms. McBee's neighbor did not
13 wish to cooperate with any further investigations.

14 14. Ms. McBee began to conduct her own due diligence, which included a
15 review of the Association's Restated Declaration of Homeowner Benefits and
16 Assurances (the "Declaration"). See Exhibit H.

17 15. Section 6.3 of the Declaration provides, in pertinent part: "The Association
18 shall be responsible for and bear the expense of the repair and maintenance of the
19 Common Area and facilities *including sewer and water lines, booster stations and*
20 *pumps serving more than one Residence even if not located in the Common Area; . . .*"
21 (emphasis added).

22 16. Ms. McBee concluded, based on her reading of Section 6.3, that because
23 she shared a sewer line with her neighbor, the Association was responsible for the
24 repair and maintenance of that sewer line, including the damages she had incurred in
25 her home as a consequence of the backflows. Ms. McBee confirmed with the City of
26 Phoenix that the sewer system in her community was a private system. See Exhibit O.

27 17. Ms. McBee appeared at the July 13, 2004 regular meeting of the
28 Association's Board of Directors (the "Board") and presented her case. Ms. McBee
29 requested that the Board undertake to repair the blockage "before another backup
30

1 occurs and results in further damage to my home.” See Exhibit M. According to Ms.
2 McBee, the Board did not take any action at that time, although the Association’s
3 president suggested that she sue her neighbor.

4 18. Subsequent to the July 13, 2004 Board meeting, Ms. McBee retained legal
5 counsel.

6 19. By letter dated July 23, 2004, Roger Foote of the law firm Jackson White
7 reiterated Ms. McBee’s demand that the Association immediately remediate the
8 “problem” at the Y connection. Mr. Foote directed his letter to Lynn Krupnik of the law
9 firm Ekmark & Ekmark, which was legal counsel for the Association.

10 20. On July 29, 2004, the Board convened a special meeting to address Ms.
11 McBee’s demand. At that meeting, the Board authorized the Association’s president to
12 enter into an agreement with Ms. McBee under which a plumber would be hired to
13 excavate the Y connection and ascertain the nature of the blockage (at this point no one
14 knew what was causing the backflows into Ms. McBee’s home). Because Ms. McBee
15 had hired legal counsel, the Board authorized Ekmark & Ekmark to represent the Board
16 in negotiations with Ms. McBee.

17 21. The negotiations between Ms. McBee and the Association were
18 unsuccessful. Ms. McBee declined the Board’s proposal to hire a plumber to excavate
19 the Y connection because she felt the terms were one-sided. Among other things,
20 under the Board’s proposal the determination as to the nature of the blockage would
21 rest with a plumber appointed by the Association, and Ms. McBee could not be sure of
22 such plumber’s objectivity.

23 22. After its July 29, 2004 meeting, the Board recessed for the remainder of
24 the summer. At that time the Board believed, reasonably, that the matter of Ms.
25 McBee’s sewer line was being handled by the attorneys and would be resolved through
26 a negotiated agreement.

27 23. In August 2004, Ms. McBee contacted Maricopa County and received an
28 opinion from Steven Borst, P.E., a manager in the County’s Environmental Services
29 Department, to the effect that the Association was responsible for the operation and
30 maintenance of the Y connection. See Exhibit S.

1 24. By letter dated September 1, 2004, Ms. McBee demanded that the Board
2 excavate and repair the sewer line within ten days. See Exhibit T.

3 25. The Board did not take immediate action on Ms. McBee's letter, but
4 placed the issue on the agenda for its October meeting (there was no September
5 meeting as the Board was still on recess).

6 26. On October 12, 2004, the Board considered Ms. McBee's situation and
7 voted to excavate the Y connection to determine the cause of the blockage. According
8 to Ms. McBee, the Board "repeatedly drilled me [sic] and tried to force me into agreeing
9 to pay for the plumbing repairs on the sewer line" prior to agreeing to conduct the
10 excavation. See Exhibit 4.

11 27. On October 22, 2004, Sun Devil Plumbing excavated the Y connection
12 and discovered that Blandford had improperly installed Ms. McBee's neighbor's sewer
13 line by extending it too far into the Y connection. Sun Devil corrected the problem by
14 installing a new Y connection. The Association paid for the repair (and confirmed by
15 subsequent letter that Ms. McBee was not responsible for such repair). Since that
16 repair, Ms. McBee has not experienced any problems with her sewer system.

17 28. After the repair was completed, Ms. McBee raised the issue of the sewer
18 line with Blandford. Blandford did not admit responsibility, but agreed, after
19 negotiations, to make a good faith payment to Ms. McBee in the amount of \$5,000.00.

20 29. On October 10, 2006, Ms. McBee sought compensation from the
21 Association for the remainder of the costs and expenses she had incurred (and would
22 incur) to restore her home to the condition in which it had been prior to the backflows.
23 The Board did not respond to Ms. McBee's demand by the October 13, 2006 deadline
24 that she had set for such response.

25 30. On October 19, 2006, Ms. McBee filed a petition with the Department
26 alleging that the Association was responsible for the damage to her home. Specifically,
27 Ms. McBee alleged:

28 Three sewer backflows occurred in my home due to a pipe which
29 was blocking the exit flow of my residential sewer in a sewer "wye"
30 connection located in my neighbor's yard which is owned and
 maintained by the PSM HOA. These sewer backflows have caused

1 repeated costs for repairs of damages. Dates of sewer backflows:
2 2/24/03, 5/21/04, 7/3/04. (Citing Section 6.3 of the Declaration).

3 Instead of taking care of the problem, the PSM HOA Board advised
4 me to sue my neighbor to get her to repair the sewer blockage,
5 even though Section 6.3 of the CC & R's clearly state[s] that the
6 PSM HOA is responsible for the repair and maintenance of the
7 sewer lines serving more than one residence even if not located in
8 the common area. (Citing Section 6.3 of the Declaration).

9 The PSM HOA refused to excavate and fix the blockage to the
10 "wye" connection for four months and instead tried to force me to
11 sign a five page "agreement" that, on its face, attempted to violate
12 the CC & R's and get me to assume responsibility for the defective
13 "wye" connection that is owned by and the responsibility of the PSM
14 HOA. (Citing Section 6.3 of the Declaration).

15 Since the PSM HOA did not take responsibility, I have had to spend
16 a huge amount of time, energy and money consulting with
17 numerous attorneys, various government officials, several plumbers
18 and even the builder in order to resolve this issue which has added
19 even more additional expenses. (Citing Section 6.3 of the
20 Declaration).

21 I have not only had to endure the horrifying experience of seeing
22 several rooms in my beautiful home damaged by contaminated
23 water on three occasions, I have also had to experience being
24 repeatedly drilled and yelled at by several members of the PSM
25 HOA board while they took their time (4 months) to finally decide[]
26 to fix the problem after they tried unsuccessfully to force me to take
27 responsibility for the sewer "wye" connection blockage. (Citing
28 Section 6.3 of the Declaration).

29 On 10/10/06 I proposed a settlement offer to the PSM HOA Board
30 that would reimburse me for damages & expenses that have been
caused due to this issue and they did not respond to my offer by
10/13/06; nor have they responded as of 10/19/06. (Citing Section
6.3 of the Declaration).

See Administrative Record.

31. By letter to the Department dated November 2, 2006, Ms. McBee clarified
that the relief she was seeking through her petition was "an award of judgment for
damages that have not been reimbursed to me in the amount of \$6,830.73, for mold

1 testing costs in the amount of \$800.00, for legal fees in the current amount of \$2,039.29
2 and for any additional legal expenses I incur in the future, plus \$2,000.00 for punitive
3 damages for Bad Faith.” See November 2, 2006 letter, a copy of which is contained in
4 the Administrative Record.

5 32. On November 3, 2006, the Department forwarded Ms. McBee’s petition to
6 the Association.

7 33. On November 22, 2006, the Association, through counsel, filed a
8 response to Ms. McBee’s petition.

9 34. On November 29, 2006, the Department issued a Notice of Hearing
10 setting this matter for hearing before the Office of Administrative Hearings, an
11 independent state agency.

12 35. At hearing, Ms. McBee urged that because the Association owned and
13 controlled the Y connection, the Association was responsible for the damages that Ms.
14 McBee incurred as a result of the backflows into her home. Ms. McBee claimed
15 damages in the amount of \$12,722.07 (a slight modification of her prior demand), which
16 consisted of (i) expenses she already had incurred in consequence of the backflows,
17 and (ii) the costs she will incur to complete the repairs to her home (including mold
18 remediation). Ms. McBee deducted the \$5,000.00 that she received from Blandford to
19 arrive at a total damage claim of \$7,722.07.

20 36. The Association asserted that it was not the party that had improperly
21 constructed Ms. McBee’s sewer line, and that it had met its obligations under the
22 Declaration by repairing the Y connection after the matter was brought to its attention.

23 **CONCLUSIONS OF LAW**

24 1. In this proceeding, Ms. McBee bears the burden to prove, by a
25 preponderance of the evidence, that the Association violated Section 6.3 of the
26 Declaration as alleged in her petition. See Arizona Administrative Code R2-19-119.

27 2. A preponderance of the evidence is “such proof as convinces the
28 trier of fact that the contention is more probably true than not.” Morris K. Udall, ARIZONA
29 LAW OF EVIDENCE § 5 (1960).

1 3. Under Section 6.3 of the Declaration, the Association is responsible
2 for the maintenance and repair of the Y connection in issue because that connection is
3 part of a sewer line that serves more than one residence within the subdivision. The
4 question presented here is whether, as Ms. McBee contends, that responsibility extends
5 to damages that she incurred as a result of the backflows into her home.

6 4. After careful consideration of the evidence of record and the
7 arguments of the parties, the Administrative Law Judge concludes that Ms. McBee
8 failed to demonstrate a violation by the Association of Section 6.3, and therefore that
9 she failed to demonstrate grounds for an award of damages.¹

10 5. The Administrative Law Judge first addresses the Association's
11 maintenance responsibility. There was no showing in the instant case that the
12 Association failed to maintain the Y connection in issue, or even what such
13 maintenance should have consisted of. Therefore, Ms. McBee failed to demonstrate
14 that the Association violated Section 6.3 with respect to its maintenance obligations.

15 6. Regarding the Association's repair responsibility, the gravamen of
16 Ms. McBee's claim appears not so much to be that the Association failed to repair the Y
17 connection, but that it failed to respond with sufficient alacrity to her demands that such
18 repair be made. As demonstrated by the evidence, the first such demand was made on
19 July 13, 2004. Prior to that time, the Association had no knowledge that Ms. McBee
20 had been experiencing sewer backflows at her home. The evidence further
21 demonstrated that no one at that time knew what the cause of the blockage was; as set
22 forth in Finding of Fact No. 11, the video recording of the sewer line was inconclusive.²

26 ¹ The Administrative Law Judge observes that even if Ms. McBee had been able to establish liability,
27 she would not be entitled to an award of compensatory damages. Arizona case law limits administrative
28 adjudication of monetary relief claims to awards of remedial restitution. See *Cactus Wren Partners v.*
29 *Arizona Department of Building and Fire Safety*, 177 Ariz. 559, 564, 869 P.2d 1212, 1217 (App. 1993).
Thus, Ms. McBee would only have been entitled to an award for expenses already incurred as a direct
consequence of the backflows.

30 ² In the absence of any evidence that there was a deficiency in the sewer line itself that required a
repair, it cannot be said that the Board acted improperly when it declined to accede to Ms. McBee's initial
demand for such a repair.

1 7. In late July 2004, the Board convened a special meeting to address
2 Ms. McBee's complaint. By that time, both parties had engaged legal counsel. In the
3 Administrative Law Judge's judgment, the Board did not act unreasonably when it voted
4 to authorize an agreement setting terms under which the Y connection would be
5 excavated. Conversely, the Administrative Law Judge does not believe that Ms. McBee
6 acted unreasonably when she declined that offer. The critical point is that at this
7 juncture, the passage of time cannot be said to be attributable to any inaction or bad
8 faith by the Board, as asserted by Ms. McBee.

9 8. When the parties' efforts to reach a negotiated settlement failed,
10 and Ms. McBee again requested in September 2004 that the Board take action, the
11 request was placed on the agenda for the Board's next meeting. That meeting did not
12 convene until October, 2004; however, that delay was due to the Board being on recess
13 and not to any refusal by the Board to consider Ms. McBee's request. When the
14 October 2004 meeting took place, the Board re-examined Ms. McBee's request and,
15 while Ms. McBee may have been subject to some tough questions (at this point there
16 still was no explanation for the blockage), the Board did ultimately agree to excavate the
17 Y connection, and did so promptly.

18 9. When the deficiency in the Y connection was discovered, the repair
19 was made and the Association bore the burden of that expense.

20 10. The foregoing reveals that a three month span of time elapsed
21 between the submission of Ms. McBee's complaint and the Board's agreement to
22 excavate the sewer line. Under the circumstances presented, that lapse of time was not
23 unreasonable. Further, the Board met its repair obligations under Section 6.3. Thus,
24 the Administrative Law Judge concludes that Ms. McBee failed to demonstrate that the
25 Association violated Section 6.3 with respect to its repair obligations.

26 11. Ms. McBee did not assert any other violations by the Association of
27 the Declaration, and none are found herein.

28 12. A.R.S. § 41-2198.02 provides that "[i]f the petitioner prevails, the
29 administrative law judge shall order the respondent to pay to the petitioner the [\$550.00]
30 filing fee required by section 41-2198.01."

