

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

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

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 JOHN C. MARTIN,

8 Petitioner,

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13 OAKWOOD LAKES COMMUNITY
14 ASSOCIATION,

15 Respondent.
16

No. 07F-H067014-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

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18 **HEARING:** February 26, 2007

19 **APPEARANCES:** John C. Martin on his own behalf; Aaron Peterson, Esq. on
20 behalf of Oakwood Lakes Community Association

21 **ADMINISTRATIVE LAW JUDGE:** Lewis D. Kowal
22

23 **FINDINGS OF FACT**

- 24 1. At all times material to this matter, John Martin ("Mr. Martin") was and currently is
25 an owner of a residence located at 765 West Beechnut Drive, Chandler, Arizona,
26 located within the Oakwood Lakes Community ("Community").
- 27 2. At all times material to this matter, Mr. Martin was, and currently is, a member of
28 Oakwood Lakes Community Association ("Association").
- 29 3. Since 2005, Mr. Martin has complained to the Board of Directors of the
30 Association (Board") through either notification to a property management company
representative acting on behalf of the Board or through direct contact with the Board

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1 about the activity taking place on his neighbor's (the "Downings") back yard that
2 affecting east block wall and property. During that time, the Community changed
3 management companies several times.

4 4. The Board, through its property management company, sent out two courtesy
5 letters¹ to the Downings advising them of the complaints that Mr. And Mrs. Martin had
6 made concerning activity on the Downings' lot.

7 5. In particular, the Martins complained that the Downings were engaged in a plant
8 servicing business and that intermittent over-watering was taking place causing damage
9 to the Martin's property and affecting the boundary block wall, i.e. the east block wall of
10 the Martins.

11 6. It is undisputed that during the relevant time, Mrs. Downing was operating a plant
12 services business in the backyard of her lot that is located adjacent to the Martins' lot.
13 Mrs. Downing obtained a permit from the City of Chandler to conduct that business
14 activity at 755 West Beechnut Drive, Chandler, Arizona, where the Downings reside.

15 7. In a letter dated November 8, 2006, the City of Chandler informed Mrs. Downing
16 that she is allowed plant storage of up to fifty square feet in her backyard, watering
17 should be done in the same area, and deliveries of plant material or other deliveries
18 related to the home business are not allowed. Mrs. Downing agreed to abide by those
19 conditions.

20 8. After attempting to obtain information from the Downings with respect to the
21 Martins' continued complaints about the Downings' business activity and over-watering
22 at their residence and no response from the Downings, based on information and
23 photographs presented by the Martins, the Board approved the issuance of a violation
24 letter to be sent to the Downings.

25 9. On March 9, 2006, letter was sent to the Downings informing them of the
26 irrigation issue and that the boundary wall must be repaired or monetary fines will be
27 assessed. The letter also referenced the landscaping section found on page 8 of the

28 ¹The letters were dated January 17, 2005 and February 10, 2006. In those letters, the Downings were
29 asked to re-direct their sprinkler or irrigation system away from the common wall to eliminate seeping,
30 staining and draining on the Martins' property and to address other issues that are not within the scope
of the instant hearing.

1 Architectural Rules requiring irrigation systems to be directed away from walls, and the
2 letters referenced maintenance provisions found in Sections 7.4 and 7.5 of the
3 Association's Declaration of Covenants, Conditions and Restrictions ("CC&Rs").

4 10. After issuance of the March 9, 2006 letter, the Board received information from
5 the Downings in response to the Martins' complaints.

6 11. After receipt of information from the Downings, the Board requested that the
7 property management company look into the matter.

8 12. Mitch Kellogg ("Mr. Kellogg"), employed by the management company, visited
9 both the Downings' and Martins' lots to inspect the situation. He noticed that a watering
10 mist system was near the boundary wall that plants and flowering shrubs were located
11 in the vicinity and requested that the Downings remove the plants to the other side of
12 the property and turn off the drip system. He was informed that the Downings would
13 comply with that request. However, he did not return for any follow-up visit and does
14 not know whether such action has taken place. During that visit, he noticed that both
15 sides of the boundary wall were wet but did not notice any damage to the Martins'
16 property boundary wall. He noticed a crack in Mr. Martins' east wall that was not in the
17 vicinity where the watering was occurring.

18 13. Mr. Kellogg reported his findings to the Board. Based on Mr. Kellogg's report, a
19 representation made by Mrs. Downing in writing that the watering had stopped, and not
20 having heard from the Martins since March 2006, the Board assumed the matter had
21 been resolved.

22 14. Mr. Martin testified that since March 2006, the watering has continued and he
23 has experienced seeping and damage to the east side block wall.

24 15. The Association presented several witnesses, current and former Board
25 members and property management representatives who testified that from the street,
26 the business activity of the Downings could not be observed.

27 16. Mr. Martin contended that the business activity of the Downings is in violation of
28 the CC& R's in that the activity is not permitted as a residential use; that the activity
29 constitutes a nuisance, that the Downings' have improperly maintained and used their
30 lot, and the Board has not taken appropriate action to stop such activity.

1 17. Mr. Martin also alleged that the watering of the plants by the Downings violates
2 the Architectural Rues.

3 18. In contrast to Mr. Martin's allegations, the Board asserted that it took the Martins'
4 complaints seriously, that the complaints were investigated and determined that this is
5 essentially a neighbor to neighbor dispute that does not involve the Association.

6 19. Believing that the Board has breached its contractual duties, Mr. Martin filed a
7 Petition with the Department of Fire, Building and Life Safety ("Department"), bringing
8 this matter to a hearing before the Office of Administrative Hearings.

9 **CONCLUSIONS OF LAW**

10 1. In this proceeding, Mr. Martin bears the burden of establishing, by a
11 preponderance of the evidence, that the Board violated provisions of the Association's
12 governing documents as alleged in the Petition that was filed with the Department.

13 2. A preponderance of the evidence is "evidence which is of greater weight or more
14 convincing than the evidence which is offered in opposition to it; that is, evidence which as
15 a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW
16 DICTIONARY 1182 (6th ed. 1990).

17 3. The weight of the evidence of record established that the Downings are conducting
18 a home business on their lot in violation of Article 3, Section 3.11 of the CC& R. That
19 provision provides an exception for home business on a residential unit, which is distinct
20 from the lot. The fact that the City of Chandler permitted the business activity of the
21 Downings does not preclude the Association from having more restrictive requirements in
22 its CC&Rs, which is the case in the instant matter.

23 4. The weight of the evidence of record did not establish that the Board had
24 sufficient information to conclude that the business activity of the Downings on their lot
25 constitutes a nuisance. Section 3.11 of the CC&Rs provides the Board with sole
26 discretion as to what constitutes a nuisance. There is credible evidence that the Board
27 did not consider the Downings' business activity to be a nuisance. Consequently, no
28 violation of CC& R Article 3, Section 3.3 is found.
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1 5. The weight of the evidence of record established that the Board had information
2 showing that the Downings' violated Article 7, Section 7.4 of the CC &Rs by using their
3 lot for a home business in violation of Article 3, Section 3.11 of the CC&Rs.

4 6. The weight of the evidence of record established that the Board had information
5 showing that the Downings violated the provisions of the Architectural Guidelines, Rear
6 Yard and Side Yard Landscaping Sections found on page 3 by having a mist system
7 that watered plants near the side of the boundary wall at issue and there was no
8 credible evidence that the Downings' corrected that situation although they represented
9 to the Association that they would. The Board neglected to perform any follow-up visit
10 to confirm compliance with the request made by Mr. Kellogg.

11 7. Mr. Martin is the prevailing party and is entitled to reimbursement of his \$550.00
12 filing fee pursuant to A.R.S. § 41-2198.02.

13 **ORDER**

14 Based on the above, the Association is ordered to comply with and enforce its
15 CC&Rs and Architectural Guidelines in accordance with the Findings of Fact and
16 Conclusions of Law set forth above and within forty-five days of this Order the
17 Association shall reimburse Mr. Martin his \$550.00 filing fee.

18 Done this day, March 19, 2007.

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20 _____
21 Lewis D. Kowal
22 Administrative Law Judge

23 Original transmitted by mail this
24 ____ day of _____, 2007, to:

25 Department of Fire Building and Life Safety - H/C
26 Robert Barger
27 ATTN: Joyce Kesterman
28 1110 W. Washington, Suite 100
Phoenix, AZ 85007

29 Aaron S. Peterson, Esq.
30 MEAGHER & GEER, P.L.L.P.

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By _____