

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 MARSHA FAGIN,

8 Petitioner,

9 vs.

10
11 DESERT COVE CONDOMINIUM
12 ASSOCIATION,

13 Respondent.

No. 07F-H067027-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

14
15
16 **HEARING:** July 2, 2007

17 **APPEARANCES:** Marsha Fagin, on her own behalf; Jason Smith, an attorney,
18 on behalf of Respondent.

19 **ADMINISTRATIVE LAW JUDGE:** Michael K. Carroll

20
21 On February 19, 2007, a Petition was filed with the Department of Fire, Building
22 and Life Safety, pursuant to A.R.S. §41-2198.01B, in which Petitioner alleged four
23 separate violations of planned community documents by Respondent.

24 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

25 **Findings of Fact:**

26 (1) Petitioner owns and lives in Condominium Unit 205 at Desert Cove
27 Condominiums in Scottsdale, Arizona. She is a member of Desert Cove Condominium
28 Association (Respondent).

29 (2) In December, 2005, the roof on Petitioner's unit was replaced by Respondent
30 as a result of a decision by the Board of Directors to replace roofs on eight of the older
units within the 45-unit complex. Prior to replacing the roof on Petitioner's unit,

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007
(602) 542-9826

1 Petitioner had not been experiencing water leaks into her unit. However, the Board
2 decided to replace the roofs on units 201-208 due to the age of the units and several
3 complaints of roof leaks from occupants of the adjacent units.

4
5 (3) In February and March, 2006, after the roof had been replaced on
6 Petitioner's Unit, the condominium community experienced heavy rains. As a result,
7 Petitioner's unit developed a leak which caused water damage to the interior ceiling and
8 walls.

9 (4) Petitioner called Robin Thomas, the manager of the condominium
10 community, and complained about the leak. Ms. Thomas contacted the roofing
11 contractor and issued a work order for the repair.

12 (5) The roofing contractor subsequently inspected the roof and conducted a
13 water leak test by flooding the roof with water from a hose. That test did not reveal any
14 leaks on the roof of the unit. However, in an attempt to determine the source of the
15 damage to Petitioner's interior ceiling and walls, the contractor sprayed water along a
16 decorative band on the exterior wall of the unit, and concluded that the band was the
17 source of Petitioner's leak.

18 (6) Respondent hired a painting contractor to caulk around the decorative band
19 and seal any leaks. However, Respondent informed Petitioner that, under the
20 Declaration of Covenants, Conditions and Restrictions (Declaration) which governs its
21 authority, it was not responsible for repairs to the interior ceiling and walls of her unit.

22 (7) In April and May, 2006, a contractor, hired by Respondent to paint the
23 exterior of the condominium units, removed wood framing around the bathroom window
24 in Petitioner's condominium unit as part of the painting project. As a result, Petitioner's
25 unit developed leaks in the area where the exterior framing had been removed. Those
26 leaks caused damage to the interior walls around that window. Respondent hired a
27 contractor to seal the exterior frame of the window. Exhibits R8 and R9. Respondent
28 also paid for repair to the interior wall around the bathroom window. Exhibit C1.

29 (8) In June, 2006, Petitioner reported another leak to Respondent when she
30 observed a wet spot on a throw rug inside her unit. Exhibit R6. The following month,

1 Respondent hired a licensed contractor to add metal flashing and resurface the roof
2 overhang at the front of Petitioner's unit because it was believed that water may have
3 penetrated into the unit at the junction of the front roof overhang and the exterior wall.
4 Exhibits R5 and R7.

5 (9) Following rainstorms at the end of July, 2006, Petitioner experienced
6 additional leaks inside her unit near a ceiling vent that leads to an air conditioning unit
7 installed on her roof. Again she contacted Respondent, who sent the roofing contractor
8 to investigate the source of the leak. The contractor concluded that the leaks were
9 coming through cracks in an exterior air duct connected to Petitioner's roof air
10 conditioner. The contractor sealed the leaks in the air duct. Respondent subsequently
11 sent a letter and photographs to Petitioner explaining the source of the leaks and the
12 fact that maintenance and repair of air conditioning units are the responsibility of each
13 condominium owner. Exhibits R4 and R4A.

14 (10) In August, 2006, Petitioner again experienced water leaks around the
15 bathroom window. Again Respondent hired a contractor to reseal the exterior frame of
16 the window. However, Respondent refused to make repairs to the interior wall around
17 the window.

18 (11) In her testimony at the hearing, Petitioner acknowledged that she did not
19 experience any leaks after August, 2006. She also acknowledged that she did not
20 experience leaks near the air conditioning vent after the duct attached to the air
21 conditioner on the roof was sealed. She alleged, however, that the repeated leaks had
22 caused mold to develop inside the walls of her unit and caused her to experience some
23 health problems which she attributed to the mold.

24 **Conclusions of Law:**

25 Petitioner alleges that Respondent violated Article 5, Section 5.1.1 or the
26 Declaration by

- 27 1. Failing to adequately maintain roof and central chutes and utility
28 installations as required;
- 29 2. Failing to adequately and promptly repair damage to roof and central
30 chutes and utility installations as required;

3. Negligently repairing her roof and overhang; and
4. Negligently repairing and maintaining areas of the complex required to be maintained.

Specifically, Petitioner based her claim on interior water damage to her dining room ceiling and wall caused by the leak around the air conditioning vent inside her unit; damage to the interior wall around her entry door caused by the water sprayed against an exterior wall in an attempt to locate the source of a water leak; and damage to the interior wall around one of her bathroom windows caused by the work done to the exterior window frame when the exterior walls of the units were repainted. She claims that Respondent violated Article 5, Section 5.1.1 of the Declaration by either failing to properly maintain the exterior of her unit, or failing to promptly and adequately repair leaks which occurred in her unit after her roof was replaced and the exterior of her unit was repainted.

Pursuant to Arizona Administrative Code, Section R2-19-119, the party asserting a claim, right, or entitlement has the burden of proving that fact by a preponderance of the evidence. A “preponderance of the evidence” is proof sufficient to persuade the fact finder that a proposition is more likely true than not.

In order to meet her burden in this case, Petitioner must establish that Respondent did not “maintain, replace, repair, restore, operate and manage” the “Common Area” of the condominium complex, as required under Declaration, Article 5, Section 5.1.1.

The Declaration defines “Common Area” to include “walls and ceilings *not contained within a Unit*; roofs and foundations...” Declaration, Article 1, Section 1.6. Emphasis added.

A “unit” is defined in the Declaration as including only the area “bounded by and contained within the interior finished surface of the perimeter walls, floors and ceilings...” Declaration, Article 2, Section 2.2.1.

The Declaration also provides:

Except for those portions of the Project which the Association is required to maintain and repair, *each Unit Owner shall, at his sole cost*

1 *and expense, maintain and repair his Unit, keeping the same in good*
2 *condition. Additionally, each Owner shall maintain, repair and replace as*
3 *necessary any separate air-conditioning, cooling, heating and/or water-*
4 *heating units (all wires and connections therefore) which service his Unit*
5 *... Each owner shall have the exclusive right to paint, plaster, panel, tile,*
6 *wax, paper or otherwise refinish and decorate the inner surfaces of the*
7 *walls, ceilings, floors, windows and doors bounding his Condominium*
8 *Unit...*

9 Declaration, Article 10, Section 10.5. Emphasis added.

10 The evidence presented at the hearing was insufficient to establish that
11 Respondent either failed to maintain the “Common Area” of Petitioner’s unit – *i.e.*
12 Petitioner’s roof and exterior walls—or that it acted in violation of the Declaration in
13 replacing, repairing or restoring the “Common Area” of Petitioner’s unit.

14 With regard to the allegation that Respondent failed to properly maintain the
15 “Common Area” of the condominium community, the replacement of Petitioner’s roof
16 was part of a comprehensive maintenance plan which was approved by the Board of
17 Directors and performed in stages, beginning with the older units. Most of those older
18 units had been experiencing leaks. After the decision to replace the roofs, the Board
19 obtained bids from four licensed contractors and ultimately hired one of those
20 contractors to replace the roofs.

21 Although Petitioner claimed that the roofing contractor had family ties to Robin
22 Thomas, the manager of the complex, there was no evidence presented to support that
23 claim. Ms. Thomas admitted that her father-in-law was one of the contractors who
24 initially bid on the project, but that company was not chosen by the Board to do any
25 work for Respondent. Furthermore, there was no evidence to suggest that anything
26 improper occurred with respect to either the manner in which the Board obtained the
27 bids or replaced the roofs.

28 With regard to the allegation that Respondent failed to properly repair the leaks
29 that developed inside Petitioner’s unit, Respondent promptly issued work orders upon
30 receipt of each of Petitioner’s complaints. The roofing contractor promptly attempted to
 determine the source of the leaks. When leaks were discovered, Respondent took
 timely and appropriate measures to correct the problems and alleviate additional

1 damage. There was no evidence to suggest that Respondent ever disregarded
2 Petitioner's complaints, or acted unreasonably in its efforts to address them.

3 The fact that some of the problems may not have been resolved on the first
4 attempt does not equate to a failure to comply with the Declaration by Respondent. In
5 fact, the evidence suggests that Respondent, by sealing Petitioner's exterior air
6 conditioning ducts and paying the cost of some of the wall repairs inside her unit, went
7 beyond its strict obligation to Petitioner under the Declaration.

8 Petitioner was understandably frustrated with the repeated water leaks into her
9 unit, and the resulting damage to the unit's interior walls and ceiling. However,
10 Respondent did "maintain, repair, replace, restore, operate and manage" Petitioner's
11 roof and exterior walls as it was required to do under the Declaration. Furthermore,
12 there is nothing contained within the applicable documents or statutes governing the
13 Association to suggest that Respondent bears any responsibility to correct damage to
14 Petitioner's interior walls or ceiling. Likewise, there is nothing in those documents and
15 statutes which creates any obligation on Respondent with respect to the mold that
16 subsequently developed inside Petitioner's unit or for health problems she may attribute
17 to that mold.

18 **ORDER**

19 Based upon the foregoing, it is ordered denying the Petition.

20 This Order is the final administrative decision and is not subject to a request for
21 rehearing. A.R.S. §41-2198.02 (B).

22 Done this day, July 5, 2007.

23
24
25 _____
26 Michael K. Carroll
27 Administrative Law Judge
28

29 Original transmitted by mail this
30 ____ day of _____, 2007, to:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

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

Marsha Fagin
3309 N. 70th St. Unit 205
Phoenix, AZ 85251

Carpenter Hazlewood, PLC
1400 E. Southern Ave. Ste. 640
Tempe, AZ 85282

By _____