Final agency action regarding decision below:

ALJFIN ALJ Decision final by statute

STATE OF ARIZONA

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

STANTON S SANDERS, Petitioner, vs. FLORENCE GARDENS MOBILE HOME ASSOCIATION, Respondent.	**No. 08F-H088007-BFS** **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: April 29, 2008

APPEARANCES: Petitioner Stanton S. Sanders appeared personally. Respondent Florence Gardens Mobile Home Association was represented by its attorney, Mark Holmgen, Esq.

ADMINISTRATIVE LAW JUDGE: Michael G. Wales

Based upon the evidence of record, the Administrative Law Judge makes the following Findings of fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. Stanton S. Sanders ("Petitioner") is the owner of record of two adjacent lots, lots 1164 and 1165, in the Florence Gardens Mobile Home Community ("the Community") in Florence, Arizona. The two lots are subject to the Deed Restrictions and certain planned community governing documents recorded by, or promulgated by, Respondent Florence Gardens Mobile Home Association, Inc. ("Respondent

Association" or "Association"). An owner of a lot in the Community automatically becomes a member of the Respondent Association, and is bound by the governing documents of the Association, by virtue of being a purchaser of, or subsequent purchaser of, any lot within the Community.

2. On April 12, 2007, Respondent Association, through its Board of Directors, and by way of letter, informed the owners of lots within the Community that its long standing practice of waiving assessments for any vacant lot adjacent to an improved lot, both of which are owned by the same member, had come to an end and, beginning in 2008, assessments would be levied for both the improved lots and vacant lots.

3. Petitioner took issue with the change in policy and on January 28, 2007 filed a Petition, pursuant to A.R.S. §41-2198.01(B), with the Arizona Department of Fire, Building and Life Safety ("the Department") alleging, in a single count, that the Respondent Association had violated the following governing documents and state statutes governing planned communities:

a. Paragraph 24 of the Declaration of Restrictions, recorded on August 15, 1974 and amended on January 11, 1979, governing members of the Community;

b. Association Policies 1-96 and 3-98 promulgated by the Respondent's Board of Directors in 1996 and 1998 respectively and later rescinded on June 6, 2006;

c. Section 4A of the Covenants, Conditions and Restrictions ("CC&Rs") dated April, 1998;

d. Rules 9(b) and 16(c) of the Rules and Regulations promulgated by the Respondent's Board of Directors ("Rules and Regulations"); and,

e. A.R.S. § 32-1802.

4. On February 15, 2007, Petitioner filed an Amended Petition which alleged no additional violations of governing documents or state statutes, but which set forth additional arguments and citations to governing documents in support of his initial allegations.

5. On February 27, 2008, Respondent Association filed a Response to the Petition denying Petitioner's allegations and the matter was set for hearing before the Office of Administrative Hearings.

6. Article V, Section F, of the Articles of Incorporation for Respondent Association, filed with the Arizona Corporation Commission on July 27, 1971, grants the Association the power to levy assessments against the owners of each lot.

7. Article II, Section 11, of the Fourth Amended and Restated Bylaws of Respondent Association ("the Bylaws"), adopted by majority vote of the members at the annual meeting on February 14, 2006, defines "Lot" as "any separate parcel of real property shown upon the plat of real properties…". Article XIII, Section 2, of the Bylaws, also grants the Respondent Association the power to levy assessments against the owners the lots.

8. The Plat of record for Florence Gardens, Unit D, recorded in the Pinal county Recorder's Office at Book 18 of Maps, Page 37 ("Plat") sets forth lots 1164 and 1165 as separate and distinct lots.

9. No evidence was presented that there have ever been any changes or amendments to the recorded Plat.

10. The language of Paragraph 24 of the Declaration of Restrictions ("the Declaration") requires "any ownership or single holding by any person comprising parts of two adjoining lots shall for the purpose of this Declaration of Conditions and Restrictions be deemed to constitute a single lot". This language is limited to those deed restrictions set forth in the Declaration and does not prohibit Respondent Association from levying assessments for Petitioner's improved lot and vacant lot because the power to levy assessments arises not from the Declaration, but from the Association's Articles of Incorporation, Article V, Section F, and from Article XIII, Section 2 of the Bylaws.

11. Uncontroverted evidence established that Respondent Association's Policies 1-96 and 3-98, waiving the assessments for the vacant adjoining lots were rescinded by Respondent Association on June 6, 2006 at a Board of Directors meeting open to the public. The imposition of the assessments at issue in this case did not take place until 2008. Thus, there was no action by the Respondent Association in contravention to its own written policies in re-imposing the assessments.

12. In response to questioning, Petitioner testified that Respondent Association has not violated Rule 9(b) or Rule 16(c) of the Rules and Regulations in regards to his lots, thus no evidence was presented that supported Petitioner's claim that Respondent Association violated these Rules.

CONCLUSIONS OF LAW

1. Pursuant to A.A.C. R2-19-119(B), Petitioner has the burden of proof in this matter. This burden of proof requires proof by a preponderance of the evidence. A.A.C. R2-19-119(A). Proof by a "preponderance" means that "the evidence is sufficient to persuade the finder of fact that the proposition is more likely true than not." In re Arnold and Baker Farms, 177 B.R. 648 (9th Cir. BAP (Ariz.) 1994). See also, Culpepper v. State of Arizona, 187 Ariz. 43, 930 P.2d 508 (App. 1996). It is "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Black's Law Dictionary* 1182 (Rev. 6th ed. 1990).

2. Pursuant to the authority conferred to Respondent by the Articles of Incorporation and Bylaws discussed above, Respondent legally exercised its authority to rescind its prior policy of waiving assessments for vacant lots adjacent to improved lots where both lots are owned by a single owner.

3. Petitioner failed to sustain his burden of proof that, by rescinding its prior policies and imposing the assessments at issue, Respondent violated the provisions of A.R.S § 33-1802, as alleged in his Petition. A.R.S. § 33-1802 simply sets forth statutory definitions and does not impose any duties, rights or obligations on any person or legal entity. As such, Respondent Association did not violate A.R.S. § 33-1802 as alleged by Petitioner.

4. Petitioner further failed to sustain his burden of proof that Respondent violated Paragraph 24 of the Declaration of Restrictions; failed to sustain his burden of proof that Respondent violated Polices 1-96 and 3-98; and failed to sustain his burden of proof that Respondent violated Rules 9(b) and 16(c) of the Rules and Regulations of the Association, as alleged in his Petition.

5. Petitioner further failed to sustain his burden of proof that Respondent violated Section 4A of the CC&Rs as alleged in his Petition. The language of Section 4A of the CC&Rs states "Combined lots will be considered as one lot and will have the same landscaping requirements as a single lot". The language of Section 4A of the CC&Rs is limited to the landscaping restrictions set forth in Section 4A. As such, the Respondent Association did not violate Section 4A in re-imposing the assessments.

6. Respondent is the prevailing party in this matter. Therefore, Petitioner is not entitled to an award of his $550.00 filling fee. A.R.S. § 41-2198.02.

7. Respondent, as prevailing party, has requested that it be awarded its attorneys' fees. This tribunal declines to award attorneys' fees to Respondent. *Semple v. Tri-City Drywall, Inc.,* 172 Ariz. 608, 838 P.2d 1369 (App.1992), precludes an award of fees under A.R.S. §§ 12-341.01(A) (relating to an "action arising out of a contract") and 33-1807(H) (relating to an "action brought under this section"). In *Semple*, the Court of Appeals held that "we do not believe that an administrative agency can be characterized as a court so that a proceeding before it could be called an 'action' for purposes of A.R.S. section 12-341.01" and that "there is no indication that the legislature intended section 12-341.01 to apply to attorney's fees incurred by the prevailing party in an administrative proceeding."[1]

ORDER

Based on the foregoing,

IT IS ORDERED dismissing Petitioner's Complaint against Respondent Florence Gardens Mobile Home Association, Inc. in Case No. HO 08-8/007.

IT IS FURTHER ORDERED denying Respondent's request for attorney's fees.

Pursuant to A.R.S. §41-2198.04(A), this Order is the final administrative decision and it is not subject to a request for rehearing.

Done this day, May 13, 2008.

[1] 172 Ariz. at 611-12, 838 P.2d at 1372-73.

Office of Administrative Hearings

_____
Michael G. Wales
Administrative Law Judge

Original transmitted by mail this
____ day of _____, 2008, to:

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