

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

2  
3 **ALJCERT ALJ decision certified as final**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6  
7 JAMES VINCENT GRUNER,

8 Petitioner,

9  
10 vs.

11 HUNTERS POINTE CONDOMINIUM  
12 ASSOCIATION,

13 Respondent.  
14

**No. 11F-H1112002-BFS**

**ADMINISTRATIVE LAW JUDGE**

**DECISION**

15  
16 **HEARING:** December 19, 2011

17 **APPEARANCES:** James Vincent Gruner appeared personally. Hunters Pointe  
18 Condominium Association was represented by its attorney, Jeffrey B. Corben, Esq.

19 **ADMINISTRATIVE LAW JUDGE:** Brian Brendan Tully  
20

21 Based upon the evidence of record, the Administrative Law Judge makes the  
22 following Findings of Fact, Conclusions of Law, and Recommended Order:

23 **FINDINGS OF FACT**

- 24 1. James Vincent Gruner ("Petitioner") has resided in the Hunters Pointe  
25 Condominium Association ("Respondent") for 15 years.
- 26 2. Petitioner and Respondent are governed by the Declaration of Horizontal  
27 Property Regime and Declaration of Covenants, Conditions and Restrictions for  
28 Hunters Pointe Condominiums ("CC&Rs"). See Exhibit 22
- 29 3. On August 3, 2011, Petitioner filed a Petition with the Arizona Department of Fire,  
30 Building, and Life Safety ("Department") alleging the following violation by  
Respondent:

1 On or about 1-7-11...the Respondent committed the specific  
2 following act, or specifically failed to act in the following manner, or  
caused the following condition to occur:

3 Our Association authorised [sic] the removal of a large fountain  
4 located at the entry way of our community. Removal of the fountain  
5 violates paragraph 10.2 of our CC&R's. Paragraph 10.2 states that  
6 "restorations of the property shall be undertaken by the  
7 Association." "Such restoration shall be performed substantially in  
8 accordance with this declaration and the original plans and  
9 specifications for the buildings, the common elements and the  
10 units." The original site plan filed with the city clearly specifies that  
11 a fountain is to be located at the entry way to the complex.  
12 Removal of [the] fountain has resulted in a dilapidated appearance  
13 of our community and likely contributed to diminished property  
14 values.

- 15 4. The Department designated Petitioner's Petition as Case No. HO 11-12/002.  
16 5. The Department forwarded Case No. HO 11-12/002 to the Office of  
17 Administrative Hearings, an independent agency, for an evidentiary hearing.

#### 18 **Hearing Evidence**

- 19 6. Petitioner testified on his own behalf. Ronald W. Stephenson, a resident of Unit  
20 2016, testified on behalf of Petitioner. Cathy Gillespie, a board member, testified  
21 for Respondent.<sup>1</sup>  
22 7. The original site plan filed with the City of Mesa reflects the placement of a  
23 fountain at the formal entry to Respondent's complex, as evidenced by  
24 Petitioner's Exhibit 6.  
25 8. Petitioner argued that the fountain had been improperly removed, that the  
26 property must be restored pursuant to paragraph 10.2 of the CC&Rs, that  
27 restoration involves the replacement of the fountain, and that the property was  
28 left in a dilapidated condition, possibly resulting in diminished property values.  
29 9. Ms. Gillespie testified that paragraph 10.2 of the CC&Rs was inapplicable. In  
30 particular, Ms. Gillespie opined that "obsolescence" did not apply and that,  
instead, Respondent "was looking at the whole picture."<sup>2</sup> Ms. Gillespie further

<sup>1</sup> Ms. Gillespie believes she is also the board's current secretary.

<sup>2</sup> Essentially the cost of repairing and maintaining the existing fountain and the requirement of Maricopa County that a fence be added to the fountain. See generally the testimony of Cathy Gillespie. Hearing Record 1:38:10 – 1:56:18. See in particular, 1:52:18 – 1:53:31.

1 testified that paragraph 13 of the CC&Rs authorized the removal, that paragraph  
2 4 of the CC&Rs permitted the disposal of the fountain, that paragraph 4.3 of the  
3 CC&Rs made the board's determination to remove and replace the fountain  
4 binding on Petitioner, and that paragraph 5 of the CC&Rs permitted Respondent  
5 to remove the fountain to change the character of a common element.

6 10. Respondent argued further that the equitable doctrine of laches should apply in  
7 this matter because Petitioner did not complain to Respondent for months after  
8 the fountain had been removed.

9 11. The fountain at issue had been in a state of disrepair for an extended period of  
10 time. In addition, Ms. Gillespie testified that Maricopa County now required  
11 Respondent to install a fence barrier around the fountain and its base to comply  
12 with local building code requirements.

13 12. Ms. Gillespie testified that approximately 35 percent of Respondent's  
14 homeowners were delinquent in paying their assessments. As a result,  
15 Respondent was severely underfunded and lacked the financial capacity to pay  
16 to repair and maintain the fountain.

17 13. Respondent's February 3, 2010 board meeting minutes reflect that the fountain  
18 pump repair would cost \$600.00. The board planned to ask owners about the  
19 removal of the fountain at Respondent's annual meeting. Owners who were  
20 present for the February 3, 2010 meeting agreed to remove the fountain. The  
21 fountain issue was listed on the annual meeting notice sent to homeowners. See  
22 Exhibit 8

23 14. At Respondent's annual meeting on March 4, 2010, there was discussion about  
24 removing the fountain because of a shortfall in funds. All attending the meeting  
25 agreed with the suggestion that the board look at selling the fountain. It was  
26 noted in the minutes that rocks had been placed in the fountain and would  
27 remain there to deter skateboarders. See Exhibit 18

28 15. Respondent's regular board meeting minutes for April 1, 2010, reflect that the  
29 fountain had been advertised in Craigslist for sale. No response to the  
30 advertisement was received by Respondent. Respondent's board decided to

1 look for a charity to donate the fountain in exchange for its removal at no cost to  
2 Respondent. Owners who were present at the meeting agreed with that  
3 suggestion. See Exhibit 19

4 16. Respondent's regular board meeting minutes for May 6, 2010, reflect that a  
5 decision had been made to donate the fountain to a non-profit organization  
6 because Respondent could not sell it. Respondent's board did not want to incur  
7 any expense to remove the fountain. Landscape designs were discussed for the  
8 fountain's base. All owners present at the meeting agreed with the board's  
9 actions. See Exhibit 20

10 17. At Respondent's board meeting on June 3, 2010, the board voted to remove the  
11 fountain. See Exhibit 21

12 18. In January of 2011, the fountain was removed. The base of the fountain was not  
13 removed and what appears to be debris remained in the base as of the time of  
14 hearing, as evidenced by Petitioner's Exhibit 11 and Exhibit 12. The record  
15 reflects that the fountain base was lightly filled with rubble from January 2011 to  
16 November 2011, and completely full of rubble, including pieces of concrete, from  
17 November 18, 2011, until the time of hearing.

18 19. In May 2011, Petitioner began to complain to Respondent about the removal of  
19 the fountain.

20 20. At its July 2011 board meeting, Respondent's board offered to mediate the  
21 dispute with Petitioner. However, Petitioner did not respond to that offer and filed  
22 the instant petition on August 3, 2011.

23 **CONCLUSIONS OF LAW**

24 1. Pursuant to A.A.C. R2-19-119(B), Petitioner has the burden of proof in this  
25 matter. The standard of proof is by a preponderance of the evidence. A.A.C.  
26 R2-19-119(A).

27 2. A preponderance of the evidence is "such proof as convinces the trier of fact that  
28 the contention is more probably true than not." Morris K. Udall, ARIZONA LAW OF  
29 EVIDENCE, § 5 (1960). It is "evidence which is of greater weight or more  
30 convincing than the evidence which is offered in opposition to it; that is, evidence

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

- 3 3. Laches is an affirmative defense, and Respondent bears the burden of  
4 establishing the defense by a preponderance of the evidence. A.C.C. R2-19-  
5 119)B)(2). Respondent has not shown that under the facts and circumstances of  
6 this case, there was unreasonable delay that has resulted in prejudice to  
7 Respondent sufficient to deny the relief Petitioner seeks, and consequently has  
8 not met its burden. See *Flynn v. Rogers*, 172 Ariz. 62 (1992).
- 9 4. Paragraph 4 of the CC&Rs provides that Respondent “shall serve as the  
10 governing body for all of the Owners for the protection, improvement, alteration,  
11 expansion, augmentation, disposal, divestment, redescription, maintenance,  
12 repair, replacement, administration and operation of the Property...” This section  
13 is general in nature and is subject to the specific provisions of the CC&Rs.
- 14 5. Paragraph 4.3 of the CC&Rs does not vest in the board binding authority to  
15 interpret and apply the CC&Rs with respect to its own actions. Such an  
16 interpretation would render the CC&R’s meaningless. The plain meaning is to  
17 grant to the board the authority to determine how the CC&Rs are to be  
18 interpreted and applied in disputes between owners.<sup>3</sup>
- 19 6. Paragraph 5 of the CC&Rs authorizes Respondent “to lease, convey easements  
20 or grant concessions consistent with the overall character and use of the  
21 Property with respect to parts of the Common Elements and to change the  
22 character, description and use thereof, subject to the provisions of this  
23 Declaration.” (emphasis added).
- 24 7. Paragraph 13 of the CC&Rs applies to alterations, additions, or improvements to  
25 the Common Elements by owners and does not govern actions by Respondent’s  
26 board.
- 27 8. Paragraph 10.2 of the CC&Rs requires “restoration” in three situations: (1)  
28 destruction; (2) condemnation; and (3) obsolescence.

29 <sup>3</sup> Paragraph 4.3 provides in relevant part that “...in the event of any dispute or disagreement between the  
30 Owners relating to the Property, or any question of interpretation or application of the provisions of this  
Declaration, the Articles or Bylaws, the determination thereof by the Board shall be final and binding on  
each and all of such Owners.” (emphasis added)

- 1 9. The evidence does not support a finding of destruction, which is defined by  
2 paragraph 10.1(1) of the CC&Rs as casualty, damage or destruction of property.
- 3 10. The evidence does not support a finding of condemnation, which is defined by  
4 paragraph 10.1(2) of the CC&Rs as a taking by condemnation, eminent domain  
5 or conveyance in lieu of condemnation or eminent domain.
- 6 11. The CC&Rs do not define the terms “obsolete” or “obsolescent.” Webster’s II  
7 New Riverside University Dictionary defines “obsolete” as “[n]o longer in use...  
8 [o]utmoded in style, design or construction.”
- 9 12. Respondent’s asserted justification for action, specifically the cost of repair and  
10 the requirement of Maricopa County to add fencing, is consistent with a finding  
11 that the fountain was obsolete. Respondent has not credibly cited to any other  
12 provision that would otherwise justify its action in removing the fountain or take it  
13 from the provenance of paragraph 10.2 of the CC&Rs.
- 14 13. Paragraph 10.1(4) of the CC&Rs provides that “in the case of obsolescence, [the  
15 term “restoration”] shall mean restoration of the Property to an attractive, sound  
16 and desirable condition.”<sup>4</sup>
- 17 14. Paragraph 10.2 of the CC&Rs provides that any restoration be “performed  
18 substantially in accordance with [the CC&Rs] and the original plans and  
19 specifications for the Buildings, the Common Elements and Units.”<sup>5</sup>
- 20 15. The fountain is a “common element” as defined by paragraph 1.5 of the CC&Rs.
- 21 16. Respondent violated paragraph 10.2 of the CC&Rs by not restoring the fountain  
22 “to an attractive, sound and desirable condition,” as required by paragraph  
23 10.1(4) of the CC&Rs. The debris presently in the base is unattractive, not a  
24 desirable look for the entrance of the community, and is a potential safety  
25 hazard. Respondent also violated paragraph 10.2 of the CC&Rs by not restoring  
26 the fountain “substantially in accordance with [the CC&Rs] and the original plans  
27 and specifications for the Buildings, the Common Elements and Units.” Although

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28 <sup>4</sup> Although there is a distinction between “partial and “substantial” obsolescence in both paragraphs 10.1  
29 and 10.2, the distinction appears to turn solely on whether a defined vote was cast. As there was no  
30 evidence of such action, obsolescence would appear to be “partial,” and Respondent’s board may act on  
its own. In either case, the analysis of required restoration remains the same.

<sup>5</sup> See note 6 supra.

1 the Respondent is not required to reproduce the exact fountain, the Respondent  
2 is required to restore the common element as a "fountain."

3 17. The Petitioner has prevailed, and therefore, Respondent shall pay to Petitioner  
4 his filing fee required by A.R.S. § 41-2198.01.

5 **RECOMMENDED ORDER**

6 Respondent is ordered to comply with paragraph 10.2 of the CC&Rs by the  
7 installation of a common element that is in substance a "fountain," to be "substantially"  
8 in the location of the former fountain, and that is "attractive, sound and [of] desirable  
9 condition."<sup>6</sup> Given the financial condition of the Respondent, Respondent, will have 180  
10 days from the effective date of the Order entered in Case No. HO 11-12/002 to restore  
11 the common element.

12 Respondent is further ordered to pay Petitioner his filing fee of \$550.00 within 30  
13 days of the effective date of the Order entered in Case No. HO 11-12/002.

14 *In the event of certification of the Administrative Law Judge Decision by the*  
15 *Director of the Office of Administrative Hearings, the effective date of the Order will be*  
16 *five (5) days from the date of that certification.*

17 Done this day, January 18, 2012.

18  
19 /s/ Brian Brendan Tully  
20 Administrative Law Judge

21 Transmitted electronically to:

22 Gene Palma, Director  
23 Department of Fire Building and Life Safety  
24  
25  
26  
27

28 <sup>6</sup> Respondent has great leeway in determining the character of such replacement. In particular, both the  
29 scale and design may change as the replacement need only be "substantially" in accordance with the  
30 original plan, for which there was no detail. For example, the common element may incorporate the  
existing basin, while eliminating standing water, such as through a smaller water feature that drains into  
rocks.