

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

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3 **ALJCERT ALJ decision certified as final**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 STUART KIRSCHNER,

8 Petitioner,

9 VS

10 TRILOGY AT VISTANCIA COMMUNITY
11 ASSOCIATION,

12 Respondent.

No. 11F-H1112008-BFS

**ADMINISTRATIVE LAW JUDGE
DECISION**

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15 **HEARING:** March 12, 2012, at 8:00 a.m.

16 **APPEARANCES:** The Petitioner appeared through his attorney, Kevin R.
17 Harper, Esq., Harper Law P.L.C. The Respondent appeared through its attorney,
18 Todd M. Allison, Esq., Fennemore Craig, P.C.

19 **ADMINISTRATIVE LAW JUDGE:** M. Douglas

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22 Evidence and testimony were presented and the following Findings of Fact,
23 Conclusions of Law and Recommended Order are made:

24 **FINDINGS OF FACT**

- 25 1. The Department of Fire, Building and Life Safety (“Department”) is authorized by
26 statute to receive Petitions for Hearing from members of homeowners associations
27 in Arizona.
- 28 2. Stuart Kirschner (“Petitioner”) owns a residence at the Trilogy at Vistancia and is a
29 member of the Trilogy at Vistancia Community Association (“Respondent”).
- 30 3. Respondent is an age restricted, planned community of homeowners located
northwest of Peoria, Arizona.

- 1 4. Respondent maintains the Kiva Club for Respondent's members. The 35,000
2 square-foot Kiva Club is a hub for social activity in the community. The Kiva Club
3 includes a fitness center, a dance studio, a library, a computer lab, tennis courts, an
4 indoor lap pool, and an outdoor swimming pool.
- 5 5. Petitioner and Respondent are governed by the Declaration of Covenants,
6 Conditions and Restrictions for Trilogy at Vistancia . See Exhibit No. C-1.
- 7 6. Both parties agreed that the Respondent's Fine Policy and Appeal Process is the
8 controlling document in this matter. See Exhibit No. C-4. On November 14, 2011,
9 Petitioner filed a Petition with the Department alleging that Respondent failed to
10 adhere to its policies with regard to discipline that Respondent imposed upon
11 Petitioner for an alleged personal code-of-conduct violation that allegedly occurred
12 at the Kiva Club on September 18, 2011.

Petitioner's Testimony Regarding the Kiva Incident

- 13 7. Petitioner testified that on September 18, 2011, he was just three days off of using a
14 walker from hip replacement surgery and that he could not find a parking spot in the
15 handicapped zone and had to park some distance away from the entrance to the
16 Kiva Club. He then slowly walked to the entrance, and he noticed one of the
17 developer's golf carts parked in front. He went to the front desk and asked why a
18 sales vehicle from the developer was parked in front of the Kiva Club.
- 19 8. Petitioner then noticed Ms. Kelly Young ("Ms. Young"). Petitioner knew that Ms.
20 Young was a sales associate for the developer because she had been the sales
21 associate who had sold him his home six years earlier. He walked down the hall way
22 and asked her to move "her damn cart." When Ms. Young failed to respond, the
23 Petitioner told her to "move your cart now!" He then asked Ms. Young how she
24 would like it if all 1,500 golf carts were parked in front, and he then walked away.
- 25 9. Petitioner then went to the sales office and asked to speak with the sales manager
26 about the incident. The sales manager was not present so he left the sales office
27 and went home.
- 28 10. Petitioner admitted that Ms. Young's golf cart was parked to the left of the front
29 entrance of the Kiva Club off of the road. He stated that he was not sure if he
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1 violated the Kiva Club code-of-conduct rule. He testified that he was not abusive but
2 admitted that he used the word “damn” and he raised his voice during his
3 conversation with Ms. Young.

4 11. Petitioner denied spitting on Ms. Young and asserted that he was incapable of
5 storming across the hall as he could barely walk. Petitioner stated that the entire
6 conversation lasted thirty seconds or less.

7 12. Petitioner admitted that he had taken pain medication and was tired and testy and
8 that he was upset because it would have been beneficial to him if he could have
9 parked in front of the Kiva Club.

10 **Ms. Young’s Testimony Regarding the Kiva Incident**

11 13. On September 18, 2011, Ms. Young was an employee of the Developer (Shea
12 Homes) and was taking prospective buyers on a tour of the community which
13 included a stop at the Kiva Club. She used a golf cart for such tours and always
14 parked to the left of the entrance door of the Kiva Club on a spot that had been
15 designated by her employer.

16 14. Ms. Young parked the golf cart on the designated spot and was in the process of her
17 sales presentation when Petitioner approached her and stated in a loud voice: “Get
18 your god damn golf cart out of the front of the club.” and began yelling and cursing at
19 her in front of her prospective buyers. She was taken by surprise and agreed to
20 move the golf cart. Petitioner then insisted that she move the cart “now” and
21 resumed yelling at her. She testified that she was embarrassed and shaken by
22 Petitioner’s behavior and became fearful during the incident.

23 **Mr. Williams’ Testimony Regarding the Kiva Incident**

24 15. Mr. Robert Williams (“Mr. Williams”) testified that he is the general manager and
25 sales manager for the development and a member of the Respondent’s Board of
26 Directors. He testified that he personally saw Kelly Young on September 18, 2011,
27 after the incident with Petitioner at the Kiva Club, and he observed that she was
28 visibly shaken by the incident.

29 **Notice of Code of Conduct Violation and Appeal**

30 16. Respondent issued a letter on September 20, 2011, notifying Petitioner that it had

1 received an incident report regarding alleged inappropriate behavior, and advised
2 him that subsection 9.1.3 of the CC&Rs required Respondent to investigate the
3 alleged violation. See Exhibit No. R-4. The letter also notified Petitioner that
4 Respondent had a right to take action against Petitioner, including the imposition of
5 a fine and suspension or termination of privileges.

6 **a. Mr. Dixon's Testimony**

7 17. Mr. Jeffrey Dixon ("Mr. Dixon") is the onsite manager for the Respondent's
8 management company. He is responsible to investigate allegations of violations of
9 community rules. He received emails and incident reports about the September 18,
10 2011 incident with the Petitioner and began his investigation to determine if there
11 was sufficient probable cause to proceed.

12 18. Mr. Dixon reviewed the incident report and spoke with the individuals involved,
13 including Petitioner, and found that there was sufficient credible evidence to
14 proceed. He assisted in the creation of the September 20, 2011 letter notifying
15 Petitioner of the alleged code-of-conduct violation.

16 19. Mr. Dixon acknowledged receiving Petitioner's September 26, 2011 request to
17 postpone any hearing until after November 3, 2011. Since hearings are usually set
18 within one week of the incident, he referred the Petitioner's request for a delay to the
19 Respondent's Board of Directors for a decision. See Exhibit R -5.

20 20. The Board of Directors agreed to the delay, and on September 30, 2011,
21 Respondent notified Petitioner that it had received and approved his request for a
22 hearing to be set after November 3, 2011. Respondent also notified Petitioner that
23 his membership rights in the Kiva Club were suspended until the matter was
24 resolved.

25 21. Mr. Dixon received an October 10, 2011 email communication from the Petitioner
26 notifying Respondent that Petitioner was agreeing to waive his right to a hearing.
27 See Exhibit No. R-6.

28 22. On October 21, 2011, Respondent provided Petitioner with written notification that
29 the Respondent's Board of Directors had reviewed the alleged code-of-conduct
30 violation, and it had determined that Petitioner had committed a code-of-conduct

1 violation. See Exhibit No. R-10. The decision informed Petitioner that his privileges
2 to use the Kiva Club were temporarily suspended for a period of sixty (60) days,
3 beginning on September 30, 2011. The written notification also informed Petitioner
4 that further code-of-conduct violations committed while he was in a common area
5 would result in progressive punitive actions up to and including permanent loss of
6 Kiva Club privileges. On November 30, 2011, Respondent reinstated Petitioner's
7 Kiva Club privileges in their entirety.

8 **b. Mr. Williams' Testimony**

9 23. Mr. Williams stated that, as a member of the Board of Directors, he participated in
10 the decision making process and that the Board found that Petitioner's erratic and
11 inappropriate behavior constituted a code-of-conduct violation and presented a
12 material danger to persons at the time of the incident. He testified that the Board's
13 decision to suspend Petitioner's Kiva Club privileges for a period of sixty days was
14 fully supported by the Fines and Appeals Process set forth in the Fine Policy.

15 **c. Petitioner's Testimony**

16 24. Petitioner received the September 20, 2011 letter from the Respondent informing the
17 Petitioner that there was an alleged code-of-conduct violation. He was surprised
18 and attempted up to speak with the person who signed the letter a few days later.
19 The person who signed the letter denied that he had written the letter and informed
20 Petitioner that the letter had actually been authored by Mr. Dixon.

21 25. Petitioner acknowledged that the September 20, 2011 letter from the Respondent
22 notified the Petitioner in writing of his right to appeal and that on September 26,
23 2011, Petitioner filed his request for a hearing for the alleged violation and asked
24 that the requested hearing be postponed until after November 3, 2011. He received
25 a voice mail on September 29, 2011, from Mr. Dixon that Respondent had approved
26 Petitioner's request to delay the hearing for the alleged violation until after November
27 3, 2011. Mr. Dixon stated that Petitioner's membership privileges would be
28 suspended until the hearing took place.

29 26. Petitioner testified that he chose not to go ahead with the hearing because he felt
30 Respondent had already made up its mind about the September 18, 2011 incident.

1 Petitioner acknowledged that he sent an October 10, 2011, email to the Respondent
2 and waived his right to a hearing.

3 27. After Petitioner withdrew his request for a hearing, he then received written
4 notification on or about October 21, 2011, of the Board of Director's decision to
5 temporarily suspend his membership privileges to the Kiva Club for a period of sixty
6 days beginning on September 30, 2011.

7 28. Petitioner contacted Mr. Dixon in an effort to appeal the suspension, and Mr. Dixon
8 informed him that the decision of the Board was final.

9 **CONCLUSIONS OF LAW**

10 1. A.R.S. § 41-2198.01 permits a member of a homeowners association to file a
11 petition against the association with the Department. That statute provides that such
12 petitions will be heard before the Office of Administrative Hearings.

13 2. The burden of proof at an administrative hearing falls to the party asserting a claim,
14 right, or entitlement and the standard of proof on all issues in this matter is by a
15 preponderance of the evidence. See *A.A.C. R2 -19-119*.

16 3. Proof by "preponderance of the evidence" means that it is sufficient to persuade the
17 finder of fact that the proposition is "more likely true than not." *In re Arnold and*
18 *Baker Farms*, 177 B.R. 648, 654 (9th Cir. BAP (Ariz.) 1994). It "is evidence which is
19 of greater weight or more convincing than the evidence which is offered in opposition
20 to it; that is, evidence which as a whole shows that the fact sought to be proved is
21 more probable than not." BLACK'S LAW DICTIONARY at 1182 (6th ed. 1990).

22 4. The Department applies and enforces the statutes regulating common interest
23 communities and provides interpretation and enforcement of the otherwise private
24 contracts and rules that govern those communities pursuant to the provisions of
25 A.R.S. § 41-2141 (B).

26 5. The CC&Rs gives the Respondent the authority to adopt and amend rules and
27 regulations pertaining to the management and operation of the common areas as
28 well as rules implemented to protect the health, safety or welfare of employees and
29 residents. See Exhibit C-1, CC&Rs 5.3.

30 6. The Respondent's Rules include a code of conduct for all common areas, which

1 prohibits, "Loud, profane, indecent or abusive language," and "Harassment or
2 physical abuse of any person by another." See Exhibit C-2, Rule 3.3.2.

3 7. The Fine Policy and Appeal Process provides that the Board of Directors reserves
4 the right to seek injunctive relief at any time, regardless of the presence or absence
5 of notices provided in the Fine Policy and Appeal Process, for any violation that the
6 Board of Directors determines in its sole and absolute discretion to constitute a
7 material danger to persons or property. The Fine Policy and Appeal Process
8 specifically provide that the decisions of the Board of Directors are final and may not
9 be further appealed.

10 8. The hearing record demonstrates that, on September 18, 2011, Petitioner closely
11 confronted Ms. Young at the Kiva Club and spoke to her in a loud and profane
12 manner causing Ms. Young to become upset and fearful of the Petitioner.
13 Therefore, the Administrative Law Judge concludes that Petitioner violated the code-
14 of-conduct rule.

15 9. After Petitioner waived his right to a hearing on October 10, 2011, the Respondent's
16 Board of Directors then considered the facts of the September 18, 2011 incident at
17 the Kiva Club. The Board found a code-of-conduct violation by the Petitioner and
18 informed Petitioner in writing of the Board's decision to impose a "temporary
19 sanction" within ten days of the Board's decision. Respondent's decision to impose
20 a temporary suspension of Petitioner's membership rights in the Kiva Club was
21 shown to have been based on Respondent's determination that Petitioner's violation
22 of the code-of-conduct with his erratic and inappropriate behavior in the Kiva Club on
23 September 18, 2011, constituted a danger to other persons on the date of the
24 incident.

25 10. Respondent's October 21, 2011 decision to temporarily suspend Petitioner's Kiva
26 Club membership privileges for a period of sixty days beginning on September 30,
27 2011, based upon Petitioner's code-of-conduct violation, was shown to be
28 reasonable and justified under the circumstances. The Administrative Law Judge
29 concludes that Respondent's decision to temporarily suspend Petitioner's Kiva Club
30 membership for a period of sixty days was reasonable and justified and in

accordance with the provisions of the Fine Policy and Appeal Process.

11. Respondent's denial of Petitioner's request for a hearing after the Board issued its decision was shown to be in conformance with the terms of the Fine Policy and Appeal Process. The Administrative Law Judge concludes that Respondent's refusal to grant Petitioner an appeal of the Board of Directors' decision in this matter is in accordance with the terms of the Fine Policy and Appeal Process. The Administrative Law Judge further concludes that Respondent fully complied with the terms of the Appeals Process set forth in the Fine Policy and Appeal Process.

RECOMMENDED ORDER

In view of the foregoing, IT IS ORDERED that no action is required of the Respondent in this matter and that the Petition be dismissed.

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

Done this day, March 20, 2012.

/s/ M. Douglas
Administrative Law Judge

Transmitted electronically to:

Gene Palma, Director
Department of Fire Building and Life Safety

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