

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

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

4  
5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6  
7 LORINDA AND JOHN STEADMAN

**No. 11F-H1112004-BFS**

8 Petitioners,

**ADMINISTRATIVE  
LAW JUDGE DECISION**

9  
10 vs.

11  
12 ESQUIRE VILLAGE HOMEOWNERS  
13 ASSOCIATION,

14 Respondent.

15  
16  
17 **HEARING:** March 22, 2012

18 **APPEARANCES:** L. Roger Wood on behalf of Lorinda and John Steadman;  
19 Joseph Tadano on behalf of Esquire Village Homeowners Association.

20 **ADMINISTRATIVE LAW JUDGE:** Lewis D. Kowal

21  
22 **RULING**

23 This hearing involved Lorinda and John Steadman’s (“Petitioners”) challenge of  
24 action taken by the Esquire Village Homeowners Association, Inc.  
25 (“Respondent”/“Association”) in assessing fees (fines) against Petitioners for flying the  
26 Gadsden flag in their backyard. The Administrative Law Judge concludes that under  
27 the law existing at the time at issue, Petitioners could fly the Gadsden flag. Therefore,  
28 Respondent’s determinations that violations occurred were improperly made and the  
29 fees were improperly assessed. Additionally, the issue as to whether Respondent did  
30 not comply with the applicable law in responding to Petitioners’ appeals of the  
assessment of fees need not be addressed in light of the ruling.

**FINDINGS OF FACT**

1 1. The parties stipulated that at all times relevant to this matter, Petitioners resided  
2 in the community known as Esquire Village Homeowners Association.

3  
4 2. At all times material to this matter, the community was governed by a Board of  
5 Directors (“Board”).

6 3. The parties stipulated that Respondent is governed by Association documents  
7 such as the Declaration of Homeowner Benefits And Covenants, Conditions, and  
8 Restrictions for Esquire Village (“CC&Rs”) and Bylaws.

9 4. The parties stipulated that on February 4, 2008, Petitioners made application to  
10 Respondent’s Architectural Review Committee to install a 20 foot aluminum flagpole in  
11 their rear yard.<sup>1</sup>

12 5. The parties stipulated that on March 4, 2008, Architectural Review Committee  
13 approved Petitioners’ application subject to the list of flags set forth in A.R.S. § 33-1808.

14 6. The version of A.R.S. § 33-1808 in effect at the time provided that a homeowner  
15 association could not restrict the flying of certain flags.<sup>2</sup> In April 2011, the statute was  
16 amended effective in July 2011, to specifically identify the Gadsden flag as one of the  
17 flags that a homeowner association could not restrict a homeowner to fly so long as it is  
18 flown in accordance with federal law.

19 7. The parties stipulated that the parties had a series of correspondences about  
20 flags. The parties stipulated that the first set of correspondences was about the  
21 confederate battle flag and then related to Petitioners flying the Gadsden flag. Specific  
22 provisions of the Respondent’s governing documents that would support the finding of a  
23 violation were not identified in the communications Respondent and Renaissance had  
24 with Petitioners.

25 8. The parties stipulated that this dispute arose on November 9, 2010, when  
26 Petitioners were sent a letter informing them of a violation for flying the Gadsden flag  
27  
28

29 <sup>1</sup> Respondent’s Board members all serve on the Architectural Review Committee.

30 <sup>2</sup> All further references to A.R.S. § 33-1808 in this Decision are to the statute as it existed during the relevant time.

1 9. The parties stipulated that on February 9, 2011, the Association issued a fine of  
2 \$50.00 against Petitioners for the violation of flying the Gadsden flag, which Petitioners  
3 subsequently appealed to the Board.

4 10. The parties stipulated that on February 23, 2011, the Association issued a fine of  
5 \$50.00 against Petitioners for the violation of flying the Gadsden flag, which  
6 subsequently Petitioners appealed to the Board.

7 11. The fines that were issued were based on Petitioners not complying with the  
8 Architectural Review Committee's grant of approval and not flying a flag identified in  
9 A.R.S. § 33-1808.

10 12. The assessment of fees and violation notices were issued by Renaissance  
11 Community Partners ("Renaissance"), the management company hired by Respondent,  
12 and done at the direction of the Board.

13 13. In its response to the appeal(s), Respondent referenced the flags that were  
14 "protected" by A.R.S. § 33-1808 and stated that the Gadsden flag was not one of those  
15 flags.

16 14. On August 29, 2011, Petitioners filed a Petition with the Arizona Department of  
17 Fire, Building and Life Safety ("Department") regarding this matter and paid a filing fee  
18 of \$550.00.<sup>3</sup>

19 15. Kevin Bishop ("Mr. Bishop"), President of Renaissance, testified that only one  
20 response was issued with respect to the appeals filed by Petitioners because they were  
21 essentially the same appeals.

22 16. At hearing the parties argued the specific language of A.R.S. § 33-1808 and  
23 offered opinions as to what constitutes an official flag of the United States marine corps.

24 17. Julie Frost ("Ms. Frost") Respondent's President and a Board member, testified  
25 that she and another Board member conducted research regarding the Gadsden flag.  
26 Ms. Frost researched flag manuals of the marine corps, army and 2 other manuals of  
27 the United States armed forces concerning official flags, and found that the Gadsden  
28 flag was not identified as an official flag. However, Ms. Frost testified that the Gadsden  
29 flag was mentioned in the marine corps manual.

30 <sup>3</sup> Administrative notice is taken of the Petition, the amount of the fling fee paid by Petitioners, and Respondent's response to the Petition.

1 18. Ms. Frost also testified that she relied upon a conversation she had with Arizona  
2 legislative counsel in January 2011 concerning A.R.S. § 33-1808. According to Ms.  
3 Frost, legislative counsel stated that the Gadsden flag was not a “protected” flag under  
4 the statute. However, legislative counsel did not testify at hearing to corroborate Ms.  
5 Frost’s testimony nor did Respondent present the analysis of counsel’s opinion. Further  
6 there was no credible evidence presented to establish that legislative counsel was  
7 providing a formal legal opinion. Consequently, such testimony was given little weight.

8 19. Ms. Frost further testified that the Board considered a press release issued by  
9 the law firm of Carpenter, Hazelwood, Delgado & Wood, PLC (“Carpenter Hazlewood”)  
10 that addressed whether the flying of the Gadsden flag fell within the then existing A.R.S.  
11 § 33-1808 in another community in the State of Arizona.

12 20. According to Ms. Frost, the Architectural Review Committee has the authority to  
13 regulate flag flying because Section 11.1 of the CC&Rs provides the authority for the  
14 Committee to regulate aesthetic improvements that are visible from the street.

15 21. Petitioners presented the legal opinion of hired legal counsel, the Legal Director  
16 of the American Civil Liberties Union of Arizona and referred to a Wikipedia as a  
17 reference tool, in support of their position. Those exhibits were stipulated into evidence  
18 by Respondent. Petitioners also presented into evidence upon stipulation an Arizona  
19 State Senate Issue Brief dated August 24, 2010, that states “An HOA cannot prohibit  
20 the outdoor display of the American flag, any U.S. military flag, the Arizona flag, an  
21 Arizona Indian nation flag or a POW/MIA flag on a member’s property, unless the  
22 display violates federal flag code.” Exhibit at 3.

23 22. Petitioners also presented the testimony of Pat Haruff (“Ms. Haruff”), the Director  
24 of Coalition of HomeOwners for Rights and Education, who also acts an advocate for  
25 homeowners who live in homeowner’s association communities.

26 23. Ms. Haruff testified that Mrs. Steadman contacted her regarding the problem Mrs.  
27 Steadman was having with Respondent concerning the flying of the Gadsden flag. Ms.  
28 Haruff also testified that she spoke with Mr. Bishop on behalf of Mrs. Steadman to  
29 address the situation. Ms. Haruff testified as to her opinion that Mrs. Steadman could  
30

1 fly the Gadsden flag and that she informed Mr. Bishop of that. Ms. Haruff further  
2 testified that the telephone call did not resolve the issue.

3 24. Petitioners asserted that Respondent did not respond to each appeal filed by  
4 Petitioners, as required by A.R.S. § 33-1803(D) and that with the exception of providing  
5 the dates of the violations, Respondent did not identify the name of the person(s) who  
6 observed the violations and failed to provide information as to the procedure to be  
7 followed to challenge the violations.

### 8 CONCLUSIONS OF LAW

9 1. At this proceeding, Petitioners bear the burden of proving by a preponderance of  
10 the evidence that respondent violated A.R.S. § 33-1808 and A.R.S. § 33-1803(D). See  
11 A.A.C. R2-19-119.

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

16 3. Although Respondent asserted that the Architectural Review Committee can  
17 regulate aesthetic improvements that can be viewed from the street such as a flagpole  
18 and flags flown on it, the Administrative Law Judge concludes that A.R.S. § 33-1808 is  
19 determinative of whether the Gadsden flag could be flown by Petitioners.

20 4. A.R.S. § 33-1808, at all relevant times, provided in pertinent part:

- 21 A. Notwithstanding any provision in the community documents, an  
22 association shall not prohibit the outdoor display of any of the following:  
23 1. The American flag or an official or replica flag of the United States  
24 army, navy, air force, marine corps

25 Emphasis added. Absent from the statute is any requirement that the flag in question  
26 be the sole official flag of any of the armed forces. The word, “an,” suggests any one of  
27 a number of official flags. Noticeably absent is any requirement that an official flag be a  
28 “current” official flag of such forces. In light of this textual analysis, the Administrative  
29 Law Judge finds that in order to be covered by the protection of A.R.S. § 33-1808,  
30

1 Petitioners must only prove by a preponderance of the evidence that the Gadsden flag  
2 was, at some time, an official flag of any one of the United States armed forces. <sup>4</sup>

3 5. The preponderance of the evidence shows that the Gadsden flag was at some  
4 time an official flag of the United State Marine Corp.

5 6. Petitioners established by a preponderance of the evidence that Respondent  
6 could not prohibit Petitioners from flying the Gadsden flag during the relevant time. The  
7 issue as to whether Respondent complied with the provisions A.R.S. § 33-1808(D) is  
8 moot because the acts taken by Respondent before Petitioners had filed their appeals  
9 with the Association were done improperly does not impact the ruling made in this  
10 matter.

11 7. Respondent shall pay Petitioners, the prevailing party, their filing fee of \$550.00.  
12 See A.R.S. § 41-2198.02

13 **ORDER**

14 Within 30 days of the effective date of the Order issued in this matter,  
15 Respondent is to take appropriate action to reflect that the flying of the Gadsden flag  
16 was not a violation of the Architectural Review Committee's grant of approval and  
17 withdraw the assessment of any fees imposed. In addition, within 30 days of the  
18 effective date of order issued in this matter, Respondent shall pay Petitioners their filing  
19 fee of \$550.00.

20 *In the event of certification of the Administrative Law Judge Decision by the*  
21 *Director of the Office of Administrative Hearings, the effective date of the Order will be 5*  
22 *days from the date of that certification.*

23  
24 Done this day, April 9, 2012.

25  
26 /s/ Lewis D. Kowal  
27 Administrative Law Judge  
28

29  
30 \_\_\_\_\_  
<sup>4</sup> Note that the reference in A.R.S. § 33-1808's to "the American flag" would by the same analysis  
exclude an historical precursor.

Transmitted electronically to:

Gene Palma, Director  
Department of Fire Building and Life Safety

- 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