

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 KATHERINE A. WINDIS,

8 Petitioner,

9 vs

10 FAIRWAY COURT WEST CONDOMINIUM
11 ASSOCIATION,

12 Respondent.

No. 12F-H1213002-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

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15 **HEARING:** December 17, 2012, at 8:00 a.m.

16 **APPEARANCES:** Katherine A. Windis (hereinafter "Petitioner") appeared on her
17 own behalf. Fairway Court West Condominium Association (hereinafter "Fairway")
18 appeared through its attorney, R. Corey Hill, Esq., Hill & Hill, PLC.

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

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

23 **FINDINGS OF FACT**

- 24 1. The Department of Fire, Building and Life Safety (the "Department") is authorized by
25 statute to receive Petitions for Hearings from members of homeowners' associations
26 and from homeowners' associations in Arizona.
- 27 2. Fairway is a homeowners' association located in Sun City, Arizona.
- 28 3. Petitioner owns a residence in and is a member of Fairway.
- 29 4. Petitioner filed a petition with the Department alleging that Fairway had violated the
30 provisions of A.R.S. § 33-1217 and A.R.S. § 33-1252. Petitioner specifically alleged
that Fairway's Board of Directors passed a resolution on April 23, 2012, allowing

1 owners of first floor units to encroach on common areas. In her response to the
2 Prehearing Order, Petitioner added an alleged violation of A.R.S. § 33-1218.

3 5. Fairway's Answer to the Petition provided, in part, as follows:

4 [Fairway] denies that it caused or permitted any "encroachment
5 on common property" to occur, denies that it received any letter
6 that "17 unit owners signed" as alleged, affirmatively stated that
7 the subject Resolution [April 23, 2012] speaks for itself and is in
8 conformity with Arizona law and the applicable CC&R's and
9 admits that "no vote of unit owners was taken" with respect to
10 the Resolution, such being unnecessary. [Fairway] further
11 affirmatively stated that no "filing with Maricopa County" is
12 required with respect to the subject Resolution Pursuant to
13 A.R.S. § 33-1212(4), unless the Declaration states otherwise,
14 "[a]ny ... stoops, porches, balconies, entryways or patios ...
15 serving a single unit, but located outside the unit's boundaries,
16 are limited common elements allocated exclusively to that unit."

13 **Petitioner's Testimony**

14 6. Petitioner testified that on April 23, 2012, Fairway's Board of Directors approved the
15 following resolution:

16 As part of our on-going conversion to desert landscaping the
17 board is allowing pavers to be placed outside the lower lanai
18 areas. These are not to be permanent installations. The paved
19 area shall not exceed 8 x 16 feet nor be less than 7 x 15 feet.
20 The pavers shall be at least 2 inches thick and shall be of a
21 color consistent with other existing installations. The
22 installation and ongoing maintenance costs will be the unit
23 owner's responsibility. All installations must have board
24 approval in writing prior to the start of the project. If the owner
25 fails to maintain the pavers the board has the right to remove
26 them or to maintain them at the owner's expense. Such
27 installations will be considered to be "Limited Common Areas"
28 and as such will be under the control of the Association.¹

25 7. Petitioner testified that she and all other property owners that own property in
26 Fairway have an undivided interest in all common areas and pay taxes on that
27 undivided interest. Petitioner stated that the Board's April 23, 2012 resolution allows
28 first-floor condominium owners to encroach on common property by placing pavers
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30 ¹ See Exhibit No. 3-1 (Minutes of Fairway Court West Condominium Association Board Meeting, April 23, 2012)

1 on patios outside of first-floor condominium units. Petitioner testified that the Board
2 failed to comply with applicable statute by conveying common property to private
3 owners for private use without the required approval of at least 80% of the property
4 owners of Fairway.²

5 8. Petitioner testified that the Board's April 23, 2012 resolution violated Fairway's Rules
6 and Regulations. Petitioner read several Rules and Regulations that she alleged the
7 Board's April 23, 2012 resolution violated. Petitioner stated the Board's resolution
8 favored the rights of first-floor unit owners over the rights of second-floor unit
9 owners.

10 9. Petitioner testified that she moved into Fairway in 2005. Petitioner testified that two
11 units have pavers in the front of Fairway and two units have pavers behind the units.
12 Petitioner acknowledged that she had previously served as Chairman of the Board
13 for Fairway. Petitioner stated that there were no requests to install pavers while she
14 was on the board. Petitioner stated that there was not enough time during her year
15 long tenure as a member of the board to do take any action against homeowners
16 who had installed pavers.³

17 10. Petitioner testified that the Board had allowed first-floor unit owners to encroach
18 upon common property by installing pavers in front of first-floor unit lanais.
19 Petitioner stated that she did not know if there had been a transfer of ownership of
20 common property. Petitioner testified that that Fairway's Board had allowed first
21 floor unit owners to convert common property to private-use property.⁴

22 11. Petitioner acknowledged that first floor unit owners had a right to have ingress and
23 egress from their residence when their original lanais had been enclosed. Petitioner
24 testified that some first-floor unit owners are putting in a second patio for their units
25 on common property. Petitioner stated that all encroachments on common land
26 should not occur. Petitioner testified that there are concrete walkways leading to the
27 front of all first floor units. Petitioner stated that the land behind the first floor units is
28 common property.⁵

29 ² 12/17/12 Hearing Record (hereinafter "H.R.") at 18:10-29:00.

30 ³ H.R. at 35:31-41:30.

⁴ H.R. at 41:31-46:10

⁵ H.R. at 46:11-1:00:41.

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2 **Dave Harris's Testimony**

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4 12. Fairway's vice-chairperson for the Board, Dave Harris (hereinafter "Mr. Harris")
5 testified that he purchased his residence in 2002. Mr. Harris stated that he does not
6 have a paver entryway. Mr. Harris testified that the Board's April 23, 2012 resolution
7 was passed to come up with a set of rules to govern the installation of pavers. Mr.
8 Harris stated that six units already had installed pavers over the lanai entryways.
9 Mr. Harris testified that the Board regarded the entrance way to the enclosed lanais
10 for the first floor units as limited common areas.⁶

11 13. Mr. Harris testified that the Board intended to provide guidance to unit owners as to
12 what the Board would like to see for future installations. Mr. Harris stated that the
13 installation of the pavers was part of the conversion of the landscaping at Fairway
14 from grass to desert landscaping. Mr. Harris testified that the property covered by
15 the pavers is still common area. Mr. Harris denied that the Board conveyed any
16 property to any individual owners. Mr. Harris stated that five members of the Board
17 voted in favor of the resolution, one member of the Board opposed the resolution,
18 and one member of the Board was absent.⁷

19 14. Mr. Harris testified that the four front ground units in Fairway have paver patios
20 installed, two north units have paver patios, and unit 115 has paver patios in front
21 and back. Mr. Harris stated that he believes that the patios with pavers installed on
22 them are limited common property because they are located on entryways to the
23 units.⁸

24 15. Mr. Harris testified that the Board did not consider authorizing second-floor units to
25 have paver covered patios next to the first-floor units. Mr. Harris stated that second-
26 floor units do not have a rear entrance. Mr. Harris testified that the stairway and
27 elevators for the second-floor units are common property that is used by second
28 floor units. Mr. Harris stated the size of the paver patios allowed for the ground floor

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⁶ H.R. at 1:00:42-1:03:32.

30 ⁷ H.R. at 1:03:33-1:08:00.

⁸ H.R. at 1:08:01-1:11:49.

units was based upon the width of the ground-floor units.⁹

PROVISIONS OF LAW REFERENCED AT HEARING

1. A.R.S. § 33-1212 provides, in pertinent part, as follows:

4. Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, entryways or patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but located outside the unit's boundaries, are limited common elements allocated exclusively to that unit.

2. A.R.S. § 33-1217 provides, in pertinent part, as follows:

A. The declaration shall allocate a fraction or percentage of undivided interests in the common elements and in the common expenses of the association, and a portion of the votes in the association, to each unit and state the formulas used to establish those allocations. Except as otherwise provided in this chapter, the allocations shall not discriminate in favor of units owned by the declarant.

B. If units may be added to or withdrawn from the condominium, the declaration must state the formulas to be used to reallocate the allocated interests among all units included in the condominium after the addition or withdrawal.

C. The declaration may provide:

1. That different allocations of votes shall be made to the units on particular matters specified in the declaration.

2. For cumulative voting only for the purpose of electing members of the board of directors.

3. For class voting on specified issues affecting the class if necessary to protect valid interests of the class.

D. Except for minor variations due to rounding, the sum of the undivided interests in the common elements and common expense liabilities allocated at any time to all the units must each equal one if stated as fractions or one hundred per cent if stated as percentages. If a discrepancy exists between an allocated interest and the result derived from application of the pertinent formula, the allocated interest prevails.

E. Except as otherwise permitted by the provisions of this chapter, the common elements are not subject to partition, and

⁹ H.R. at 1:11:50-1:16:51.

1 any purported conveyance, encumbrance, judicial sale or other
2 voluntary or involuntary transfer of an undivided interest in the
3 common elements made without the unit to which that interest
4 is allocated is void.

5 3. A.R.S. § 33-1218 provides, in pertinent part, as follows:

6 A. Except for the limited common elements described in section
7 33-1212, paragraphs 2 and 4, other than porches, balconies,
8 patios and entryways, the declaration shall specify to which unit
9 or units each limited common element is allocated. The
10 allocation shall not be altered without the consent of the unit
11 owners whose units are affected.

12 B. Except as the declaration otherwise provides, a limited
13 common element may be reallocated by an amendment to the
14 declaration. The amendment shall be executed by the unit
15 owners between or among whose units the reallocation is
16 made, shall state the manner in which the limited common
17 elements are to be reallocated and, before recording the
18 amendment, shall be submitted to the board of directors.
19 Unless the board of directors determines within thirty days that
20 the proposed amendment is unreasonable, which determination
21 shall be in writing and specifically state the reasons for
22 disapproval, the association shall execute its approval and
23 record the amendment.

24 C. A common element not previously allocated as a limited
25 common element shall not be so allocated except pursuant to
26 provisions in the declaration. The allocations shall be made by
27 amendments to the declaration.

28 4. A.R.S. § 33-1252 provides, in pertinent part, as follows:

29 A. Portions of the common elements may be conveyed or
30 subjected to a mortgage, deed of trust or security interest by
the association if persons entitled to cast at least eighty per
cent of the votes in the association, or any larger percentage
the declaration specifies, agree to that action in the manner
prescribed in subsection B, except that all the owners of units
to which any limited common element is allocated must agree
in order to convey that limited common element or subject it to
a mortgage, deed of trust or security interest. The declaration
may specify a smaller percentage only if all of the units in the
condominium are restricted exclusively to nonresidential uses.
Proceeds of the sale or encumbrance of the common elements
are an asset of the association.

1 B. An agreement to convey common elements or subject them
2 to a mortgage, deed of trust or security interest shall be
3 evidenced by the execution of an agreement, or ratifications of
4 the agreement, in the same manner as a deed, by the requisite
5 number of unit owners. The agreement shall specify a date
6 after which the agreement will be void unless previously
7 recorded. The agreement and all ratifications of the agreement
8 shall be recorded in each county in which a portion of the
9 condominium is situated and are effective only on recordation.

10 C. The association, on behalf of the unit owners, may contract
11 to convey common elements or subject them to a mortgage,
12 deed of trust or security interest, but the contract is not
13 enforceable against the association until approved pursuant to
14 subsections A and B. Thereafter, the association has all powers
15 necessary and appropriate to [affect] the conveyance or
16 encumbrance, including the power to execute deeds or other
17 instruments.

18 D. Except as permitted in this chapter, any purported
19 conveyance, encumbrance, judicial sale or other voluntary
20 transfer of common elements is void.

21 E. A conveyance or encumbrance of common elements
22 pursuant to this section does not deprive any unit of its rights of
23 access and support.

24 F. A conveyance or encumbrance of common elements
25 pursuant to this section does not affect the priority or validity of
26 preexisting encumbrances.

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CC&Rs cited by Petitioner at Hearing

1. CC&R 1.10. Administration of Rules provides, in pertinent part, as follows:

It shall be the duty of the Board of Directors to administer impartially the rules and regulations governing the use and occupancy of the condominiums.

2. CC&R 2.03 Exterior provides, in pertinent part, as follows:

No structural changes are permitted. Owners own only to the exterior walls. Beyond the exterior walls is regarded as the "Common Area", which is jointly owned by all the owners. The Board of Directors maintains the "Common Area." This is done so as to preserve the beauty of the structure and maintain property value.

1 3. CC&R 2.05 Walkways and Common Areas provides, in pertinent part, as follows:

2 All walkways are part of the "Common Area" for the use of all
3 owners and their guests. There must be no chairs, stools,
4 benches or any other items placed on common property. All
5 walks must kept free and clear for easy and convenient
6 walking, wheelchair access and emergency personnel.

7 4. CC&R 2.21 Use of Common Area provides, in pertinent part, as follows:

8 The deed to first floor condominiums and the deed to second
9 floor condominiums grant equal rights and privileges, as well as
10 the same restrictions and responsibilities as to lawns, carports,
11 driveways and plantings. Any area beyond outside walls is
12 common property for the use and enjoyment of all.

13 **CONCLUSIONS OF LAW**

- 14 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to file a
15 petition with the Department for a hearing concerning violations of planned
16 community documents or violations of statutes that regulate planned communities.
17 That statute provides that such petitions will be heard before the Office of
18 Administrative Hearings.
- 19 2. The burden of proof at an administrative hearing falls to the party asserting a claim,
20 right, or entitlement and the standard of proof on all issue in this matter is by a
21 preponderance of the evidence. See A.A.C. R2-19-119.
- 22 3. Proof by "preponderance of the evidence" means that it is sufficient to persuade the
23 finder of fact that the proposition is "more likely true than not." *In re Arnold and*
24 *Baker Farms*, 177 B.R. 648, 654 (9th Cir. 1994).
- 25 4. Petitioner failed to meet her burden of proof to establish that the April 23, 2012
26 Resolution of the Board for Fairway that allowed pavers to be installed on entryways
27 or patios outside of the first floor units is in violation of applicable statute or the cited
28 CC&Rs of Fairway. Credible testimony and evidence established that the pavers
29 are installed on areas that are designed to serve as ingress and egress areas for a
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1 single condominium unit and are limited common elements allocated exclusively to
2 that condominium unit.

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4 **RECOMMENDED ORDER**

5 In view of the foregoing, it is ORDERED that Fairway be deemed the prevailing
6 party in this matter.

7 It is further ORDERED that this petition be dismissed.

8 *In the event of certification of the Administrative Law Judge Decision by the*
9 *Director of the Office of Administrative Hearings, the effective date of this Order will*
10 *be five (5) days from the date of that certification.*
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12 Done this day, December 21, 2012.

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14 /s/ M. Douglas
15 Administrative Law Judge
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17 Transmitted electronically to:

18 Gene Palma, Director
19 Department of Fire Building and Life Safety
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