

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 WILLIAM CAVANAUGH

8 Petitioner,

9 vs

10 AGUA DULCE HOMEOWNERS
11 ASSOCIATION,

12 Respondent.

No. 12F-H1213005-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

13
14
15 **HEARING:** February 4, 2013, at 8:00 a.m. The matter was held open until
16 March 5, 2013, to allow parties to file memoranda regarding subject matter jurisdiction.

17 **APPEARANCES:** William Cavanaugh (hereinafter "Petitioner") appeared on his
18 own behalf. Agua Dulce Homeowners Association (hereinafter "Agua") appeared
19 through its attorney, Douglas W. Glasson, Esq., The Curl Law Firm, P.L.C.

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

21
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 (the "Department") is authorized by
26 statute to receive Petitions for Hearings from members of homeowners' associations
27 and from homeowners' associations in Arizona.
28 2. Agua is a homeowners' association located in Tucson, Arizona.
29 3. Petitioner owns a residence in, and is a member of, Agua.
30 4. Petitioner filed a petition with the Department alleging that Agua had violated the
provisions of A.R.S. § 33-1205. Petitioner specifically alleged that Agua had violated

1 Pima County Zoning Laws and Agua's CC&Rs by allowing homeowners to plant
2 non-native plants and plants that were other than low-pollen, low-water vegetation
3 plants.¹

- 4 5. Agua's Answer to the Petition provided, in pertinent part, as follows:

5 The Department has the power to interpret and enforce the private
6 contracts and rules that regulate Agua Dulce. Pima County
7 Zoning Code Co9-85-50 is not a private rule or contract between
8 the Petitioner and Agua Dulce. The Department does not have
9 subject-matter jurisdiction over alleged infractions of the Pima
10 County Zoning Code.

11 **Petitioner's Testimony**

- 12 6. Petitioner produced exhibits and testified that Agua was violating Pima County
13 Zoning Laws by allowing homeowners to plant non-native plants and plants that
14 were other than low-pollen, low-water vegetation plants. Petitioner stated that Agua
15 had failed to follow the plant list approved by Pima County.² Petitioner
16 acknowledged that there were similar non-native, non low-pollen, non low-water
17 vegetation planted in the area surrounding Agua. Petitioner stated that he suffered
18 health issues as a result of the vegetation planted in and around Agua. Petitioner
19 testified that he was a member of the architectural review committee ("ARC") for
20 Agua. Petitioner stated that a member of the ARC informed him that she did not
21 care about the vegetation planted in Agua. Petitioner stated that Agua could cause
22 the removal of non-native, non low-pollen, non low-water vegetation from the
23 individual homes within Agua.³

24 **Linda Ware's Testimony**

- 25 7. Linda Ware (hereinafter "Ms. Ware") testified that she had lived at Agua since 2008
26 and was a member of the Agua ARC. Ms. Ware stated that Agua was concerned
27 about maintaining the value of homes within Agua. Ms. Ware testified that one of
28 the main functions of the ARC was maintaining control of the vegetation planted in
29 homeowners' private backyards. Ms. Ware denied that she had stated that Agua had

30 ¹ See Brief Statement Identifying the Single Issue to be Addressed at Hearing.

² See Exhibit No. J.

³ 2/4/13 Hearing Record (hereinafter "H.R.") at 28:24-1:27:46.

1 allowed high-pollen and high-water usage plants to be planted in Agua. Ms. Ware
2 stated that the cost of implementing the changes in vegetation suggested by
3 Petitioner would be very high. Ms. Ware stated that Petitioner had not brought his
4 complaint regarding the issues set forth in the petition to the Board of Agua. Ms.
5 Ware testified that the Agua is very strict regarding the vegetation that is allowed to
6 be planted in homeowners' front yards and maintained a list of approved vegetation
7 guidelines for vegetation that can be planted in homeowners' private backyards. Ms.
8 Ware acknowledged that she was not a plant expert.⁴

9 **Betty Blaylock's testimony**

10 8. Betty Blaylock (hereinafter "Ms. Blaylock") testified that she is president of the Board
11 of Directors ("Board") for Agua. Ms. Blalock stated that she was present at the ARC
12 meeting with Ms. Ware and Petitioner and that she heard the conversation between
13 Ms. Ware and the Petitioner. Ms. Blaylock testified that Ms. Ware stated that she
14 had gone to Pima County and was informed by Pima County that Pima County was
15 not concerned about the vegetation planted in homeowners' private backyards in
16 Agua.⁵

17 **Terry Anderson's testimony**

18 9. Terry Anderson (hereinafter "Mr. Anderson") testified that he was a homeowner in
19 Agua. Mr. Anderson stated that he was concerned about the possibility of private
20 property rights being "trampled." Mr. Anderson testified that he was very concerned
21 about the potential costs of the removal of vegetation that was already planted
22 homeowners' private backyards.⁶

23 **PROVISIONS OF LAW REFERENCED AT HEARING BY PETITIONER**

24
25
26 1. A.R.S. § 33-1205 provides as follows:

27 Applicability of local ordinances, rules and building codes
28 A. A zoning, subdivision or building code or other real estate
use law, ordinance or rule shall not prohibit a condominium

29

⁴ H.R. at 1:27:48-2:10:10.

30 ⁵ H.R. at 2:10:53-2:14:30.

⁶ H.R. at 2:14:40-2:19:43.

1 form of ownership or impose any requirement on a
2 condominium which it would not impose on a physically
3 identical development under a different form of ownership.
4 B. Except as provided in subsection A, this chapter does not
5 invalidate or modify any provision of any zoning, subdivision or
6 building code or other real estate use law, ordinance or rule.

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

CONCLUSIONS OF LAW

1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of planned community documents or violations of statutes that regulate planned communities. That statute provides that such petitions will be heard before the Office of Administrative Hearings.
2. The burden of proof at an administrative hearing falls to the party asserting a claim, right, or entitlement and the standard of proof on all issue in this matter is by a preponderance of the evidence. See A.A.C. R2-19-119.
3. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not." MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).
4. Petitioner's testimony and evidence presented at hearing referred to alleged violations of Pima County Zoning Ordinances. The Department does not have jurisdiction over alleged violations of Pima County Zoning Codes.
5. Petitioner failed to present any credible evidence that Agua violated any statutes regulating homeowners' associations or that Agua violated any of Agua's CC&Rs.
6. This Tribunal concludes that Petitioner's Petition should be dismissed.

RECOMMENDED ORDER

In view of the foregoing, it is ORDERED that no action is required of Agua in this matter and that the Petition is dismissed.

