

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 EDWARD J. AND JUDITH S.  
8 MCCONNELL,

9 Petitioners,

10 vs

11 DEW MUTUAL EXPENSE SHARING  
12 GROUP,

13 Respondent

**No. 12F-H1213013-BFS**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

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17 **HEARING:** March 26, 2013

18 **APPEARANCES:** Edward J. McConnell and Judith S. McConnell appeared  
19 personally. Dew Mutual Expense Sharing Group was represented by its authorized  
20 representative, Kenn MacIntosh.

21 **ADMINISTRATIVE LAW JUDGE:** Brian Brendan Tully

22  
23  
24 Based upon the evidence of record, the Administrative Law Judge makes the  
25 following Findings of Fact, Conclusions of Law, and Recommended Order:

26 **FINDINGS OF FACT**

- 27 1. Edward J. McConnell and Judith S. McConnell ("Petitioners") are members of the  
28 Dew Mutual Expense Sharing Group ("Respondent"), an unincorporated  
29 condominium association located in Sun City, Arizona. Respondent's members  
30 are subject to the Covenants, Conditions, and Restrictions of the Sun City Unit  
34A ("CC&Rs").
2. Respondent's membership consists of the owners of 24 condominiums.

1 3. On or about December 20, 2012, Petitioners filed a single issue Petition with the  
2 Arizona Department of Fire, Building, and Life Safety (“Department”) against  
3 Respondent. The Department designated the Petition as Case No. HO 12-  
4 13/013.

5 4. In Section B. Complaint, paragraph 1 of the Petition, Petitioners identified the  
6 following sole violation of the condominium documents: “Rules & Regulations,  
7 Article 2.04.”

8 5. In Section B. Complaint, paragraph 2 of the Petition, Petitioners gave the  
9 following description of the alleged violation by Respondent:

10 On 9/12/2012, the Petitioner [sic] requested  
11 authorization to install an Alumawood™ shade  
12 structure on the west side of their condominium. On  
13 9/17/2012 the HOA Board neither approved nor  
14 denied the authorization. On 10/24/2012 the shade  
15 structure was installed. 2012 the HOA Board denied  
16 approval and ordered dismantling of the shade  
17 structure.

18 6. On January 15, 2013, Respondent filed an Answer to the Petition with the  
19 Department. Respondent denied the alleged violation and claimed that  
20 Petitioners constructed a shade structure in the common elements<sup>1</sup> without  
21 permission.

22 7. On January 22, 2013, Petitioners filed a response to Respondent’s Answer with  
23 the Department. Petitioners wrote that Respondent’s “response was not truthful  
24 and simply restated [its] prior position, so the matter remains unresolved.”  
25 Petitioners requested that the matter be scheduled for formal hearing.

26 8. The Department forwarded Case No. HO 12-13/013 to the Office of  
27 Administrative Hearings, an independent agency, for an evidentiary hearing.

28 <sup>1</sup> Paragraph 10 of the applicable CC&Rs defines “common elements” as follows:

29 The “common elements” shall be defined as including, but not  
30 limited to, land not otherwise specifically conveyed with individual  
units, community and commercial facilities, if any, swimming  
pools, pumps, trees, pavements, streets, pipes, wires, conduits  
and other public utility lines. No building shall be constructed on  
any part of the common elements.

1 9. On February 7, 2013, the Tribunal issued a Prehearing Order that contained the  
2 following Order:

3 **PETITIONERS ARE ORDERED**, within 15 business  
4 days of the date of this Order, to submit a brief  
5 statement identifying with specificity the single issue  
6 to be addressed at hearing, fairly encompassed by  
7 the previously filed petition, together with the precise  
8 statutory subsection of A.R.S. Title 33, Chapters 9 or  
9 16 and/or provision(s) of the governing documents in  
10 support of the alleged violation . . . .

11 (Emphasis in the original).

12 10. On February 20, 2013, Petitioners filed a response to the Prehearing Order and  
13 identified the single issue to be addressed at the hearing as follows:

14 Our written request for approval of construction of a  
15 shade structure was presented to the board of  
16 directors of our homeowners association on  
17 September 12, 2012. The response letter we received  
18 from the board dated September 17, 2012 neither  
19 denied nor approved our request.

20 The board did not formally deny our request until  
21 November 14, 2012, by which date the construction  
22 had been completed. This delay of over two months is  
23 a violation of **A.R.S. 33-1803, subsection D**, and in  
24 further violation of that statute, the information required  
25 in **paragraphs 2, 3 and 4** was not provided to us.

26 (Emphasis in the original).

27 11. In August 2012, a Palo Verde tree located in Respondent's common elements  
28 located outside of Petitioners' condominium unit was trimmed back significantly  
29 due to unhealthy limbs. The trunk of the tree remains. Prior to being trimmed, the  
30 tree provided shade to Petitioners' kitchen and breakfast room.

12. On or about September 12, 2012, Petitioners presented Ronald Wayne McIntyre,  
one of Respondent's board members, with a written request to Respondent's  
Board for installing an Alumawood™ shade structure to provide shade to their  
kitchen and breakfast room. At the hearing, Mr. McIntyre acknowledged receiving

1 the request. He also testified that Petitioner Edward J. McConnell stated to him at  
2 that time that Petitioners would construct the structure with or without the Board's  
3 approval.

4 13. By letter dated September 17, 2012, Respondent's Board expressed its  
5 "misgivings regarding the . . . proposal for an Alumawood™ shade structure . . ."  
6 and requested that Petitioners "explore other options less obtrusive."

7 14. Without the Board's approval, Petitioners had the shade structure erected in  
8 Respondent's common elements.

9 15. By letter dated November 14, 2012, Respondent's Board stated that Petitioners  
10 were in violation of Section 2.04 of Respondent's Rules and Regulations because  
11 they had erected the shade structure in the common elements without approval  
12 from the Board. Section 2.04 pertains to exterior additions and reads as follows:

13 No exterior additions or alterations to any building,  
14 walls, or other structures, including, but not limited to  
15 color thereof, shall be made until the plans and  
16 specifications showing the nature, kind, shape, height,  
17 location and approximated cost of same shall be  
18 submitted to and approved in writing by the Board of  
19 Management. Approval must be received from the  
20 Board of Management prior to installing any TV  
21 antenna, satellite dish and/or radio antenna more than  
22 six (6) feet above the roof line.

23 16. In its November 14, 2012 letter, Respondent's Board advised Petitioners that the  
24 shade structure had to be removed from the common elements or they would be  
25 fined by the Board. In addition, the Board further advised Petitioners that if they  
26 did not remove the shade structure, then the Board would have it removed at  
27 Petitioners' expense.

28 17. By letter dated November 18, 2012, Petitioners responded to Respondent's  
29 Board's November 14, 2012 letter. Petitioners stated that they had explored other  
30 options but concluded that their selection of the shade structure "was the most  
attractive and the least obtrusive one."

18. Paragraph 11 of the applicable CC&Rs contains the following restriction:

No exterior additions, or alterations to any building, nor changes in fences, hedges, walls and other structures including, but not limited to color thereof, shall be commenced, erected or maintained until the plans and specifications showing the nature, kind, shape, height, materials, location and approximate cost of same, shall have been submitted to and approved in writing as to conformity and harmony of external design and location with existing structures in the property by an architectural committee composed of the Board of Management, or by a representative designated by the Board of Management. . . .

19. The evidence of record established that Respondent's common elements include the exterior of condominium units to the sidewalk.
20. Petitioners own a proportionate share of Respondent's common elements with the other condominium homeowners.
21. The evidence of record further established that Petitioners erected their shade structure outside their condominium unit in the common elements without permission from Respondent or a conveyance of the portion of common elements upon which the shade structure was erected by at least 80% of Respondent's members.<sup>2</sup>

**CONCLUSIONS OF LAW**

1. The Department has jurisdiction to hear disputes between a property owner and a condominium association. A.R.S. § 41-2198.01(B).
2. Pursuant to A.A.C. R2-19-119(B), Petitioners have the burden of proof in this matter. The standard of proof is by a preponderance of the evidence. A.A.C. R2-19-119(A).
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). It is "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence

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<sup>2</sup> See A.R.S. § 33-1252(A) at Exhibit D.

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 4. In their Petition, Petitioners allege that Respondent violated the provisions of  
4 Section 2.04 of Respondent’s Rules and Regulations. The evidence of record  
5 supports a conclusion that Petitioners failed to establish that Respondent violated  
6 Section 2.04. On the contrary, the evidence of record established that Petitioners  
7 violated the provisions of Section 2.04 by erecting the shade structure on the  
8 common elements without written approval of Respondent’s Board and without a  
9 conveyance of the portion of the common elements upon which the shade  
10 structure was erected by at least 80% of Respondent’s members.

11 5. In their response to the Prehearing Order but not specified in their Petition,  
12 Petitioners allege that Respondent’s delay in denying their request for approval of  
13 the shade structure until November 14, 2012, violated the provisions of A.R.S. §  
14 33(B)(2), (3), and (4).

15 6. A.R.S. § 33-1803(C) provides as follows:

16 A member who receives a written notice that the  
17 condition of the property owned by the member is in  
18 violation of the community documents without regard  
19 to whether a monetary penalty is imposed by the  
20 notice may provide the association with a written  
21 response by sending the response by certified mail  
22 within ten business days after the date of the notice.  
23 The response shall be sent to the address contained  
24 in the notice or in the recorded notice prescribed by  
25 section 33-1807, subsection J.

26 7. A.R.S. § 33-1803(D) provides as follows:

27 Within ten business days after receipt of the certified  
28 mail containing the response from the member, the  
29 association shall respond to the member with a  
30 written explanation regarding the notice that shall  
provide at least the following information unless  
previously provided in the notice of violation:

1. The provision of the community documents that has allegedly been violated.
2. The date of the violation or the date the violation was observed.

1 3. The first and last name of the person or persons  
2 who observed the violation.

3 4. The process the member must follow to contest the  
4 notice.

5 8. By letter dated November 14, 2012, Respondent informed Petitioners that they  
6 had violated Rule and Regulation Section 2.04 when they erected the shade  
7 structure in the common elements without approval. A.R.S. § 33-1803(C)  
8 required Petitioners to send their November 18, 2012 response to Respondent  
9 by certified mail. There is no evidence that Petitioners had sent their response  
10 by certified mail. A.R.S. § 33-1803(D) requires a condominium association to  
11 respond to a member within ten business days after receipt of the member's  
12 certified mailing. Since Petitioners did not establish that their response had been  
13 sent to Respondent by certified mail, it is concluded that Respondent did not  
14 violate the provisions of A.R.S. § 33-1803(D) as alleged by Petitioners.

15 9. A.R.S. § 33-1221(2) provides that a member "[s]hall not change the appearance  
16 of the common elements, or the exterior appearance of a unit or any other  
17 portion of the condominium, without written permission of the association."  
18 Petitioners did not receive written permission from Respondent to erect the  
19 shade structure on the common elements outside Petitioners' condominium.

20 10. Petitioners did not request the conveyance of the common elements used in the  
21 erection of the shade structure, which included the attachment of the shade  
22 structure to the exterior of Petitioners' condominium and the ground, from  
23 Respondent's members as provided for in A.R.S. § 33-1252.

24 11. Since Petitioners failed to sustain their burden of proof in this matter, their  
25 Petition should be dismissed.

26 12. Respondent did not file a petition with the Department seeking to have  
27 Petitioners remove the shade structure from the common elements. Therefore,  
28 Respondent's request for an order requiring Petitioners to remove the shade  
29 structure is denied.

30 **RECOMMENDED ORDER**

1 In view of the foregoing, it is recommended that the Petition in Case No. HO 12-  
2 13/013 be dismissed.

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

7  
8 Done this day, April 15, 2013.

9 /s/ Brian Brendan Tully  
10 Administrative Law Judge

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12 Transmitted electronically to:

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14 Gene Palma, Director  
15 Department of Fire Building and Life Safety  
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