

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 THE CENTER COURT CONDOMINIUMS  
8 ASSOCIATION,

9 Petitioner,

10 VS

11 KATRINA KLISSAS,

12 Respondent.

**No. 13F-H1313005-BFS**

**ADMINISTRATIVE  
LAW JUDGE DECISION**

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15 **HEARING:** October 24, 2013, at 8:00 a.m.

16 **APPEARANCES:** The Center Court Condominiums Association (hereinafter  
17 “Center Court” or “Petitioner”) was represented by its attorney, Erin McManis, Esq.,  
18 Mulcahy Law Firm P.C. Katrina Klissas (hereinafter “Ms. Klissas” or “Respondent”) was  
19 represented by her attorney, James B. Rolle III, Esq., Law Offices of James B. Rolle.

20 **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 (the “Department”) is authorized  
26 by statute to receive Petitions for Hearings from members of homeowners’  
27 associations and from homeowners’ associations in Arizona.
- 28 2. Center Court is a condominium association located in Scottsdale, Arizona.
- 29 3. Ms. Klissas owns a residence in and is a member of Center Court.
- 30 4. Center Court filed a petition with the Department alleging that Ms. Klissas had  
violated the provisions of Rule L-8 of the Rules and Regulations of the Center Court.

1 Petitioner specifically alleged that Ms. Klissas had a balcony enclosure and that Ms.  
2 Klissas had more than four wind chimes on her balcony.

- 3 5. Ms. Klissas' Answer to the Petition provided, in part, as follows:

4 "The board on Respondent's patio is not an enclosure."

5 **Testimony of Timothy Bartlett**

- 6 6. Timothy Bartlett (hereinafter "Mr. Bartlett") testified that he is the president of  
7 Center Court. Mr. Bartlett stated that the dispute between Center Court and Ms.  
8 Klissas has been ongoing for several years. Mr. Bartlett testified that Center Court  
9 has repeatedly requested that Ms. Klissas remove the board from her balcony and  
10 has repeated requested that she remove the excessive number of wind chimes from  
11 her balcony. Mr. Bartlett reviewed the numerous letters that have been exchanged  
12 by the parties since 2001. Mr. Bartlett acknowledged that Center Court had first  
13 informed Ms. Klissas of the alleged violations in October 2001.

14 **Testimony of John Foster Flynn**

- 15 7. John Foster Flynn (hereinafter "Mr. Flynn") testified that he has lived in Center  
16 Court for twenty years. Mr. Flynn stated that he owns the condominium unit directly  
17 above Ms. Klissas. Mr. Flynn testified that Ms. Klissas has turned her patio into a  
18 third bedroom. Mr. Flynn stated that Ms. Klissas has numerous wind chimes on her  
19 balcony and that he finds the noise from the wind chimes to be a nuisance.

20 **Testimony of Mike Weber**

- 21 8. Mike Weber (hereinafter "Mr. Weber") testified that he is Ms. Klissas' husband.  
22 Mr. Weber stated that the prior owner of the residence had installed a board across  
23 the railing of the balcony for Ms. Klissas' condominium unit in 1998. Mr. Weber  
24 testified that the board was installed as a privacy measure because the  
25 condominium unit overlooks the entrance to the swimming pool. Mr. Weber stated  
26 that the board is approximately ½" thick, approximately five feet long and  
27 approximately three feet high, which is the height and length of the wooden railings  
28 for the balcony. Mr. Weber stated that Center Court painted the board to match the  
29 rest of the wood trim for Center Court in 2004. Mr. Weber testified that Ms. Klissas  
30 has no more than four wind chimes on her balcony.

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**Testimony of Katrina Klissas**

9. Ms. Klissas testified that she had four wind chimes on her balcony. Ms. Klissas stated that the remaining devices hanging in her balcony were wind spinners. Ms. Klissas testified that wind spinners do not make noise. Ms. Klissas testified that whenever she purchases a new wind chime, she removes one of the old wind chimes.

10. Ms. Klissas testified that a wooden board had been placed across the wooden railings of her balcony by the prior owner of the condominium unit. Ms. Klissas stated that the board was necessary to provide privacy for her balcony because the balcony for her condominium unit is located directly across from the entrance to the Center Court swimming pool.

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**Testimony of Roberta Piatt**

11. Roberta Piatt (hereinafter "Ms. Piatt") testified that she was the former owner of Ms. Klissas' condominium unit. Ms. Piatt stated that she installed the wooden board across the wooden railings for the condominium unit's balcony as a privacy measure in 1998. Ms. Piatt asserted that in 1998, she had asked a member of the Center Court's Board of Directors for permission to install the board. Ms. Piatt testified that there was never an issue with the board while she owned the condominium unit. Ms. Piatt stated that Center Court painted the board the same color as the rest of the wooden trim for Center Court in 2004.

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**PROVISIONS OF CENTER COURT RULES AND REGULATIONS REFERENCED AT**  
23  
**HEARING**

24 Section L.8 provides in relevant part, as follows:

25 Wind Chimes- One large or 4 small wind chimes will be permitted  
26 to be placed on Balconies [sic] or patios. If a noise complaint is  
made the wind chimes must be disabled or removed.

27 Section L.9 provides, in relevant part, as follows:

28 Enclosures- As per CC&R section 9.09 enclosures are not  
29 permitted on balconies or patios. The owner can request the  
30 board to make exceptions. Any enclosure must consist of a see

1 through material such as clear plastic, Plexiglas or wire mesh that  
2 is approved by the board.

3 **PROVISIONS OF CENTER COURT CC&R's REFERENCED AT HEARING**

4 CC&R Section 9.09 provides, in relevant part, as follows:

5 No external items such as, but not limited to, television and radio  
6 antennas, flag poles, clotheslines, wiring, insulation, air  
7 conditioning equipment, water softening equipment, fences,  
8 awning, ornamental screens, screen doors, porch or patio or  
9 balcony enclosures . . . other than those approved by the Board  
and any replacement thereof, shall be constructed, erected, or  
maintained on the Property, including any Buildings [sic] thereon. .  
..”

11 **CONCLUSIONS OF LAW**

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- 13 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to file a  
14 petition with the Department to request a hearing concerning violations of planned  
15 community documents or violations of the statutes that regulate planned communities.  
16 That statute also provides that such petitions will be heard before the Office of  
17 Administrative Hearings.
- 18 2. The burden of proof at an administrative hearing falls to the party asserting a claim,  
19 right, or entitlement and the standard of proof on all issue in this matter is by a  
20 preponderance of the evidence. See A.A.C. R2-19-119.
- 21 3. Proof by “preponderance of the evidence” means that it is sufficient to persuade the  
22 finder of fact that the proposition is “more likely true than not.” *In re Arnold and Baker*  
23 *Farms*, 177 B.R. 648, 654 (9<sup>th</sup> Cir. BAP (Ariz.) 1994).
- 24 4. The credible evidence of record was insufficient and failed to establish that placing a  
25 3’ by 5’ board across Ms. Klissas’ balcony railing constitutes an enclosure of the  
26 balcony for Ms. Klissas’ condominium unit.
- 27 5. Undisputed credible testimony established that that the board that is installed across  
28 the railing of Ms. Klissas’ balcony has been there since 1998. Center Court repeatedly  
29 notified Ms. Klissas of the alleged balcony violation from October 2001 through May 28,  
30 2013, when Center Court filed the petition at issue.

1 6. The doctrine of laches, as described by the Arizona Court of Appeals, is an  
2 "inexcusable delay in asserting a right during a period of time in which adverse rights  
3 have been acquired under circumstances that make it inequitable to displace such  
4 adverse rights for the benefit of those who are bound by the delay." In other words,  
5 laches arises where a party delays making its claim in such a way that another party is  
6 unfairly prejudiced. The defense of laches bars a claim when, under the totality of  
7 circumstances, the delay in prosecuting the claim "would produce an unjust result."  
8 *Harris v. Purcell*, 193 Ariz. 409, 410, 973 P.2d 1166, 1167 n.2 (1998).

9 7. This Tribunal concludes that Center Court's delay of more than a decade in taking  
10 action against Ms. Klissas for the board that was installed across her patio railing in  
11 1998 is unreasonable and prejudicial to Ms. Klissas.

12 8. There was no credible proof the Ms. Klissas has more than four small wind chimes  
13 on her balcony. There was no evidence that a complaint had been filed with Center  
14 Court regarding the amount of noise produced by Ms. Klissas' wind chimes. There was  
15 no credible evidence that the wind chimes on Ms. Klissas' balcony were in violation of  
16 the charged provision of Rule Section L.8.

17 **RECOMMENDED ORDER**

18 In view of the foregoing, it is ORDERED that this matter be dismissed.

19 It is further ORDERED that Ms. Klissas be deemed the prevailing party in this  
20 matter.

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

24 Done this day, November 13, 2013.

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26 /s/ M. Douglas  
27 Administrative Law Judge

28 Transmitted electronically to:

29 Gene Palma, Director  
30 Department of Fire Building and Life Safety

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