

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 DAVID & LOREE JANUSZ

8 Petitioners,

9 vs

10 CRESTA NORTE HOA

11 Respondent.

No. 13F-H1314002-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

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14 **HEARING:** February 18, 2014, at 8:00 a.m.

15 **APPEARANCES:** David and Loree Janusz (hereinafter "Petitioners" or "Mr.
16 Janusz" or "Ms. Janusz") appeared on their own behalf. Cresta Norte HOA (hereinafter
17 "Cresta Norte", "Respondent," or "the association") was represented by its attorneys,
18 Curtis S. Ekmark, Esq., and Molly J. Streiff, Esq., Ekmark & Ekmark LLC.

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. Cresta Norte is a homeowners' association located in Scottsdale, Arizona.
- 28 3. Petitioners own a residence in and are members of Cresta Norte.
- 29 4. Petitioners filed a petition with the Department alleging that Cresta Norte had
30 violated its design guidelines and CC&Rs. Petitioners alleged that Cresta Norte had
violated the purpose and philosophy of Cresta Norte's design guidelines and,

1 specifically, that Cresta Norte had violated Section N Miscellaneous (7) of the Cresta
2 Norte Guidelines.

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

4 Petitioners submitted an Architectural Change Request to add
5 shutters to the exterior of their home. The Architectural
6 Committee denied Petitioners' request for shutters; and the
7 association's Board of Directors denied Petitioners' appeal
8 regarding the shutters.

9 **Testimony of David Janusz**

10 6. Mr. Janusz testified that he was a member of Cresta Norte's Board of Directors from
11 2006 through 2010. Mr. Janusz stated that he had been a member of the architectural
12 committee. Mr. Janusz testified that Cresta Norte had violated its design guidelines by
13 denying Petitioners' request to install exterior shutters on their residence.

14 7. Mr. Janusz testified that Petitioners had submitted an Architectural Change Request
15 to the architectural committee to add shutters to Petitioners' residence. Mr. Janusz
16 stated that the architectural committee denied Petitioners' request for shutters and
17 Petitioners then appealed the denial to the Board of Directors. Mr. Janusz
18 acknowledged that the Board of Directors had denied Petitioners' appeal.

19 8. Mr. Janusz testified that the design guidelines for Cresta Norte were to encourage
20 creativity and diversity. Mr. Janusz stated that the specific guidelines for Cresta Norte
21 provide that any change to the exterior appearance of the houses in Cresta Norte,
22 specifically including garage doors, stone work, shutters, etc., must be consistent with
23 the design and color palette of the community. Mr. Janusz acknowledged that the
24 design guidelines for Cresta Norte provide that written approval from the architectural
25 committee is required prior to commencement of any work.

26 9. Mr. Janusz testified that the Board of Directors violated Cresta Norte's design
27 guidelines by denying Petitioners' appeal. Mr. Janusz testified that that "to the best of
28 his knowledge" this was the first time anyone had requested permission to install
29 exterior shutters in Cresta Norte. Mr. Janusz acknowledged that there were no
30 residences with exterior shutters currently in Cresta Norte.

10. Mr. Janusz testified that the requested shutters were consistent with the design

1 and color palette of Cresta Norte. Mr. Janusz stated that when he was a member of
2 the architectural committee, the committee envisioned that some homeowners would
3 want to place exterior shutters on their residences. Mr. Janusz testified that the
4 language of the guidelines specifically provided for the installation of exterior shutters.

5 11. Mr. Janusz testified that Petitioners had contacted all of Petitioners' neighbors
6 that would be able to observe the exterior of Petitioners' residence. Mr. Janusz stated
7 that none of Petitioners' neighbors expressed any opposition to the installation of the
8 requested shutters.

9 12. Mr. Janusz testified that he was a member of the architectural committee in
10 2009, and that he was "involved in the initial collaboration" that included the installation
11 of exterior shutters in the design guidelines for Cresta Norte. Mr. Janusz
12 acknowledged that he was not a member of the architectural committee in 2011, when
13 the design guidelines were implemented by Cresta Norte.

14 13. Mr. Janusz testified that his recollection was that the architectural committee
15 specifically discussed the installation of shutters in 2009. Mr. Janusz stated that the
16 architectural committee included shutters in the guidelines because the architectural
17 committee had discussed and approved the installation of exterior shutters in the
18 community.

19 14. Mr. Janusz testified that the language in the guidelines was chosen to provide
20 homeowners with flexibility for methods of improving the exterior of their residences,
21 including the installation of exterior shutters. Mr. Janusz stated that the governing
22 documents are supposed to be guidelines for acceptability. Mr. Janusz testified that
23 the architectural committee is supposed to have flexibility to encourage creativity and
24 diversity in the community.

25 15. Mr. Janusz testified that he was President of the Board of Directors for Cresta
26 Norte from 2006 through 2010. Mr. Janusz stated that he was chairman of the
27 architectural committee from approximately 2007 through 2009. Mr. Janusz testified
28 that the wording of the guidelines offered the installation of exterior shutters to
29 homeowners in Cresta Norte to enable the homeowners to show individuality and
30

1 creativity within the community.¹ Mr. Janusz asserted that Cresta Norte violated its
2 guidelines by denying Petitioners' request to install exterior shutters on their residence.

3 **Testimony of James A. Wooley**

4 16. James A. Wooley (hereinafter "Mr. Wooley") testified that he had lived Cresta
5 Norte since 2005. Mr. Wooley stated that he is on the Board of Directors for Cresta
6 Norte. Mr. Wooley testified that he had been on the Board of Directors since 2008.

7 17. Mr. Wooley testified that he was also a member of the architectural committee for
8 Cresta Norte. Mr. Wooley stated that he had been a member of the architectural
9 committee since approximately 2007. Mr. Wooley testified he was on the architectural
10 committee when the design guidelines were considered for amendment.

11 18. Mr. Wooley testified that he was on the architectural committee when the design
12 guidelines were actually changed in 2011. Mr. Wooley stated that he recalled that Mr.
13 Janusz was chairman of the architectural committee in 2009. Mr. Wooley testified that
14 the main purpose for the change of the design guidelines was that the architectural
15 committee felt that landscaping in the community should be improved.

16 19. Mr. Wooley testified that he did not recall any discussion of shutters. Mr. Wooley
17 stated that he did not recall even a mention of shutters. Mr. Wooley denied that it was
18 the intent of the 2009 architectural committee to allow shutters in Cresta Norte. Mr.
19 Wooley stated that it was not the intent of the architectural committee in either 2009 or
20 2011 to make exterior shutters an approved architectural feature for Cresta Norte.

21 20. Mr. Wooley testified that he read the design guidelines before they were
22 published on several occasions. Mr. Wooley stated that he did not see that shutters
23 were included in the design guidelines when the guidelines were approved. Mr. Wooley
24 testified that the use of the word "shutters" in the guidelines was an example, not an
25 express approval for the installation of shutters in the community. Mr. Wooley
26 acknowledged that the guidelines do not expressly prohibit the installation of shutters in
27 Cresta Norte.²

28 **Testimony of Brian McNamara**

29 21. Brian McNamara (hereinafter "Mr. McNamara") testified that he had lived in

30 ¹ 2/18/14 Hearing Record (hereinafter "H.R.") at 24:27-1:06:01.

² H.R. at 1:11:53-1:20:35.

1 Cresta Norte since 2007. Mr. McNamara stated that he is a member of the Board of
2 Directors for Cresta Norte. Mr. McNamara testified that he had been a member of the
3 Board of Directors for two years.

4 22. Mr. McNamara testified that he is also a member of the architectural committee.
5 Mr. McNamara stated that he been a member of the architectural committee since
6 2011. Mr. McNamara testified that the design guidelines for Cresta Norte were
7 amended in 2011. Mr. McNamara stated that there was no discussion to allow the
8 installation of shutters when the guidelines for Cresta Norte were amended in 2011.

9 23. Mr. McNamara testified that he was on the architectural committee when the
10 Petitioners presented their application for shutters. Mr. McNamara stated that there are
11 no shutters in the community. Mr. McNamara testified that there had been no prior
12 applications for shutters in Cresta Norte.

13 24. Mr. McNamara testified that he went to Petitioners' residence and spoke with Mr.
14 Janusz about the application. Mr. McNamara stated that the Board of Directors
15 considered the particular shutters that Petitioners wanted to install and denied the
16 application. Mr. McNamara testified that the Board of Directors considered the design
17 guidelines in making its decision.

18 25. Mr. McNamara testified that the Board of Directors determined that the
19 installation of exterior shutters was not a desirable architectural feature for Cresta
20 Norte. Mr. McNamara stated that changes to the exteriors of residences in Cresta
21 Norte are subject to approval by the architectural committee. Mr. McNamara testified
22 that the architectural committee did not approve Petitioners' application. Mr.
23 McNamara acknowledged that he had an opportunity to review the 2011 revisions to
24 the Cresta Norte guidelines.

25 26. Mr. McNamara acknowledged that the architectural committee had approved
26 applications for the installation of stonework for residences that did not previously have
27 exterior stonework.³

28 **Provisions of CC&Rs and Cresta Norte Design Guidelines referenced at Hearing**

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³ H.R. at 1:20:36-1:36:35.

1 The Cresta Norte Design Guidelines provide, in relevant part, as
2 follows:

3 The purpose of the Guidelines is to encourage creativity and
4 diversity while maintaining a balance with the natural desert
5 environment, to promote neighborly consideration and to address
6 issues of privacy and architectural consistency, which will
7 preserve property value and community image.⁴

8 Section N Miscellaneous (7) of the Cresta Norte Guidelines provides as follows:

9 Any change to the exterior appearance of the house (garage door,
10 stone work, shutters, etc.) must be consistent with the design and
11 color [palette] of the community. Architectural Committee written
12 approval is required prior to commencement of any work.

13 **CONCLUSIONS OF LAW**

14 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to
15 file a petition with the Department for a hearing concerning violations of planned
16 community documents or violations of statutes that regulate planned communities. That
17 statute provides that such petitions will be heard before the Office of Administrative
18 Hearings.

19 2. The burden of proof at an administrative hearing falls to the party asserting a
20 claim, 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 a “preponderance of the evidence” means that the evidence is sufficient
23 to persuade the finder of fact that the proposition is “more likely true than not.” *In re*
24 *Arnold and Baker Farms*, 177 B.R. 648, 654 (9th Cir. BAP (Ariz.) 1994).

25 4. Petitioners submitted an Architectural Change Request to add shutters to the
26 exterior of their home. The architectural committee for Cresta Norte denied Petitioners’
27 request for shutters and Cresta Norte’s Board of Directors denied Petitioners’ appeal
28 regarding the shutters. There was no credible evidence that the architectural committee
29 violated Cresta Norte’s CC&Rs or design guidelines when it denied Petitioners’ request to
30 install exterior shutters on Petitioners’ residence. There was no credible evidence

⁴ See Exhibit No. 4 (Cresta Norte Design Guidelines, May 1, 2011 Edition).

1 presented to establish that Cresta Norte violated applicable rule or statute when the
2 Board of Directors for Cresta Norte denied Petitioners' appeal.

3 5. Cresta Norte's 2011 Design Guidelines provide that any change to the exterior
4 appearance of the house (garage door, stone work, shutters, etc.) must be consistent
5 with the design and color palette of the community and that written approval from the
6 architectural committee is required prior to commencement of any work. The denial of
7 Petitioners' application to change the appearance of their residence by adding exterior
8 shutters does not violate the Design Guidelines.

9 **RECOMMENDED ORDER**

10 In view of the foregoing, it is ORDERED that Cresta Norte be deemed the
11 prevailing party in this matter.

12 It is further ORDERED that this petition be dismissed.

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

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17 Done this day, February 27, 2014.

18 /s/ M. Douglas
19 Administrative Law Judge
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22 Transmitted electronically to:

23 Gene Palma, Director
24 Department of Fire Building and Life Safety
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