

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 KRYSTINE P. STRIKE,

8 Petitioner,

9 vs

10 LAS TORRES HOMEOWNERS  
11 ASSOCIATION

12 Respondent.

**No. 13F-H1314009-BFS**

**ADMINISTRATIVE  
LAW JUDGE DECISION**

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14  
15 **HEARING:** May 6, 2014, at 8:00 a.m.

16 **APPEARANCES:** Krystine P. Strike (hereinafter "Ms. Strike" or "Petitioner")  
17 appeared on her own behalf. Las Torres Homeowners Association (hereinafter "Las  
18 Torres" or "Respondent") was represented by its attorney, Mark K. Sahl, Esq.  
19 Carpenter, Hazlewood, Delgado & Bolen, PLC.

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 **Background**

- 26 1. The Department of Fire, Building and Life Safety (the "Department") is authorized by  
27 statute to receive Petitions for Hearings from members of homeowners' associations  
28 and from homeowners' associations in Arizona.  
29 2. Las Torres is a homeowners' association located in Carefree, Arizona.  
30 3. Ms. Strike owns a residence in and is a member of Las Torres.  
4. Units 603 and 604 were previously owned by the same owners.

1 5. The previous owners chose to enclose the patio for unit 604.

2 6. The previous owners then constructed a concrete slab in a common area at Las  
3 Torres joining the existing concrete patio for unit 603 and thereby creating a patio that  
4 stretched from unit 603 to unit 604.

5 7. The previous owners constructed the concrete slab in the common area with  
6 knowledge and evidently at least tacit approval by Las Torres.

7 8. The City of Carefree, Arizona inspected and approved the construction of the  
8 concrete slab in the common area on or about November 18, 1998.<sup>1</sup>

9 9. The concrete slab in the common area had been in existence for approximately nine  
10 years in 2007, when Ms. Strike purchased unit 603.

11 10. In June 2012, the owner of unit 604 petitioned Las Torres for approval to enlarge  
12 the concrete slab in the common area. Las Torres informed the owner of unit 604 that  
13 the concrete slab was in a common area and had never been expressly approved. Las  
14 Torres informed the owner of unit 604 that the concrete slab did not belong to the  
15 owner of unit 604.

16 11. On or about November 1, 2013, Las Torres sent a letter to the owner of unit 604  
17 asking her to remove her patio furniture from the concrete slab in the common area  
18 when the patio furniture was not in use. Las Torres issued a second letter to the owner  
19 of unit 604 on January 7, 2014, again asking her to remove her patio furniture from the  
20 concrete slab in the common area when the patio furniture was not in use.

21 12. Las Torres issued a third letter to the owner unit 604 on February 20, 2014, and  
22 a fourth letter on April 21, 2014, asking the owner of unit 604 to remove her patio  
23 furniture from the concrete slab in the common area when the patio furniture was not in  
24 use.

25 13. The owner of unit 604 has failed to remove her patio furniture from the concrete  
26 slab in the common area, despite Las Torres' repeated requests that she do so.

27 14. On or about November 22, 2013, Ms. Strike filed a petition with the Department  
28 alleging that Las Torres had violated the provisions of A.R.S. § 33-1221 and A.R.S. §  
29 33-1218. Ms. Strike specifically alleged that "[t]he association (Las Torres) has allowed

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<sup>1</sup> See Respondent's Exhibit 5 (Copy of City of Carefree Inspection Card).

1 an owner to alter the common area between units by placing a concrete slab, filling it  
2 with furniture, and using as her patio. No consent was given for this encroachment onto  
3 the common area by either the HOA (Las Torres) [or] affected owners. The HOA did  
4 [not] consider my privacy rights. I want the common area restored to its unaltered  
5 state.”

6 15. Las Torres’ Answer to the Petition provided, in relevant part, as follows:

7 The Petitioner alleges that the Association (Las Torres) violated  
8 A.R.S. § 33-1218 and § 33-1221 by failing to obtain her consent  
9 before her neighbor allegedly altered the common area  
10 adjacent to her unit. For the reasons set forth below, A.R.S. §§  
11 33-1218 and 33-1221 are inapplicable.

12 A.R.S. § 33-1218 only applies to limited common elements  
13 (altering limited common elements or reallocating limited common  
14 elements). However, the area at issue is not a limited common  
15 element. The common area between Petitioner’s unit and her  
16 neighbor’s unit is simply a General Common Element, as defined  
17 in the Association’s Declaration. The area at issue is not  
18 assigned to Petitioner’s neighbor and Petitioner’s neighbor does  
19 not have exclusive use to this area.

20 A.R.S. § 33-1221 does not apply because the Association’s  
21 Declaration, at Article IV, Section I(d) addresses the Owner’s use  
22 of the General Common Elements and therefore controls.  
23 Finally, the Petition should be dismissed because the Department  
24 lacks jurisdiction to grant the relief the Petitioner requests. The  
25 Petitioner states in her Petition that, “I want the common area  
26 restored to its unaltered state.” Petitioner’s demand requires  
27 injunctive relief (removing a concrete pad from the common  
28 element). The Department lacks jurisdiction to grant injunctive  
29 relief. See A.R.S. § 41-2198.02 . . . .

30 **Testimony of Krystine P. Strike**

16. Ms. Strike testified that Las Torres violated the provisions A.R.S. § 33-1218 and  
§ 33-1221 by allowing her neighbor in unit 604 to construct and utilize a concrete  
slab in a common area as a private patio. Ms. Strike stated that she should not be  
barred by the applicable one-year statute of limitations because she had  
previously been a member of the Board of Directors (hereinafter “Board) for Las

1 Torres and that she had signed a Code of Conduct that prevented her from filing  
2 any unilateral action against Las Torres while she was a member of the Board.  
3 Ms. Strike testified that she resigned her position as a member of the Board in  
4 April 2013.

5 17. Ms. Strike testified that Las Torres had given her neighbor in unit 604  
6 unauthorized approval to use the concrete slab in the common area despite Ms.  
7 Strike's repeated complaints about the matter. Ms. Strike stated that the owner of  
8 unit 604 "may not have known that she was breaking the law." Ms. Strike testified  
9 that the May 29, 2012 Notice of Disapproval issued to the owner of unit 604 was  
10 not specific enough to inform the owner of unit 604 that her actions were in  
11 violation of state statute.<sup>2</sup>

12  
13 18. Ms. Strike testified that she received conflicting information from Las Torres  
14 regarding the status of the concrete slab in the common area. Ms. Strike stated that  
15 Las Torres had provided the owner of unit 604 with incorrect information that was not  
16 approved by the Board.

17 19. Ms. Strike asserted that the Department does have the authority to direct Las  
18 Torres to remove the unapproved concrete patio in the common area. Ms. Strike  
19 stated that Las Torres had been complacent in allowing the owner of unit 604 to  
20 improperly use a concrete slab in the common area as her private patio.

21 20. Ms. Strike testified that the installation of the concrete slab in the common area  
22 was never approved by the Board. Ms. Strike stated that she believed that Board had  
23 misled the owner of unit 604 by allowing the owner to construct a concrete slab in a  
24 common area and then by allowing the owner of unit 604 to use the concrete slab as a  
25 private patio.

26 21. Ms. Strike acknowledged that she purchased unit 603 in 2007. Ms. Strike  
27 acknowledged that she noticed the concrete slab in the common area after she moved  
28 into unit 603 in 2007. Ms. Strike testified that the owner of unit 604 moved into unit 604  
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<sup>2</sup> See Complainant's Exhibit No. G (5/29/12 Notice of Disapproval).

1 after Ms. Strike moved into unit 603.

2 22. Ms. Strike acknowledged that the owner of unit 604 did not install the concrete  
3 slab in the common area. Ms. Strike testified that the owner of unit 604 altered the  
4 concrete slab in the common area by placing furniture on the concrete slab. Ms. Strike  
5 asserted that the violation letters that were issued by Las Torres to the owner of unit of  
6 604 were not authorized by the Board.

7 **Testimony of Pamela A. Dixon**

8 23. Pamela A. Dixon (hereinafter "Ms. Dixon") testified that was a member of the  
9 Board. Ms. Dixon stated that she had seen the violation letters issued to the owner of  
10 unit 604. Ms. Dixon testified that all of the violation letters were authorized by the  
11 Board.

12 24. Ms. Dixon testified that the concrete slab in the common area was installed in  
13 1998. Ms. Dixon stated that Board had given the previous owners authorization to  
14 construct the concrete slab in the common area in 1998. Ms. Dixon stated that there  
15 were several other concrete slabs in Las Torres. Ms. Dixon testified that in the 1990s,  
16 no records by the Board were maintained by Las Torres. Ms. Dixon stated that the old  
17 records for Las Torres had been purged and were no longer available.

18 **Testimony of Marc Vasquez**

19 25. Marc Vasquez (hereinafter "Mr. Vasquez") testified that one Board meeting was  
20 held in April, 2013. Mr. Vasquez stated that all of the violation letters issued to the  
21 owner of unit 604 were approved by the Board.

22 26. Mr. Vasquez testified that the concrete slab had been in existence for over ten  
23 years. Mr. Vasquez acknowledged that the Board had allowed the concrete slab to  
24 continue in existence despite the fact that it was on common property. Mr. Vasquez  
25 stated that the concrete slab is considered to be part of the common elements of Las  
26 Torres. Mr. Vasquez testified that the Board had repeatedly requested that furniture on  
27 the concrete slab be stored when not in use. Mr. Vasquez stated that Las Torres had  
28 issued numerous violation letters to the owner of unit 604 for leaving patio furniture on  
29 the concrete slab.  
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**PROVISIONS OF LAW REFERENCED AT HEARING**

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1. A.R.S. § 12-541 provides, in relevant part, as follows:

There shall be commenced and prosecuted within one year after the cause of action accrues, and not afterward, the following actions:

.....

5. Upon a liability created by statute, other than a penalty or forfeiture.

2. A.R.S. § 33-1218 provides as follows:

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

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

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

3. A.R.S. § 33-1221 provides as follows:

Subject to the provisions of the declaration and other provisions of law, a unit owner:

1 1. May make any improvements or alterations to his unit that do  
2 not impair the structural integrity or mechanical systems or lessen  
3 the support of any portion of the condominium.

4 2. Shall not change the appearance of the common elements, or  
5 the exterior appearance of a unit or any other portion of the  
6 condominium, without written permission of the association.

7 3. After acquiring an adjoining unit or, if the declaration expressly  
8 permits, an adjoining part of an adjoining unit, may remove or alter  
9 any intervening partition or create apertures in intervening  
10 partitions, even if the partition in whole or in part is a common  
11 element, if those acts do not impair the structural integrity or  
12 mechanical systems or lessen the support of any portion of the  
13 condominium. Removal of partitions or creation of apertures under  
14 this paragraph is not an alteration of boundaries.

#### 12 CONCLUSIONS OF LAW

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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 alleged violations of  
16 planned community documents or violations of statutes that regulate planned  
17 communities. That statute provides that such petitions will be heard before the Office  
18 of Administrative 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 “preponderance of the evidence” means that it is sufficient to persuade  
23 the finder of fact that the proposition is “more likely true than not.” *In re Arnold and*  
24 *Baker Farms*, 177 B.R. 648, 654 (9<sup>th</sup> Cir. BAP (Ariz.) 1994).

25 4. The concrete slab at issue was installed by the previous owner of units 603 and  
26 604 in 1998. The concrete slab was in existence and in use when Ms. Strike  
27 purchased unit 603 in 2007. Ms. Strike did not file her petition until 2013,  
28 approximately six years after her occupation of unit 603. The current owner of unit 604  
29 did not purchase unit 604 until after Ms. Strike purchased unit 603. The current owner  
30 of unit 604 could not have constructed the concrete slab as alleged in the petition.

1 5. Las Torres has repeatedly issued violation letters to the owner of unit 604 asking  
2 her to remove her patio furniture when not in use from the concrete slab. The common  
3 area between unit 603 unit and unit 604 is a common element. The concrete slab at  
4 issue is not assigned to Ms. Strike's neighbor in unit 604 and Ms. Strike's neighbor  
5 does not have exclusive use of the concrete slab.

6 6. The concrete slab at issue has been in existence since 1998. The concrete slab  
7 was in existence when Ms. Strike purchased unit 603 in 2007. Ms. Strike did not file her  
8 petition regarding the concrete slab until 2013, approximately six years after her initial  
9 occupation of unit 603. Because Ms. Strike's petition was not filed within one year of the  
10 accrual of Ms. Strike's cause of action, it is time-barred.

11 **RECOMMENDED ORDER**

12 In view of the foregoing, it is ORDERED that Respondent be deemed the  
13 prevailing party in this matter.

14 It is further ORDERED that this matter be dismissed.

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

18 Done this day, May 16, 2014.

19  
20 /s/ M. Douglas  
21 Administrative Law Judge

22  
23 Transmitted electronically to:  
24  
25 Gene Palma, Director  
26 Department of Fire Building and Life Safety  
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