

1 1. The Department of Fire, Building and Life Safety (the "Department") is authorized by
2 statute to receive Petitions for Hearings from members of homeowners' associations
3 and from homeowners' associations in Arizona.

4 2. Gainey Ranch Community Association is formed as a Master Planned Community in
5 Scottsdale, Arizona. The Pavilions Council of Co-Owners is a Satellite Association
6 located within the Gainey Ranch Community Association.

7 3. MS-Pavillions 35 LLC (hereinafter "Respondent") is a domestic LLC in the State of
8 Arizona. Respondent owns a residence in and is a member of Gainey Ranch
9 Community Association and the Pavilions Council of Co-Owners.

10 4. Gainey Ranch Community Association and Pavilions Council of Co-Owners
11 (hereinafter "Petitioner") filed a petition with the Department alleging that Respondent
12 had violated provisions of Article VIII, Section 5(a) of the Satellite CC&Rs. Petitioner
13 specifically alleged, in relative part, as follows:

14 Respondent failed to obtain approval from Architectural
15 Committee prior to removing deck railing.

16 5. Respondent's November 11, 2015, amended response provides, in relevant part, as
17 follows:

18 With respect to the Petition, Gainey Ranch alleges that
19 "Respondent failed to obtain approval from the Architectural
20 Committee prior to removing deck railing." This is simply not
21 true. On or about January 15, 2015, Mr. Shotey received
22 approval from the Gainey Ranch Architectural Committee to
23 install new metal fascia (flashings) on his deck. Such
24 approval was recorded in the Minutes of the Master
25 Architectural Committee Meeting of January 15, 2015, which
26 are attached hereto for your reference. Upon consideration
27 of the fascia installation, the Architectural Committee knew
28 or should have known that it would be impossible to install
29 the fascia without removing the deck railing. Accordingly,
30 approval to remove the deck railing was a necessary
element of the Architectural Committee's approval to install
the fascia.

1 6. On December 3, 2015, the Department issued a Notice of Hearing to the parties
2 notifying them that a hearing on the Petition would be conducted by the Office of
3 Administrative Hearings.

4 7. On February 26, 2016, a hearing was held on the Petition and the parties presented
5 evidence and argument regarding the violation alleged in the Petition.

6 **Hearing Evidence**

7 8. The Minutes of the Master Architectural Committee Meeting of January 15, 2015
8 provide, in relevant part, as follows:¹

9 4. Pavilions #35-Shotey New metal flashing at patio
10 Pavilions approved. Discussion: NONE

11 9. Dee Bloom (hereinafter "Ms. Bloom") testified that Respondent failed to obtain
12 required approval before removing the deck railing in front of Respondent's residence.
13 Ms. Bloom said that Respondent asked for permission to remove the metal flashing for
14 the deck not the deck railing. Ms. Bloom said that Respondent removed the deck
15 railing after January 15, 2015. Ms. Bloom said that she did know the exact date
16 because Respondent failed to ask and obtain approval to remove the deck railing. Ms.
17 Bloom said that Respondent failed to obtain required approval from the Architectural
18 Committee prior to removing deck railing.

19 10. James A. Funk (hereinafter "Mr. Funk") testified that he is the executive director
20 of the Gainey Ranch Community Association and a member of the Master Architectural
21 Committee (hereinafter "MAC") for the Gainey Ranch Community Association. Mr.
22 Funk stated that he has been a member of MAC for over seven years. Mr. Funk said
23 that members of the community must obtain approval from MAC before making exterior
24 changes to their residence. Mr. Funk said that removal of deck railing would have to
25 be approved by MAC. Mr. Funk acknowledged that MAC did give the Respondent
26 approval to replace the wood flashing on Respondent's deck and replace the wood
27 flashing with metal flashing. Mr. Funk said there was no discussion at the time
28 regarding the removal of Respondent's deck railing. Mr. Funk said that Respondent
29 removed the deck railing without approval of MAC. Mr. Funk said that Respondent is

30 _____
¹ See Exhibit No. A (MAC minutes of January 15, 2015).

1 in violation of the Gainey Ranch Community Association's CC&Rs. Mr. Funk said that
2 the MAC's approval would include whatever process was required to complete the
3 approval. Mr. Funk said that the approval to remove the wood flashing and replace it
4 with metal flashing could include the temporary removal of the railing.

5 11. Michael Shotay (hereinafter "Mr. Shotay") testified that in order to remove the
6 wood flashing the railing had to be removed because the railing was attached to the
7 wood flashing. Mr. Shotay said that when he remodeled his deck he moved the railing
8 to the wood flashing on the deck. Mr. Shotay said that railing had to be removed to
9 replace the wood flashing. Mr. Shotay said that he obtained approval from Pavilions to
10 remove the wood flashing. Mr. Shotay said that he was out of the country while the
11 work was performed. Mr. Shotay said that he believed that his representatives went
12 through all of the proper procedures to obtain approval to remove and replace the
13 wood flashing.

14 12. Mr. Shotay testified that his contractor informed him that the railing could not be
15 replaced because the railing was rusted out and rotting. Mr. Shotay said that Tom
16 Tedford was the name of his contractor.² Mr. Shotay said that the existing deck railing
17 could not be reinstalled. Mr. Shotay said that he assumed that he had approval to do
18 whatever was necessary to install the new metal flashing.

19 13. Mr. Shotay acknowledged that pursuant to the CC&Rs the Association is
20 responsible for the maintenance of the deck railing. Mr. Shotay said that he would
21 have repaired the railing if it had been repairable.

22 14. Michael Shotay is the managing member for Respondent.

23 **APPLICABLE CC&Rs REFERENCED AT HEARING**

24 1. Article VIII, Section 5(a) of the Pavilions Council of Co-Owners CC&Rs provides
25 as follows:³

26 (a) No exterior changes whatsoever shall be commenced,
27 erected, maintained, made or done without the prior written
28 approval of the Master Architectural Committee and the prior

29 ² Tom Tedford, Flo-Tech Inc. ROC License No. 153023.

30 ³ See Exhibit No. 2 (Declaration of Covenants, Conditions and Restrictions, for the Pavilions (Satellite Association)).

1 written approval of the Board or any committee established by
2 the Board for that purpose. By way of illustration but not of
3 limitation the following are considered exterior changes:
4 painting, landscaping, except within the enclosed patio,
5 repairs, excavation, patio covers, screens, doors, evaporative
6 coolers, fireplaces, skylights, storage buildings, solar
7 collectors, shade screens, awnings, window coating or tinting,
8 decorative alterations or other work which in any way alters the
9 exterior appearance of any property. The Board, or committee
10 established by the Board for that purpose, may designate
11 design, style, model and manufacturer of any exterior
12 improvement or alteration which is acceptable to the Board.
13 Such designations shall be for the purpose of achieving
14 uniformity of appearance and preservation of property values.

15 CONCLUSIONS OF LAW

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

21 2. The burden of proof at an administrative hearing falls to the party asserting a
22 claim, right, or entitlement and the standard of proof on all issue in this matter is by a
23 preponderance of the evidence. See A.A.C. R2-19-119.

24 3. Proof by “preponderance of the evidence” means that it is sufficient to persuade
25 the finder of fact that the proposition is “more likely true than not.” *In re Arnold and*
26 *Baker Farms*, 177 B.R. 648, 654 (9th Cir. BAP (Ariz.) 1994).

27 4. The single issue presented in this matter is that “Respondent failed to obtain
28 approval from Architectural Committee prior to removing deck railing.” There was no
29 dispute that Petitioners’ gave the Respondent approval to remove the existing wood
30 flashing on the Respondent’s deck and replace it with metal flashing. There was no
dispute that Respondent removed the deck railing. Mr. Shotay credibly testified that
when he remodeled his deck he moved the existing railing to the wood flashing on his

1 deck. Mr. Shotay said that in order to remove the wood flashing the existing railing had
2 to be removed because the railing was attached to the wood flashing.

3 5. Because the Respondent relocated the existing railing to the wood fascia on his
4 deck the Architectural Committee would not have known that it would be impossible to
5 install the new metal fascia without removing the deck railing. Accordingly, the
6 Architectural Committee would not have known that its approval to install new fascia
7 would necessarily include the removal of the existing deck railing. Therefore, the
8 Administrative Law Judge concludes that Respondent failed to obtain approval from
9 Architectural Committee prior to removing deck railing and that Petitioners' Petition
10 should be granted.

11 **RECOMMENDED ORDER**

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

14 It is further ORDERED that Respondent fully comply with the applicable
15 provisions of Article VIII, Section 5(a) of the Pavilions Council of Co-Owners CC&Rs.

16 It is further ORDERED that Respondent pay Petitioners' filing fee of \$550.00, to
17 be paid directly to Petitioners within thirty (30) days of this Order.

18 No civil penalty is found to be appropriate in this matter.

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

22 Done this day, March 11, 2016.

23 /s/ M. Douglas
24 Administrative Law Judge

25 Transmitted electronically to:

26 Debra Blake, Interim Director
27 Department of Fire Building and Life Safety
28
29
30