

1 **Final agency action regarding decision below:**

2
3 **ALJCERT ALJ decision certified as final**

4
5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 ROBERT A. WHITE,

8 Petitioner,

9
10 vs

11 ASPEN SHADOWS CONDOMINIUM
12 ASSOCIATION,

13 Respondent.

No. 16F-H1616001-BFS

ADMINISTRATIVE LAW JUDGE

DECISION

14
15 **HEARING:** March 24, 2016, at 8:30 a.m.

16 **APPEARANCES:** Robert A. White (“Petitioner”) appeared on his own behalf;
17 Aspen Shadows Condominium Association (“Respondent”) was represented by Maria
18 R. Kupillas, Esq., Choate & Seletos.

19 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

20
21 **FINDINGS OF FACT**

22 **BACKGROUND AND PROCEDURE**

23 1. The Department of Fire, Building and Life Safety (the “Department”) is
24 authorized by statute to receive Petitions for Hearings from members of homeowners’
25 associations and from homeowners’ associations in Arizona.

26 2. Respondent is a homeowners’ association whose members own
27 condominiums in the Aspen Shadows Condominium development located in Flagstaff,
28 Arizona.

29 3. Petitioner owns Unit 41 in the Aspen Shadows Condominium development
30 and is a member of Respondent.

1 4. On or about December 28, 2015, Petitioner filed a petition with the
2 Department alleging that Respondent had violated A.R.S. §§ 33-1247, 33-1260, and 33-
3 1253 and Respondent's Covenants, Conditions, and Restrictions ("CC&Rs") in certain
4 respects, in relevant part as follows:

5 [2a.] On 12 October 2015, a water leak occurred coming
6 from the above Unit 42 The leak caused extensive
7 damage to the bathroom and closet. [Respondent] was
8 notified of the leak on 14 October 2015 [Respondent]
9 submitted a claim (3004645187) with Farmers Insurance
10 [and I]ater withdrew the claim because the [deductible] was
11 too high (\$5,000.00). Since claim is cancelled, I am denied
12 the protection and coverage that would be provided from the
13 insurance, a violation of CC&R's Article 8.1 specifically
14 Article 8.1.1(vii)(e)

15 [2b.] On 22 Oct 2014, the grinder pump at my Condo was
16 damaged from storm water run-off caused from an
17 improperly installed diversion wall, a part of the HOA
18 common elements. This violated ARS 33-1247 and CC&R's
19 Article 5 (Repair Common Element Damages).
20 [Respondent] refused to correct this defect. Storm water
21 continues to flow in the grinder and is now damaging the
22 replaced pump, also is damaging the exterior of the air
23 conditioning unit, which is now buried in about a foot of
24 sediment. [Respondent] also refused to pay the cost for the
25 replaced pump (\$1,697.50) and its installation (\$859.34).
26 The wall needs to be removed or corrected to prevent water
27 being diverted which causes the damage.

28 [2c.] The CC&R's Article 4.23 and its amendment prohibit
29 hard floor coverings [.] On 15 Oct 2015, this violation was
30 observed in the Condo unit above mine No violation
was given to the offending unit. I sent a letter 24 Nov 2015
requesting [that Respondent] enforce the violation which
causes undesirable noise disturbance which affects the sale
ability off my unit. [Respondent] has taken no action to
enforce the violation.

[2d.] On 30 Mar 2014 a contract was signed to purchase
[Unit 41]. The Close of Escrow was 30 Apr 2014.
[Respondent] failed to provide the documents required by
ARS 33-1260 which included the Declaration, Bylaws, and
Rules of the Association. [Respondent] did advise an

1 electronic format was available from HOAMCO for a fee.
2 [Respondent] was informed on 21 Apr 2014 the electronic
3 format was unacceptable and the required written
4 documents must be received and reviewed before any such
5 acknowledgement could be given. The required documents
6 were never received. The COE closed as scheduled. This
7 is a violation of ARS 33-1260.

8 5. Respondent's attorney filed an answer to the Petition, denying any violation of
9 the CC&Rs or applicable statute. Respondent's answer provided, in relevant part, as
10 follows:
11

12 [Respondent] denies all of the allegations in Section
13 2(a). [Respondent] carries property insurance on the
14 common elements and units as required by Section 8.1 of
15 the [CC&Rs]. See insurance declaration page at Exhibit B.

16 In response to the loss at the Petitioner's property,
17 [Respondent] submitted a claim to its insurance carrier,
18 Farmers Insurance ("Farmers"). On December 7, 2015,
19 Farmers denied the claim based on exclusions in the policy
20 for damage that occurs over a long period of time. See
21 denial letter attached hereto at Exhibit C.

22 As demonstrated at Exhibit B, [Respondent] carries
23 the insurance required by the [CC&Rs] and is therefore in
24 compliance with Section 8.1. Furthermore, [Respondent] did
25 not deny the Petitioner insurance coverage for this loss.
26 [Respondent] actually submitted a claim to Farmers, and
27 Farmers denied the claim. See Exhibit C.

28

29 [Respondent] denies all of the allegations in Section
30 2(b). [Respondent] has not violated A.R.S. 33-1247 or
Article 5 of its [CC&Rs]. The facilities engineer for the
master association, Flagstaff Ranch, addressed and
repaired any drainage issues in the common elements
adjacent to the Petitioner's unit in Building 14. See letter
attached hereto at Exhibit D. . . .

. . . .

[Respondent] denies all of the allegations in Section
2(c). [Respondent] was unaware of any violation at a
neighboring unit until late November 2015. The Association
cannot be expected to take enforcement action on a violation

1 it did not know existed. In addition, Section 13.20 of the
2 Declaration provides that the Petitioner, when he purchased
3 his unit, assumed the risk that noise and vibrations from
4 other units could be heard in his unit. Pursuant to Section
5 13.20, the Petitioner has agreed that [Respondent] will not
6 be liable for noise from one unit to the other and has
7 released [Respondent] from any claims related to noise
8 issues. . . .
9

10 [Respondent] denies all of the allegations in Section
11 2(d). No violation of A.R.S. 33-1260 exists. This statute
12 allows the Association to provide copies of its governing
13 documents "in either paper or electronic format." See
14 Subsections A and C attached hereto at Exhibit E. Simply
15 because the Petitioner refused to accept the electronic
16 versions of the documents does not mean that [Respondent]
17 failed to provide the documents. Governing documents were
18 provided in electronic format in compliance with the statute.
19 In addition, when [Respondent] received notice of the
20 Petitioner's objection to electronic records, it mailed the
21 Petitioner hard copies of the documents eight days before
22 the closing. See Resale Disclosure Statement and related
23 closing documents attached hereto at Exhibit F. . . .

24 6. A hearing was held on March 24, 2016. Petitioner submitted six exhibits and
25 testified on his own behalf. Respondent submitted five exhibits and presented the
26 testimony of Melanie Lashlee ("Ms. Lashlee"), its community manager.

27 **HEARING EVIDENCE**

28 **Additional Background**

29 7. The Aspen Shadows Condominium development was constructed in
30 approximately 2005.

8. As noted in the petition, Petitioner closed on the purchase of Unit 41 on April
30, 2014.

9. Petitioner resides in Scottsdale and has rented Unit 41 to a tenant since he
purchased it. Petitioner has never lived in Unit 41.

10. At the time of the hearing, Petitioner acknowledged that Unit 41 was under
contract of sale. Petitioner testified that the sale price was \$315,000, but that he paid
\$427,000 for Unit 41 in April 2014. Petitioner testified that the issues raised in the

1 petition, especially the noise from the hardwood floor in Unit 42, reduced the price that
2 he could get for Unit 41.

3 **a. Whether Respondent's Insurance Policy Complies with A.R.S. § 33-1253(A)**
4 **(1) and Section 8.1.1(vii)(e) of the CC&Rs**

5 **Cited Authorities**

6 11. A.R.S. § 33-1253 provides in relevant part as follows:

7 A. Commencing not later than the time of the first
8 conveyance of a unit to a person other than a declarant, the
9 association shall maintain, to the extent reasonably
10 available, both:

11 1. Property insurance on the common elements insuring
12 against all risks of direct physical loss commonly insured
13 against or, as determined by the board of directors against
14 fire and extended coverage perils. . . .

15

16 D. Insurance policies carried pursuant to subsection A of this
17 section shall provide the following:

18

19 3. No act or omission by any unit owner, unless acting within
20 the scope of his authority on behalf of the association, will
21 void the policy or be a condition to recovery under the policy.

22 12. Article 8.1.1 of the CC&Rs regarding insurance and the scope of coverage
23 provides in relevant part as follows:

24 Commencing not later than the date of the first conveyance
25 of a Unit to a purchaser, [Respondent] shall maintain, to the
26 extent reasonably available, the following insurance
27 coverage:

28 (i) Property insurance on the Common Elements and
29 Units, exclusive of improvements and betterments installed
30 in Units by Unit Owners and exclusive of the personal
property of Unit Owners . . . , issued under a form which
provides "All Risk of Direct Physical Loss" coverage

. . . .

(vii) The insurance policies purchased by the
Association shall, to the extent reasonably available, contain

the following provisions:

....

(e) A “severability of interest” endorsement which shall preclude the insurer from denying the claim of a Unit Owner because of the negligent acts of [Respondent] or other Unit Owners.¹

The Parties’ Evidence on the October 2015 Insurance Claim

13. On or about October 14, 2015, Petitioner’s tenant reported water damage in Unit 41 to Ms. Lashlee.

14. Ms. Lashlee dispatched DC Restoration, a licensed contractor whom Respondent uses frequently to assess damage to common elements, to inspect the damage. DC Restoration determined that the source of the water was a leak in the plumbing in Unit 42, which is located above Unit 41.

15. The owner of Unit 42 hired Royal Plumbing, Inc. to fix the leak.

16. Ms. Lashlee testified that she would have reported the claim to Respondent’s insurance carrier, Farmers, on the next day. Ms. Lashlee testified that she asked Farmers to send out an adjuster.

17. Petitioner submitted a letter dated October 21, 2015, from Farmers to Ms. Lashlee regarding “Withdrawal of Claim” that stated on relevant part as follows:

On October 21, 2015, we talked about your property damages for this loss. You explained that you do not wish to pursue this claim. Since you’ve decided to withdraw your claim, we’re no longer investigating and have closed your file.

....

During our discussion, you said your damages were related to faulty construction. You stated that the leak had possibly been ongoing over a long period of time. Since your policy may not cover this type of loss, please review this section of your Condominium Property Coverage Form²

Farmers’ October 21, 2015 letter set forth the referenced policy exclusions, including water damage that was not caused by a “[s]udden and accidental discharge or leakage

¹ Respondent’s Exhibit B at 29-30.

² Complainant’s Exhibit A at 3.

1 of water . . . as a direct result of the breaking apart or cracking of any part of a system
2 or appliance . . .” and “[f]aulty, inadequate or defective . . . [d]esign, specifications,
3 workmanship, repair, [and] construction”³

4 18. Ms. Lashlee testified that she did not understand that sending out an
5 adjuster also meant that Farmers would open a claim. She testified that she may have
6 told the Farmers’ insurance agent that he did not need to open a claim if Farmers sent
7 out an adjuster to determine whether it should open a claim. Ms. Lashlee stated that
8 notwithstanding Farmers’ October 21, 2015 letter, the adjuster continued to investigate
9 the claim.

10 19. Petitioner submitted an email from Respondent’s insurance agent
11 addressed to Petitioner dated November 30, 2015, referring to an attached letter from
12 the adjuster stating that the claim was not able to proceed because “our understanding
13 of what caused the damage to occur does not fall under the definition of a covered
14 loss.”⁴

15 20. Respondent submitted a letter from the Farmers’ insurance adjuster
16 assigned to the claim to Ms. Lashlee dated December 7, 2015, denying the claim under
17 the exclusions referred to in the October 21, 2015 letter, based on the following findings:

18 As you discussed with Senior Field Claims Representative
19 Nicolas Boley on December 7, 2015, his investigation found
20 that the leak in the PEX piping between the two units was
21 the result of a repeated, slow drip that occurred over a long
22 period of time. Nicolas Boley spoke to the plumber who
23 performed the repairs, Kenji Cassady with Royal Plumbing,
24 who confirmed that the pipe was either not installed properly,
25 or was worn out. He further confirmed that the leak was a
26 drip that had saturated wood, drywall and insulation over a
27 period of time. Mr. Cassady wrote a report which we have
28 attached to this letter for your review. Nicolas Boley also
29 spoke to the mitigation contractor, Tyler at DC Restoration,
30 who sent an email to him confirming that, in his opinion, the
drip had been ongoing for approximately a month. Please
see a copy of their email which we have also attached for
your reference. Nicolas Boley also received . . . a
photograph, again attached to this letter, that shows that this

³ Complainant’s Exhibit A at 5.

⁴ See Petitioner’s Exhibit A at 2.

1 leak was a result of a drip in the PEX plumbing system. The
2 evidence Nicolas Boley gathered shows that this leak was a
3 result of a drip in the PEX plumbing system. The evidence
4 Nicolas Boley gathered suggests that the water damages at
5 the location listed above, were the result of a slow drip that
6 occurred over a period of 14 days or more. DC Restoration
7 also stated that they found a small amount of mold onsite
8 that was remediated during the water mitigation process,
9 again suggesting a leak that occurred over a long period of
10 time. Unfortunately, wear and tear, faulty or improper
11 installation, mold, damages caused by mold and water
12 damages that occur over a long period of time are all
13 excluded from coverage under your policy.⁵

14 The letter quoted the referenced insurance police exclusions. Respondent also
15 submitted the referenced letter from Kenji Cassady at Royal Plumbing, Inc., the
16 referenced email from Jacqueline Martinez at Damage Control AZ, which Ms. Lashlee
17 testified was the construction arm of DC Restoration, and the referenced photograph.⁶

18 21. Petitioner testified that he did not agree with Farmers' analysis because
19 PEX pipes do not wear out. Petitioner testified that Respondent had purchased the
20 insurance policy because it was inexpensive and that A.R.S. § 33-1253 and Section
21 8.1.1 of the CC&Rs required Respondent to purchase an insurance policy that covered
22 "all risks," including the risk of a slow leak or defective construction. Petitioner
23 acknowledged that he was not familiar with the kinds of insurance coverage that was
24 commonly available to condominium homeowners' associations.

25 22. Ms. Lashlee testified that she has worked eight years as a community
26 manager, including three years as Respondent's community manager. She is currently
27 a portfolio manager and manages ten associations.

28 23. Ms. Lashlee testified that she played a role in obtaining Respondent's
29 current insurance policy. The usual protocol is if an insurance policy is coming up for
30 renewal, she will shop it around by send other insurance agents a copy of the CC&Rs to
obtain a policy that complies with them at a lower premium if possible.

24. Ms. Lashlee testified that in her eight years' experience, she has never

⁵ Respondent's Exhibit C at 1.

⁶ See Respondent's Exhibit C at 6, 7, and 8.

1 seen an insurance policy that would cover damages caused by a slow leak or faulty
2 installation of plumbing pipes. The only type of water damage that is usually covered is
3 caused by a sudden release of water, such as a frozen pipe that bursts or a fire
4 sprinkler malfunction.

5 **b. Whether Respondent violated A.R.S. § 33-1247 and Section 5 of the CC&Rs**
6 **by Failing to Repair or Replace the Grinder Pump for Unit 41**

7 **Cited Authorities**

8 25. A.R.S. § 33-1247 provides in relevant part as follows:

9 A. Except to the extent provided by the declaration,
10 subsection C of this section or section 33-1253, subsection
11 B, the association is responsible for maintenance, repair and
12 replacement of the common elements and each unit owner
13 is responsible for maintenance, repair and replacement of
14 the unit. On reasonable notice, each unit owner shall afford
15 to the association and the other unit owners, and to their
16 agents or employees, access through the unit reasonably
17 necessary for those purposes. If damage is inflicted on the
18 common elements or any unit through which access is
19 taken, the unit owner responsible for the damage, or the
20 association if it is responsible, is liable for the prompt repair
21 of the damage.

22

23 C. In addition to the liability borne by the declarant as a unit
24 owner under this chapter, the declarant alone is liable for the
25 maintenance, repair and replacement of any portion of the
26 common elements which the declarant reserves the right to
27 withdraw from the condominium, as long as the unit owner
28 maintains that right.

29 26. Section 5.1 of the CC&Rs provides in relevant part as follows:

30 **Duties of the Association.** Except as otherwise provided
for in Section 5.3 below,⁷ and as further provided in Section
5.2 below,⁸ [Respondent] shall inspect, maintain, repair and

7 Section 5.3 of the CC&R's requires unit owners maintain limited common elements consisting of the interior of the garage assigned to their unit or the interior of a patio that they have been allowed to enclose. See Respondent's Exhibit B at 20.

8 Section 5.2 of the CC&R's requires Respondent to inspect the common elements once a year, including the exterior and structural integrity of all buildings, structures, gates, walls, and walkways, the operation of all irrigation systems, fire sprinkler systems, drainage systems and devices, and appearance of landscaping. See Respondent's Exhibit B at 19.

1 replace all Common Elements and Limited Common
2 Elements The cost of all such inspection, maintenance,
3 repairs and replacements shall be a Common Expense and
4 shall be paid for by [Respondent] provided, that the
5 Association may assess the cost of any maintenance, repair
6 or replacement of a Limited Common Element that is
7 allocated exclusively to the use of less than all Units Owners
8 to the Unit Owners benefiting from the Limited Common
9 Elements.⁹

10 Section 1.2.26 of the CC&Rs defines “limited common elements” as follows:

11 **“Limited Common Elements”** means a portion of the
12 Common Elements specifically designated in this
13 Declaration as a Limited Common Element and allocated by
14 this Declaration or by operation of the Condominium Act for
15 the exclusive use of one or more but fewer than all of the
16 Units.¹⁰

17 **The Parties’ Evidence on the Grinder Pump**

18 27. Petitioner explained that the grinder pump is needed to process sewage
19 waste into the Respondent’s sewer or septic system. The parties agreed that because
20 the grinder pump serves only Unit 41, it is a limited common element.

21 28. Petitioner testified that the grinder pump is sensitive to what goes into it.
22 Petitioner testified that the grinder pump was improperly installed to be lower than the
23 grinder pumps for the other units. Petitioner testified that in addition, Respondent
24 constructed a retaining wall to protect the air conditioning unit next to the grinder pump.
25 Petitioner testified that as a result of the improper installation and placement of the
26 retaining wall, yard debris entered into the grinder pump, causing it to malfunction.

27 29. Ms. Lashlee testified that the original developer/general contractor of the
28 Aspen Shadows Condominium development installed the grinder pump and the
29 retaining wall that protects the air conditioning unit for Unit 41 from storm runoff and
30 erosion. Ms. Lashlee testified that Coconino County would have inspected the project,
including the installation of the grinder pumps and retaining walls, before it issued a
certificate of occupancy that allowed units to be sold.

⁹ Respondent’s Exhibit B at 19 (footnotes added).
¹⁰ Respondent’s Exhibit B at 3.

1 30. Ms. Lashlee testified that Ty Hart, the Flagstaff Ranch Facilities Engineer,
2 told her that the grinder pump housing was designed so that if the lid was properly
3 secured, debris could not get into the pump.

4 31. Petitioner testified that on October 21, 2015, the grinder pump for Unit 41
5 failed. Petitioner testified that because waste could not be flushed into the septic or
6 sewer system without an operational grinder pump, on October 22, 2015, he had a new
7 grinder pump installed.

8 32. Petitioner testified that on October 22, 2015, he contacted Respondent to
9 ask it to reimburse him for the cost of replacing the grinder pump. Petitioner testified
10 that Ms. Lashlee told him that nothing could be done.

11 33. Ms. Lashlee testified that she remembers that Petitioner contacted her
12 about the grinder pump, but does not remember that he ever told her that the pump was
13 nonfunctional. Ms. Lashlee testified that she does not remember telling Petitioner that
14 nothing could be done about the pump.

15 34. Ms. Lashlee testified that she asked Mr. Hart, the Flagstaff Ranch Facilities
16 Engineer, to inspect the grinder pump at Unit 41 because he is knowledgeable about
17 the waste system at the condominium development. Respondent submitted Mr. Hart's
18 letter about his inspection, which stated in relevant part as follows:

19 On October 24 we inspected ASC Building 14 and
20 found the lid to unit 41 sitting half off the grinder pump with
21 debris around the pump well as well as in it. We cleaned the
22 inside of the pump well and around the outside to secure the
23 lids. We also ran water into the wells to verify the pumps
24 were still in working order.

25 On October 25, 30 of 2014¹¹ we dug out around the
26 grinder pumps and the Air handlers on building 14 for units
27 40 and 41. Then on October 31 and November 6 2014 we
28 finished the job by hauling and stacking rocks around to help
29 . . . divert the flow of water from around the A.C. units and
30 the grinder pumps. The total time of nine hours was [billed]
to [Respondent].

I am a grade four waste water operator as well as a

¹¹ The events at issue occurred in 2015. Mr. Hart's letter apparently contains a scrivener's error regarding the year that these events occurred.

1 grade four waste water collections and have been in the
2 waste water field for over 14 years. I have troubleshot
3 hundreds of grinder pumps over the years and when this
4 pump was inspected it was in proper working order and the
5 drainage was addressed and repaired.¹²

6 35. Ms. Lashlee testified that Mr. Hart never informed her that the grinder
7 pump at Unit 41 was new.

8 36. Petitioner testified that Mr. Hart inspected the wrong pump. The pump that
9 Mr. Hart inspected was the new pump that Petitioner had installed on October 22, 2015.

10 **c. Whether Respondent violated Section 4 of the CC&Rs by Allowing the**
11 **Owner of Unit 42 to Keep a Hard Floor**

12 **Cited Authorities**

13 37. Section 4.23 of the CC&Rs provides in relevant part as follows:

14 **Restriction on Floor Coverings.** Except for the
15 kitchen/nook, utility room and entryway areas in the Plan C
16 and Plan F Units, as shown on sheets 8 and 9 of the Plat,
17 hard floor coverings (e.g., ceramic tile, natural stone, vinyl,
18 hardwood or laminated flooring) shall be prohibited in all
19 other areas of the Plan C and Plan F Units. Carpet and pad
20 shall be required in all areas where hard floor coverings are
21 prohibited, including, without limitation, the stairwell, to
22 mitigate noise disturbance to the first floor.¹³

23 Section 4.26 of the CC&Rs allows Respondent's Board of directors to grant variances,
24 providing in relevant part as follows:

25 **Variances.** The Board of Directors may, at its option and in
26 extenuating circumstances, grant variances from the
27 restrictions set forth in this Article 4 if the Board of Directors
28 determines in its discretion that: (a) a restriction would
29 create an unreasonable hardship or burden on a Unit Owner
30 or occupant or a change of circumstances since the
31 recordation of this Declaration has rendered such restriction
32 obsolete; and (b) the activity permitted under the variance
33 will not have any substantial adverse effect on Unit Owners
34 and occupants and is consistent with the high quality of life
35 intended for residents of the Condominium.¹⁴

36 ¹² Respondent's Exhibit D.

37 ¹³ Respondent's Exhibit B at 18.

38 ¹⁴ Respondent's Exhibit B at 19.

1 Section 13.20 of the CC&Rs provides in relevant part as follows:

2 **Sound issues; Release of Claims.** Each Unit Owner and
3 occupant of a Unit has read and understands Section 4.19 of
4 this Declaration¹⁵ and acknowledges that the Units are
5 attached residential Units with common walls. Each Unit
6 Owner and occupant of a Unit may hear loud noises and feel
7 vibrations from activities in adjoining Units. Each Unit Owner
8 and occupant of a Unit, for itself and its family, invitees and
9 licensees, acknowledges and agrees as follows:

- 10 (i) Declarant makes no representations or warranties
11 with respect to the level of noise or vibrations that
12 may be heard or felt from Unit to Unit at any point in
13 time;
- 14 (ii) Compliance with Section 4.19 of this Declaration is
15 necessary to attempt to reduce the noise and
16 vibration levels heard and felt within adjacent Units.

17 Each Unit Owner and occupant of a Unit, on behalf of
18 itself and its family, invitees and licensees, assumes the risk
19 that, because the Units are attached residential Units,
20 certain noise and vibrations from other Units may be heard
21 within the Unit and acknowledges that the foregoing was
22 considered in the Unit Owner's decision to purchase a Unit. .
23 . . Neither the Declarant Parties, the Association nor any
24 director, officer, agent or employee of the Association shall
25 be liable to any Unit Owner, occupant of a Unit or its family,
26 invitees or licensees for any claims or damages resulting,
27 directly or indirectly, from any noise or vibrations emanating
28 from one unit to another. . . .¹⁶

29 **The Parties' Evidence on the Hard Floor in Unit 42**

30 38. Petitioner testified that on October 15, 2015, he observed that Unit 42 had
a hard floor installed in it and that he asked Respondent to take affirmative action on the
violation of Section 4.23 of the CC&Rs.

39. Ms. Lashlee testified that Petitioner's complaint was the first notice that
she received that Dave Taylor, the owner of Unit 42, had a hardwood floor. Ms. Lashlee

¹⁵ Section 4.19 prohibits the use of horns, loud music, and other loud noise generating activities that constitute nuisances and are offensive in the attached units. See Respondent's Exhibit B at 18.

¹⁶ Respondent's Exhibit B at 43.

1 testified that Mr. Taylor said that he had installed the hardwood floor in 2008 after he
2 had obtained a variance under Section 4.26 of the CC&Rs.

3 40. Ms. Lashlee testified that she has been going through the archived
4 minutes of Respondent's Board's meetings to locate the variance. Ms. Lashlee testified
5 that when she receives a complaint, she usually performs research on it. Ms. Lashlee
6 testified that after her research is complete, there is always some action taken on the
7 complaint.

8 **d. Whether Respondent violated A.R.S. § 33-1260(A)(1) and (2) by Failing to**
9 **Provide the Bylaws and CC&Rs to Petitioner When He Purchased Unit 41**

10 **Cited Authorities**

11 41. A.R.S. § 33-1260 provides in relevant part as follows:

12 A. For condominiums with fewer than fifty units, a unit owner
13 shall mail or deliver to a purchaser or a purchaser's
14 authorized agent within ten days after receipt of a written
15 notice of a pending sale of the unit, and for condominiums
16 with fifty or more units, the association shall mail or deliver to
17 a purchaser or a purchaser's authorized agent within ten
18 days after receipt of a written notice of a pending sale that
19 contains the name and address of the purchaser all of the
20 following in either paper or electronic format:

- 21 1. A copy of the bylaws and the rules of the association.
22 2. A copy of the declaration.
23

24 B. The association may charge the unit owner a fee of no
25 more than an aggregate of four hundred dollars to
26 compensate the association for the costs incurred in the
27 preparation of a statement or other documents furnished by
28 the association pursuant to this section for purposes of
29 resale disclosure, lien estoppel and any other services
30 related to the transfer or use of the property.

27 **The Parties' Evidence on Whether Respondent Timely Delivered the Bylaws and**
28 **CC&Rs to Petitioner**

29 42. As noted above, Petitioner closed escrow on the purchase of Unit 41 on
30 April 30, 2014. Petitioner testified that on April 1, 2014, he signed a contract to

1 purchase Unit 41 and that on April 11, 2014, he received a letter from Home Wise Docs
2 instructing him how to obtain electronically the documents required by A.R.S. § 33-
3 1260. Petitioner testified that he went to the website but that when he was asked for a
4 credit card number, he did not proceed and instead contacted Respondent.

5 43. Respondent submitted the Resale Disclosure Statement, including a
6 Resale Disclosure fee of \$21.00, Petitioner's signature acknowledging receipt of a letter
7 from HomeWiseDocs.com describing how to obtain Respondent's documents required
8 by A.R.S. § 33-1260 electronically, and his notation that the documents "need to be
9 delivered to me so I may review them before I can make any such acknowledgment"
10 and "I do not agree to an electronic format."¹⁷ The Resale Disclosure Statement also
11 included two notations, "4/22/14 mailed hard copies – f.j."¹⁸

12 44. Ms. Lashlee testified that the initials, "f.j.," belong to Faith Johnson,
13 Respondent's escrow officer. Ms. Lashlee testified that she asked Ms. Johnson to
14 provide a packet of hard copies of the CC&Rs and Bylaws to Petitioner, although
15 usually Respondent provides the copies electronically through paperless delivery. Ms.
16 Lashlee testified that she is confident that Ms. Johnson mailed the documents to
17 Petitioner.

18 45. Petitioner testified that he never received the documents and that the first
19 time he saw the CC&Rs was when he was preparing his administrative complaint
20 against Respondent.

21 CONCLUSIONS OF LAW

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

27
28
29
30

¹⁷ Respondent's Exhibit E at 12.

¹⁸ Respondent's Exhibit E at 7 and 12.

1 2. Petitioner bears the burden of proof to establish that Respondent violated its
2 CC&Rs or applicable statute by a preponderance of the evidence.¹⁹ Respondent bears
3 the burden to establish affirmative defenses by the same evidentiary standard.²⁰

4 3. “A preponderance of the evidence is such proof as convinces the trier of fact
5 that the contention is more probably true than not.”²¹ A preponderance of the evidence is
6 “[t]he greater weight of the evidence, not necessarily established by the greater number of
7 witnesses testifying to a fact but by evidence that has the most convincing force; superior
8 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
9 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather
10 than the other.”²²

11 4. Respondent established that it had an insurance policy from Farmers in effect
12 on October 14, 2015, when Petitioner’s tenant reported water damage in Unit 41 to
13 Respondent, that a Farmers’ adjuster investigated the claim, and that on December 7,
14 2015, Farmers denied the claim under exclusions for a slow drip in the plumbing
15 system. Respondent also established that such exclusions are common in insurance
16 policies that are reasonably available to condominium associations. Petitioner did not
17 establish that Petitioner ever withdrew the claim or that Respondent violated A.R.S. §
18 33-1253 or Article 8.1.1 of the CC&Rs when it obtained the policy, even though
19 Farmers’ eventually denied the claim.

20 5. Petitioner did not establish that the grinder pump was defective and needed
21 to be replaced. Even if he had, because Section 5.1 gave Respondent the right to
22 assess the cost of repair of a limited common element that was used only by
23 Petitioner’s Unit 41, like the grinder pump, any failure by Respondent to take ultimate
24 responsibility for repairing the pump is moot. Petitioner did not establish that
25 Respondent violated Section 5.1 of the CC&Rs or A.R.S. § 33-1247 by failing to
26 reimburse Petitioner for the claimed costs of replacing the grinder pump for Unit 41.
27

28 ¹⁹ See A.R.S. § 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74
29 Ariz. 369, 372, 249 P.2d 837 (1952).

30 ²⁰ See A.A.C. R2-19-119(B)(2).

²¹ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

²² BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

1 6. Petitioner established that the hard floor in Unit 42 potentially violates Section
2 4.23 of the CC&Rs if Mr. Taylor failed to obtain a variance for the floor under Section
3 4.26 of the CC&Rs. Respondent established that it is investigating the installation of the
4 floor. Even if the floor in Unit 42 violates Section 4.23 of the CC&Rs, however, the hard
5 floor was installed in Unit 42 in 2008, six years before Petitioner purchased Unit 41.
6 Section 13.20 of the CC&Rs provides that Petitioner cannot make a claim against
7 Respondent for noise due to construction in adjacent units, especially if he failed to
8 investigate possible excessive noise in Unit 41 due to its location underneath Unit 42
9 before he purchased Unit 41. Petitioner therefore did not bear his burden to establish
10 that Respondent is responsible for Mr. Taylor's potential violation of Section 4.23 of the
11 CC&Rs.

12 7. A.R.S. § 33-1260 allowed Respondent to deliver electronically the CC&Rs
13 and bylaws to Petitioner and to charge him up to \$400.00 to provide the documents.
14 His refusal to accept electronic delivery or to pay for the documents does not make
15 Respondent's usual business practice in providing required documents to purchasers a
16 violation of A.R.S. § 33-1260.

17 **RECOMMENDED ORDER**

18 In view of the foregoing, it is ORDERED that no action is required of Respondent
19 in this matter and that the petition is dismissed.

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

23 Done this day, April 1, 2016.

24 /s/ Diane Mihalsky
25 Administrative Law Judge

26 Transmitted electronically to:

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