

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**

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8 WALTER WARD GRIFFITH, JR,

9 Petitioner,

10 VS

11 ALISANOS COMMUNITY ASSOCIATION,

12 Respondent.

**No. 15F-H1516011-BFS**

**ADMINISTRATIVE LAW JUDGE**

**DECISION**

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17 **HEARING:** March 28, 2016

18 **APPEARANCES:** Walter Ward Griffith, Jr. on his own behalf; Mark Sahl, Esq.  
19 and Greg Stein, Esq. for Respondent

20 **ADMINISTRATIVE LAW JUDGE:** Thomas Shedden

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22 **FINDINGS OF FACT**

23 1. On February 19, 2016, the Arizona Department of Fire, Building and Life  
24 Safety issued a Notice of Hearing setting the above-captioned matter for hearing on  
25 March 28, 2016, at the Office of Administrative Hearings in Phoenix, Arizona.

26 2. The Notice of Hearing shows that Petitioner Walter Ward Griffith, Jr.  
27 alleged that Respondent Alisanos Community Association had violated sections 7.7,  
28 7.21, and 10.3 of the Covenants, Conditions and Restrictions ("CC&Rs").

29 3. At the hearing the parties agreed that the issue for hearing should be  
30 amended to address whether Petitioner was in violation of section 7.7, which provides

1 that no work that alters the exterior appearance of a property may be done without the  
2 approval of Respondent's Architectural Review Committee.

3 4. Respondent alleges that a concrete ring surrounding a jacaranda tree in  
4 Petitioner's yard had not been approved by the Committee. Respondent acknowledged  
5 that it had the burden of proof to show that Petitioner had committed the alleged  
6 violation and that Petitioner would be entitled to a refund of his filing fee if Respondent  
7 did not meet that burden.

8 5. Through a letter dated December 16, 2008, Respondent granted Petitioner  
9 approval to plant the jacaranda tree. The approval notice shows that any improvements  
10 were required to be done in a professional manner and maintained in good condition.  
11 The approval notice also shows that Respondent's Board had the right to conduct an  
12 inspection of the completed improvements.

13 6. The December 16, 2008 approval notice included a sketch or plan  
14 Petitioner submitted with his request. Petitioner's sketch or plan has a number of  
15 squiggly lines including one in the general location of the jacaranda tree. Petitioner  
16 testified that that squiggly line was intended to show the tree ring and so, in his opinion,  
17 the Board had approved the ring when it approved planting of the jacaranda tree.  
18 Petitioner also testified however that the other squiggly lines represent bushes or trees,  
19 not concrete rings.

20 7. Although Petitioner was not required to use standard landscaping symbols  
21 with his request, squiggly lines are typically used to represent trees or bushes in  
22 landscape plans.

23 8. After receiving approval to plant the jacaranda tree, Petitioner spend five  
24 or six months digging the hole and pouring the concrete ring. Petitioner testified that an  
25 "inspector" saw the work and the ring was obviously there, yet Petitioner received no  
26 complaints.

27 9. Through a letter dated April 1, 2009, Respondent informed Petitioner that a  
28 "routine inspection of the community" showed that Petitioner had not completed the  
29 installation of artificial grass that he had received approval to place in his yard and  
30

1 provided that Petitioner was required to do so within fifteen days. The letter does not  
2 provide any information related to the jacaranda tree or ring.

3 10. Petitioner annotated the April 1st letter and requested that the matter be  
4 addressed at a Board meeting to be held on May 13, 2009. A date stamp shows that  
5 Respondent received Petitioner's request on April 15, 2009.

6 11. Board member Brian Moore testified that it was not until 2012 or 2013 that  
7 the area in question started to look odd and become noticeable. According to Mr.  
8 Moore, it was around that time that Respondent learned that the tree ring was present.  
9 Based on the evidence of record, Respondent first provided Petitioner written notice of  
10 its concerns about the tree ring in a letter dated January 7, 2014.<sup>1</sup>

11 12. Through a letter dated October 21, 2015, Respondent informed Petitioner  
12 that the tree ring surrounding the jacaranda tree had not been approved and, as such,  
13 Petitioner was in violation of section 7.7.<sup>2</sup>

14 13. The October 21, 2015 letter provided that the tree ring had not been  
15 evident until the ground around the ring had settled. Petitioner had admitted into  
16 evidence a February 19, 2014 letter from Architectural Review Committee member  
17 Greg Kotsakis to the Committee. On the face of that letter is a comment that the tree  
18 roots are probably lifting the ring, which is why it was now more visible. It is not clear  
19 whether that opinion was Mr. Kotsakis's or someone else had annotated his letter.

20 14. The October 21, 2015 letter provided Petitioner with three potential  
21 remedies: (1) fill the area with properly compacted base fill, which would not require a  
22 review by the Architectural Review Committee; (2) remove the ring, which also would  
23 not require a review by the Architectural Review Committee; and (3) refinish and re-  
24 landscape the area, which would require review by the Architectural Review Committee.

25 15. Petitioner had entered into evidence a video recording of a portion of a  
26 Board meeting conducted on March 8, 2015. Petitioner asserts that during that meeting  
27 the Board, through its member Augustus Shaw, acknowledged that the tree ring had

28 <sup>1</sup> In that letter, Respondent asserts that Petitioner had failed to remove the concrete ring prior to  
29 installation (of the tree). Petitioner had removed a concrete ring from an existing tree, and Respondent  
30 had apparently confused or conflated the two issues.

<sup>2</sup> The letter also informed Petitioner that the condition of his artificial grass was such that he was in  
violation of CC&R sections 7.21 and 10.3. By agreement of the parties, the condition of the grass was  
not addressed at the hearing.

1 been approved. The video does not support Petitioner's assertion, but rather shows that  
2 Mr. Shaw was addressing the artificial grass when he made his comment.

3 **CONCLUSIONS OF LAW**

4 1. Respondent bears the burden of proof; a party asserting an affirmative  
5 defense bears the burden of proving that defense. The standard of proof on all issues in  
6 this matter is that of a preponderance of the evidence. ARIZ. ADMIN. CODE § R2-19-119.

7 2. A preponderance of the evidence is:

8 The greater weight of the evidence, not necessarily established  
9 by the greater number of witnesses testifying to a fact but by  
10 evidence that has the most convincing force; superior  
11 evidentiary weight that, though not sufficient to free the mind  
12 wholly from all reasonable doubt, is still sufficient to incline a  
13 fair and impartial mind to one side of the issue rather than the  
14 other.

15 BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

16 3. Petitioner's assertion that the Architectural Review Committee approved  
17 the tree ring when it approved his planting the jacaranda tree is an affirmative defense.  
18 Petitioner has not proven by a preponderance of the evidence that the tree ring was  
19 approved by the Committee at that time.

20 4. Petitioner installed the tree ring in the early months of 2009. During that  
21 time Respondent conducted at least one "routine inspection" of Petitioner's yard, which  
22 led to his request that the condition of his yard be taken up at a Board meeting in May  
23 2009. In addition, Petitioner testified to the effect that his work was being inspected, and  
24 the approval notice shows that Respondent reserved the right to make such  
25 inspections. The preponderance of the evidence shows that Respondent had  
26 constructive notice of the tree ring in 2009.<sup>3</sup>

27 5. Considering these factors and that it was not until 2014 that Respondent  
28 informed Petitioner of the alleged violation, Respondent has not met its burden to show  
29 that Petitioner is in violation of CC&R section 7.7.

30 **ORDER**

**IT IS ORDERED** that Petitioner be deemed the prevailing party in this matter;

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<sup>3</sup> It is reasonable to conclude that Respondent had actual notice as well, but that conclusion is not necessary to the resolution of this matter.



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/s/ Thomas Shedden  
Administrative Law Judge

Transmitted electronically to:  
Debra Blake, Interim Director  
Department of Fire Building and Life Safety