

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 PROVINCE COMMUNITY ASSOCIATION,

8 Petitioner,

9
10 vs

11 CAROLL GAINES,

12 Respondent.

No. 16F-H1616007-BFS

**ADMINISTRATIVE LAW JUDGE
DECISION**

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15 **HEARING:** June 1, 2016, at 8:30 a.m.

16 **APPEARANCES:** Province Community Association (“Petitioner”) was
17 represented by Mark K. Sahl, Esq., Carpenter, Hazlewood, Delgado & Bolen, PLC;
18 Caroll Gaines (“Respondent”) was represented by Robert J. Metli, Esq., Munger
19 Chadwick, PLC.

20 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

21
22 **FINDINGS OF FACT**

23 **BACKGROUND AND PROCEDURE**

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

27 2. Petitioner is a homeowners’ association whose members own homes in
28 Province, a planned community in Maricopa, Arizona that is mostly restricted to
29 residents who are over 55 years old. The developer of Province, Meritage Homes
30 Corporation (“Meritage”), markets Province to retired persons who want to “retire like
you mean it.” Province is the only 55+ age-restricted community in Maricopa.

1 7. Petitioner's CC&Rs were first recorded at the Pinal County Recorder's Office
2 on May 8, 2014. Article 3, Section 3.1(b) of the CC&Rs provides, in relevant part, as
3 follows:

4 Age Restricted Housing. PROVINCE is intended to provide
5 housing primarily for persons 55 years of age or older,
6 pursuant to HOPA . . .¹ The Property shall be operated as
7 an age restricted community in compliance with any and all
8 applicable Arizona and federal laws. Subject to the
9 foregoing, persons under 19 years of age may stay overnight
10 in a Unit for up to 90 days during the year, but shall not
11 Occupy any Unit. . .²

12 8. On July 28, 2010, an amendment to Section 2.48 of the Concepts and
13 Definitions section of the CC&Rs was recorded with the Pinal County Recorder,
14 providing in relevant part as follows:

15 **“Occupy”, “Occupies”, or “Occupancy** Unless otherwise
16 specified in the Governing Documents, actually residing in
17 the Unit for at least 90 days in the applicable calendar year.
18 **“Occupant”** shall refer to the individual who Occupies a
19 Unit. . .³

20 **HEARING EVIDENCE**

21 9. Respondent purchased her home in Province in 2007, with her husband.
22 Respondent's daughter Barbara moved shortly after Respondent had her husband
23 purchased the home. At some point, Respondent's husband died.

24 10. Beginning in approximately 2012 or 2013, Ms. Gaines started caring for her
25 granddaughter, Ms. Jennings' daughter, during the week at Respondent's home in
26 Province. In 2014 or 2015, Ms. Jennings had another child, a son. After Ms. Jennings'
27 son was born, Ms. Gaines cared for both children during the week at Respondent's
28 home in Province.

29 11. At the time of the hearing, Ms. Jennings' daughter was approximately 9
30 years old and her son was approximately 1½ years old.

12. Respondent suffers from high blood pressure, hemochromatosis, and

¹ The federal Housing for Older Persons Act of 1995. See 24 C.F.R. Part 100 (promulgated by the Department of Housing and Urban Development to implement HOPA's requirements).

² Petitioner's Exhibit 1 at 11 (footnotes added).

³ Petitioner's Exhibit 2 at 1.

1 Meniere's syndrome, and is wheelchair-bound and prone to falling. Respondent
2 testified that as a result, she is disabled and requires 24-hour care.

3 13. On or about August 25, 2015, Respondent requested that Petitioner approve
4 her request for accommodation to allow Ms. Jennings and her great-granddaughter to
5 move in with her so that Ms. Jennings could provide care.⁴

6 14. On or about September 15, 2015, Petitioner informed Respondent that "the
7 Association [was] granting [her] request to have your granddaughter (Alisha Jennings)
8 live with you to provide you with 24-hour care and to allow Ms. Jennings's minor
9 child(ren) to live with their mother at your residence."⁵

10 15. Ms. Jennings testified that because she had exhausted her maternity leave,
11 in September 2015, she returned to work during the day. Respondent's daughter, Ms.
12 Gaines, continued to care for Respondent and for Ms. Jennings' children during the day
13 at Respondent's house. Ms. Jennings testified that she was also going to school on-
14 line.

15 16. Ms. Jennings is a divorced single mother. She testified that because she
16 has moved every year, she has used Respondent's mailing address for several years
17 so that she can receive information from the DMV, hospital bills, and child support
18 payments. She also testified that has used other addresses for her residence.⁶

19 17. In September 2015, some of Respondent's neighbors posted objections to
20 Respondent's minor great-grandchildren being allowed to live with her at her residence
21 in Province because they felt that the practice threatened its age-restricted status.⁷

22 18. On or about September 24, 2015, Ms. Jennings posted a response to the
23 objections, acknowledging that she and her children were temporarily living with
24 Respondent because she needed a caregiver and Ms. Gaines was unable to lift
25 Respondent. Ms. Jennings stated that her mother cared for her children at
26 Respondent's house while Ms. Jennings worked during the day. Ms. Jennings stated
27 that only two of the neighbors objected to her mother caring for her minor children

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29 ⁴ See Respondent's Exhibit A at A-1.

⁵ Respondent's Exhibit A at A-2.

⁶ See Petitioner's Exhibit A.

⁷ See Petitioner's Exhibit A at A-3a and A-3b.

1 during the day.⁸

2 19. On or about October 1, 2015, Petitioner revoked the accommodation
3 previously granted to Respondent to allow her great-grandchildren to move into her
4 house in Province, in relevant part as follows:

5 [T]he Association felt that further investigation was needed
6 into the issue of whether the requested accommodation was
7 necessary in the fashion set forth in your original request to
8 the Association after the Association saw the recent post
9 from your granddaughter on NextDoor.com. The post
10 contained new information of which the Association was not
11 previously aware and prompted a reevaluation of information
12 previously submitted.

13 Based on the information provided with your Reasonable
14 Accommodation Request Verification Form received by the
15 Association on August 25th, it was the Association's
16 understanding that you were requesting your granddaughter
17 to live with you to provide you with 24 hour care. However,
18 based on your granddaughter's post and our discussion, it
19 has come to our attention that your granddaughter is not
20 providing you with 24 hour care. Rather, your
21 granddaughter is working and going to school outside of the
22 home. Also, even if 24 hour care was in fact necessary,
23 there has been no assertion and/or showing by you that
24 arrangements other than your granddaughter and her
25 children moving in with you cannot be made to provide that
26 care without violating the age restriction provisions in the
27 Province CCR's which form the cornerstone for this age-
28 restricted community. Therefore, based on the new
29 information, inconsistencies contained in previously provided
30 information, and the absence of evidence that the requested
accommodation is necessary, as opposed to convenient, the
Association has determined that the accommodation
requested is not necessary to accommodate your disability.

Accordingly, persons under 19 years of age may only stay
overnight in your home for up to 90 days during a calendar
year. It is our understanding from our meeting with you that
your great grandchildren (under the age of 19) have been
staying overnight in your home since September 19, 2015.
Therefore, your granddaughter needs to make other
arrangements for her children so that they are not staying

⁸ See Petitioner's Exhibit 6.

1 overnight in the community after December 19, 2015. Your
2 granddaughter is obviously still welcome in the community
3 as often as necessary to help you with your needs, your
4 great grandchildren are also welcome so long as they are
not staying overnight in the home and are in compliance with
all the provisions of the Association's governing documents.⁹

5 20. Ms. Jennings testified that she moved her children out of Province on
6 December 4, 2015. Ms. Jennings testified that after she finished working, she returned
7 to Province to help Ms. Gaines care for Respondent, then drove her children to their
8 home to sleep.¹⁰ Ms. Jennings testified that her children only stayed overnight at
9 Province on Christmas Eve and Christmas Day and for three or four days in January
10 2016, when the whole family had the flu.

11 21. Respondent testified that Ms. Jennings may return to care for her at night
12 after dropping off her great-grandchildren at their home if she has had a bad day.

13 22. Respondent, Ms. Gaines, and Ms. Jennings testified that they understood
14 that the Respondent's daughter could care for her great-grandchildren during the day,
15 as long as they did not remain overnight in Province.

16 23. Respondent, Ms. Gaines, and Ms. Jennings testified that Ms. Gaines cares
17 for Ms. Jennings' children five days a week, starting at approximately 6 or 6:30 a.m.
18 The older child goes to school at 7:30 a.m. Ms. Jennings picks up the children at
19 approximately 6:30 p.m. or 7:30 p.m., for an average of approximately 60 or 65 hours
20 during week days.

21 24. Respondent, Ms. Gaines, and Ms. Jennings testified that Ms. Jennings
22 usually brings the children to Respondent's house in Province on both weekend days,
23 from approximately 2:30 p.m. until 9:30 or 10:00 p.m., for an additional 14 or 15 hours
24 per week.

25 25. Ms. Clark testified that in July 2013, she and her husband moved three-
26 quarters mile to live in an age-restricted community in Maricopa. Although Ms. Clark
27 has six children and 15 grandchildren, she would not have moved into Province if she
28

29 ⁹ Respondent's Exhibit A at A-4.

30 ¹⁰ There is some indication in the record that Ms. Jennings' children were staying with her uncle or
another family member.

1 had known children would be living across the street.

2 26. Ms. Clark testified that since she moved into Province, children under 19
3 years old have been living in Respondent's house. Ms. Clark testified that the little girl
4 was there all the time and rides her bicycle in the cul-de-sac. Ms. Clark testified that the
5 white car that Ms. Jennings drove was in the driveway on most nights. After the car
6 stopped running, Respondent, Ms. Gaines, and Ms. Jennings shared a Traverse, which
7 was parked in the driveway of Respondent's home on most nights. Ms. Clark testified
8 that she is able to see the cars because her bathroom is in the front of her house, facing
9 Respondent's house.

10 27. Ms. Clark explained that the 90 overnight visits allowed in Petitioner's
11 CC&Rs were to allow residents to have visits with their grandchildren during the
12 summer vacation and winter holidays.

13 28. Ms. Kuzmic testified that the Advisory Committee received complaints about
14 the young children who were living at Respondent's house. Ms. Kuzmic testified that if
15 Petitioner did not enforce the CC&Rs, it could jeopardize Province's age-restricted
16 status and homeowners' investments.

17 **CONCLUSIONS OF LAW**

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

23 2. Petitioner bears the burden of proof to establish that Respondent violated its
24 CC&Rs or bylaws by a preponderance of the evidence.¹¹ Respondent bears the burden
25 to establish affirmative defenses by the same evidentiary standard.¹²

26 3. "A preponderance of the evidence is such proof as convinces the trier of fact
27 that the contention is more probably true than not."¹³ A preponderance of the evidence is
28 "[t]he greater weight of the evidence, not necessarily established by the greater number of

29 ¹¹ 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
30 Ariz. 369, 372, 249 P.2d 837 (1952).

¹² See A.A.C. R2-19-119(B)(2).

¹³ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 witnesses testifying to a fact but by evidence that has the most convincing force; superior
2 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
3 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather
4 than the other.”¹⁴

5 4. Article 3, Section 3.1(b) allows children who are under nineteen years old to
6 stay overnight in a unit for 90 days or less, but prohibits them from occupying a unit.
7 Section 2.48 defines occupancy as “actually residing in a unit for at least 90 days.” The
8 best and most reliable index of the meaning of a CC&R or a bylaw is its language and,
9 when the language is clear and unequivocal, it is determinative of the meaning of the
10 CC&R.¹⁵ Each word, phrase, clause, and sentence must be given meaning so that no
11 part of the CC&R will be void, inert, redundant, or trivial.¹⁶ But in interpreting a CC&R,
12 the problems that it was designed to address must be considered.¹⁷

13 5. Reside means “to dwell permanently or for a considerable time.”¹⁸ Eighty or
14 85 hours per week is a considerable time. Residence “usu. just means bodily presence
15 as an inhabitant in a given place; *domicile* usu. requires bodily presence plus an
16 intention to make the place one’s home.”¹⁹ If an overnight stay for more than ninety
17 days were required for occupancy, all the homeowners in Province could provide
18 childcare services to their grandchildren or others seven days a week from before
19 sunrise until well after sunset. Province would no longer be an age-restricted
20 community because the exception would have swallowed the rule.

21 6. Therefore, Petitioner has established that at least since August 2015,
22 Respondent continuously violated Article 3, Section 3.1(b) of the CC&Rs.

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25 **RECOMMENDED ORDER**

26 ¹⁴ BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

27 ¹⁵ See *Jansen v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991) (quoted in *Bentivegna*,
206 Ariz. at 587 ¶ 20, 81 P.3d at 1046).

28 ¹⁶ See *Walker v. City of Scottsdale*, 163 Ariz. 206, 210, 786 P.2d 1057, 1061 (App. 1990) (citing *City of*
Phoenix v. Yates, 69 Ariz. 68, 72, 208 P.2d 1147, 1149 (1949); *United States v. Mehrmanesh*, 689 F.2d
29 822 (9th Cir. 1982)).

30 ¹⁷ See *Bogue v. Better-Bilt Aluminum Co.*, 179 Ariz. 22, 32, 875 P.2d 1327, 1337 (App. 1994).

¹⁸ <http://www.dictionary.com/browse/reside>.

¹⁹ BLACK’S LAW DICTIONARY, *supra*, at 1335.

1 In view of the foregoing, it is ORDERED that Respondent shall comply with
2 Article 3, Section 3.1(b) of the CC&Rs.

3 It is FURTHER ORDERED that pursuant to A.R.S. § 41-2198.02(A), that
4 Respondent shall pay to Petitioner the filing fee required by A.R.S. § 41-2198.01.

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

8 Done this day, June 6, 2016.

9 /s/ Diane Mihalsky
10 Administrative Law Judge

11 Transmitted electronically to:

12 Debra Blake, Interim Director
13 Department of Fire Building and Life Safety
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