

1 3. On April 22, 2019, the Department notified the Association of Petitioner's
2 petition.³ The Association was advised that it had until May 17, 2019, to supply a written
3 ANSWER to the Department.⁴

4 4. On or about May 14, 2019, the Association filed its ANSWER with the
5 Department whereby it denied all complaint items in the petition.⁵

6 5. Per the NOTICE OF HEARING, the Department referred this matter to the
7 Office of Administrative Hearings ("OAH"), an independent state agency, for an
8 evidentiary hearing on July 19, 2019, regarding the following issue(s) based on
9 Petitioner's petition:

10 **Whether Clemente Ranch Homeowners Association (Respondent)**
11 **violated Community Document Bylaws Article 3.11(A)(5).⁶**

12 **THE PARTIES AND GOVERNING DOCUMENTS**

13 6. Respondent is a homeowners' association whose members own
14 properties in a residential real estate development located in Chandler, Arizona.
15 Membership for the Association is compromised of the Clemente Ranch subdivision.⁷

16 7. Petitioner is a Clemente Ranch subdivision property owner and a member
17 of the Association.

18 8. The Association is governed by its Declaration of Covenants, Conditions,
19 and Restrictions ("CC&Rs")⁸ and Bylaws⁹, and overseen by a Board of Directors ("the
20 Board"). The Association is also regulated by Title 33, Chapter 16, Article 1 of the
21 Arizona Revised Statutes ("ARIZ. REV. STAT.").

22 **HEARING EVIDENCE**

23 9. Petitioner testified on her own behalf and submitted six exhibits.
24 Respondent called Jaime Therrien, community manager, as a witness and submitted
25 fourteen exhibits. The Agency Record from the Department, including the NOTICE OF
26 HEARING, was also admitted into the evidentiary record.

27 ³ See HO19-19058_Notice_Petition.pdf.

28 ⁴ *Id.*

29 ⁵ See HO19-19058_Response_Petition.pdf.

30 ⁶ See HO19-19058_Notice_Hearing.pdf.

⁷ See Respondent Exhibit E.

⁸ Filed on July 11, 1994, in the Maricopa County Recorder's Office.

⁹ Adopted by the Association's Board of Directors on of July 08, 1994.

Petitioner's testimony

1
2 10. Petitioner is being assessed a fifty percent fee of \$9,342.60 for repair of a
3 wall between her property, #8B0049¹⁰, and a common area that lies on Queen Creek
4 Road.¹¹

5 11. The common area is owned and maintained by the Association.

6 12. Petitioner argues that her back walls meet the definition of a common
7 area, and that for several years the Association was of the same belief because it
8 provided maintenance, repair, and landscaping services in the area.¹²

9 13. At some point in 2012 Petitioner's back walls showed signs of
10 deterioration.

11 14. In December 2012, Petitioner received a notice advising her that her back
12 walls would be repaired per Board of Director Meeting Minutes dated November 26,
13 2012.¹³

14 15. The November 26, 2012, Meeting Minutes state, in pertinent part,
15 "Resolved: To send a letter to the owners of Lot # 8A0126, #8A0128, #8B0038,
16 #8B0044 and #8B0049 advising of the plans to add reinforcement columns to the
17 Association side (south side) of their rear yard walls."¹⁴

18 16. November 26, 2012, Meeting Minutes specifically note that, "The letter will
19 indicate that because the cost to repair and reinforce the walls along Queen Creek
20 Road is less than \$20,000.00, the Board believes its more efficient to have the
21 Association pay for the cost of the wall repair and landscape work needed in the
22 common area along Queen Creek; however the homeowners will need to pay for any
23 damage or landscape work on their side of the wall."¹⁵ [sic]

24 17. February 12, 2013, Meeting Minutes state, in pertinent part, "Resolved: To
25 have Sunset Fence proceed with the proposal to renovate the wall along Queen Creek
26 at a cost of \$16,678.12 plus \$1,000 for engineering plans and permitting."¹⁶

27 ¹⁰ See Petitioner Exhibit 1.

28 ¹¹ See Petitioner Exhibit 5.

29 ¹² See Petitioner Exhibit 6; see also Respondent Exhibits B, F, and L.

30 ¹³ See HO19-19058_Minutes 11.26.2012.pdf.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See HO19-19058_Minutes 02.12.2013.pdf.

1 18. Petitioner opined, per the third amendment of the CC&Rs¹⁷, that one
2 portion of her back wall is classified as “a boundary wall adjoining the common area”
3 and the other portion of her back wall is classified as a “boundary wall adjacent to the
4 common area.” Petitioner denies that either of her back walls may be classified as a
5 “party wall.”

6 19. In accordance with section 1.11 of the CC&Rs¹⁸, the Tract B common area
7 adjacent to Petitioner’s boundary wall has always been maintained by the Association.

8 20. In March 2019 Petitioner’s adjacent boundary wall was torn down by the
9 Association and replaced with a chain-link fence.¹⁹ No action was taken on Petitioner’s
10 adjoining boundary wall by the Association.

11 21. In May 2019 the Association added plywood to the chain-link fencing on
12 Petitioner’s adjacent boundary wall.²⁰

13 22. On June 04, 2019, Petitioner received a letter from the Association
14 advising that it had retained new legal counsel because its prior counsel advised them
15 incorrectly regarding the parties’ rights and responsibilities of wall repair and
16 maintenance in the community.²¹

17 23. Petitioner argues that Respondent violated Article 3.11(A)(5) of the
18 Association’s Bylaws²² by failing to repair the wall located between her property and a
19 common area.

20 ¹⁷ See Respondent Exhibit A. Filed as of January 17, 1996, in the Maricopa County Recorder’s Office.

21 ¹⁸ Section 1.11 defines “Common Area” in pertinent part, to mean (a) Tracts A-E as shown on the plat of
22 Parcel 8A of Clemente Ranch, (b) Tracts A-H as shown on the plat of Parcel 12 of Clemente Ranch, (c)
23 the Tracts (but not the Lots) described on Exhibit ‘B’ attached hereto, (d) the Project boundary walls
24 located adjacent to Common Areas on the boundary lines of Lots, and (e) any property deeded to and
25 accepted by the Association in the future for use of maintenance provided such property has been
26 subjected to the Declaration pursuant to the Provisions of the Declaration.

27 ¹⁹ See Petitioner’s Exhibit 6.

28 ²⁰ *Id.*

29 ²¹ See Petitioner Exhibit 4.

30 ²² See HO19-19058_Clemente-bylaws.pdf at page 10. 3.11(A)(5) states, “The Board shall have all of the
powers and duties necessary for the administration of the affairs of the Association and may do all such
acts and things as are not by the Project Documents required to be exercised or done by the Members. In
addition to the duties imposed by these Bylaws or by any resolution of the Members that may hereafter be
adopted, the Board shall have the following powers and duties: Provide for the operation, care, upkeep
and maintenance of all of the Common Area and borrow money on behalf of the Association when
required in connection with the operation, upkeep and maintenance for said areas; provided, however, the
consent of Members having at least two-thirds (2/3) of the total votes in the Association shall be obtained
either in writing or at a meeting called and held for such purposes in accordance with the provisions of
these Bylaws in order for the Association to borrow in excess of \$5,000.”

1 Jaime Therrien's testimony

2 24. On April 06, 1993, the Association was formed as a nonprofit
3 corporation.²³ Among the Association's duties to its members, is the duty to maintain all
4 common areas.²⁴

5 25. When maintenance issues arise the Association obtains bids for
6 necessary work, and oftentimes employs the use of subject-matter experts to assist it in
7 making determinations on what work should be undertaken, by whom, and how.

8 26. When the issue(s) regarding the subdivision's walls were brought to the
9 Association's attention, the Association consulted with its legal counsel and decided to
10 hire a structural engineering firm to investigate.²⁵

11 27. On June 19, 2018, a report and evaluation of the subdivision's walls was
12 delivered to the Association's Board with repair recommendations.²⁶

13 28. On October 04, 2018, the Association opened a requisition for contracting
14 bids for the wall project, which was scheduled to close on October 24, 2018.²⁷

15 29. On January 02, 2019, the Association issued a notification to its members
16 whereby it provided a two-page spreadsheet that tabulated three bids.²⁸

17 30. On January 03, 2019, the Association's Board voted to select a bid
18 submitted by Berlin Precision Construction ("BPC"). The Board's president signed a
19 \$129,203.00 contract with BPC for the repair of the subdivision's walls on January 13,
20 2019.²⁹

21 31. On February 25, 2019, BPC started construction on the wall project.

22 32. Shortly thereafter the Association was informed that latent defects were
23 present in the original construction of the subdivision's walls, and that the current project
24 could not cure or repair the inherent defects.

25 33. On July 02, 2019, the Board met in executive session and decided to
26 issue a special assessment for the new wall project.³⁰ The Association's coffers were

27 ²³ *Id.*

28 ²⁴ See HO19-19058_Clemente CC R.pdf.

29 ²⁵ See Respondent Exhibit G.

30 ²⁶ See Respondent Exhibit H.

²⁷ See Respondent Exhibit I.

²⁸ See Respondent Exhibit J.

²⁹ See Respondent Exhibit K.

³⁰ See Respondent Exhibit M.

1 underfunded and it had only been able to secure a \$1,500,000.00 loan to cover
2 associated repair costs.

3 34. Bids were returned for the new wall project ranging from \$2,500,000.00 to
4 \$3,100,000.00.

5 35. As of the date of the hearing no further action had been taken on the new
6 wall project because Association members have not voted on the special assessment.

7 36. Notably, the Association is trying to create a committee comprised of
8 members to oversee the new wall project.³¹

9 **CONCLUSIONS OF LAW**

10 1. This matter lies within the Department's jurisdiction. Pursuant to ARIZ. REV.
11 STAT. §§ 32-2102 and 32-2199 et al., regarding a dispute between an owner and a
12 planned community association, the owner or association may petition the department
13 for a hearing concerning violations of community documents or violations of the statutes
14 that regulate planned communities as long as the petitioner has filed a petition with the
15 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

16 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(D), 32-2199.02,
17 and 41-1092, OAH has the authority to hear and decide the contested case at bar.

18 3. In this proceeding, Petitioner bears the burden of proving by a
19 preponderance of the evidence that Respondent violated Bylaw Article 3.11(A)(5).³²
20 Respondent bears the burden to establish affirmative defenses by the same evidentiary
21 standard.³³

22 4. "A preponderance of the evidence is such proof as convinces the trier of
23 fact that the contention is more probably true than not."³⁴ A preponderance of the
24 evidence is "[t]he greater weight of the evidence, not necessarily established by the
25 greater number of witnesses testifying to a fact but by evidence that has the most
26 convincing force; superior evidentiary weight that, though not sufficient to free the mind
27

28 ³¹ See Respondent Exhibit N.

29 ³² See ARIZ. REV. STAT. § 41-1092.07(G)(2); ARIZ. ADMIN. CODE R2-19-119(A) and (B)(1); see also *Vazanno*
v. Superior Court, 74 Ariz. 369, 372, 249 P.2d 837 (1952).

30 ³³ See ARIZ. ADMIN. CODE R2-19-119(B)(2).

³⁴ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one
2 side of the issue rather than the other.”³⁵

3 5. Bylaws must be construed to avoid an absurdity.³⁶

4 6. The crux of Bylaw Article 3.11(A)(5) is that the Association is required to
5 maintain common areas in the subdivision, and borrow money for this purpose with the
6 consent of its members.

7 7. Here, both parties presented evidence in direct conflict regarding what
8 areas of the subdivision constitute “common areas” as defined by the Association’s
9 governing documents. Petitioner’s, however, presented more substantially persuasive
10 and credible evidence.

11 8. The evidence of record establishes that Petitioner’s back walls, one
12 adjoining and one adjacent to the Association’s common area, faces a public roadway.
13 The Association has always been responsible for the maintenance, repair, and
14 landscaping of said common area. In 2012 when the Association discovered that the
15 walls at issue needed repair, it took action to make necessary repairs. The Board voted
16 to hire an engineer, the Board voted to approve the engineer’s proposed remediations,
17 and the Board voted to approve the costs associated with repairs. Once the Association
18 discovered that the necessary repairs were grander in all aspects, the Board voted to
19 secure a loan to cover the associated expenses. However, it was not until the
20 Association realized that the loan failed to cover its increased expenses that the
21 Association decided to require homeowners, including Petitioner, to make financial
22 contributions.

23 9. The evidence of record also establishes that Respondent tore down
24 Petitioner’s adjacent boundary and replaced it with a chain-link fence and some
25 plywood. Petitioner’s wall remains in this state as of the date of the hearing.

26 10. Because Petitioner has established by a preponderance of the evidence
27 that the Association, over the course of the past seven years, has not maintained the
28 underlying common area at issue, Petitioner has also established a violation of Bylaw
29 Article 3.11(A)(5).

30 ³⁵ BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

³⁶ See *Mail Boxes v. Industrial Comm’n of Arizona*, 181 Ariz. 119, 122, 888 P.2d 777, 780 (1995).

11. Therefore, Petitioner's petition shall be granted.

ORDER

In view of the forgoing,

IT IS ORDERED that Petitioner's petition is granted.

IT IS FURTHER ORDERED that Respondent comply with Article 3.11(A)(5) of its Bylaws.

NOTICE

Pursuant to ARIZ. REV. STAT. §32-2199.02(B), this ORDER is binding on the parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. § 32-2199.04. Pursuant to ARIZ. REV. STAT. § 41-1092.09, a request for rehearing in this matter must be filed with the Commissioner of the Department of Real Estate within thirty (30) days of the service of this ORDER upon the parties.

Done this day, August 07, 2019.

/s/ Jenna Clark
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate

Transmitted US Mail to:

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