

1 so that the flat roof would not be visible to neighboring properties, pursuant to Article
2 1.34 of PMPE's Covenant, Conditions, and Restrictions (CC&Rs).

3 9. PMPE CC&R 1.34 provides:

4 "Visible From Neighboring Property" means, with respect to
5 any given object, that such object is or would be visible to a
6 person six feet tall, standing at ground level on any part of
7 the adjoining Lot or Common Area. Notwithstanding the
8 foregoing, an object in a back yard, which back yard is
9 enclosed by a wall, which does not exceed the height of the
10 wall enclosing the back yard shall not be deemed to be
11 Visible From Neighboring Property.

12 10. On or about May 10, 2019, Mr. Archer filed a petition with the Arizona
13 Department of Real Estate (ADRE) alleging that PMPE had violated Arizona Revised
14 Statutes (A.R.S.) § 33-1817(3). Mr. Archer alleged that PMPE unreasonably withheld
15 approval of his plan for a garage addition with a flat roof that would exceed the height of
16 the adjacent wall.

17 11. The matter was referred to the Office of Administrative Hearings for an
18 evidentiary hearing.

19 12. On or about June 18, 2019, the ADRE issued a Notice of Hearing which
20 provided, in relevant part, "The Petitioner alleges that [PMPE] violated A.R.S. § 33-
21 1817(3)."

22 13. A hearing was held on August 12, 2019.

23 14. At hearing, Mr. Archer testified on behalf of himself. PMPE presented the
24 testimony of Keith Scott Kauffman, a member of the PMPE Board of Directors.

25 15. Mr. Archer contended that the design plan for his proposed garage
26 addition was harmonious with the surrounding structures. Mr. Archer asserted that the
27 flat roof that he would connect to his existing pitched roof would look similar to the other
28 side of this home which has a pitched roof and a flat top patio. Mr. Archer also
29 contended that PMPE does not consistently enforce the CC&Rs against other
30 homeowners, but attempts to enforce the CC&Rs against him. Mr. Archer contended
that PMPE has previously approved other homeowners to add patios to their homes
which were not in harmony with the surrounding structures. Mr. Archer contended that

1 PMPE allowed a homeowner to keep a kitchen countertop in his front yard for almost a
2 year and a cart for longer than the allowable timeframe under the governing rules.
3 Mr. Archer contended that PMPE's enforcement of the CC&Rs is arbitrary and
4 discriminatory.

5 16. PMPE denied that it failed to enforce the CC&Rs against a homeowner
6 that had kept a countertop in his front yard for almost a year. PMPE denied that it
7 approved the construction of patio additions that were not harmonious with the
8 surrounding structures.

9 17. PMPE contended that the CC&Rs provide that pitched roofs are an
10 important part of the visual environment and should predominate. PMPE contended
11 that the architectural design must be harmonious with surrounding structures. PMPE
12 argued that it reasonably required that Mr. Archer construct a pitched roof on his garage
13 addition, because his existing garage had a pitched roof. Furthermore, PMPE was
14 willing to allow Mr. Archer to construct a garage addition with a flat roof if the roof was
15 not visible to neighboring properties, pursuant to CC&R 1.34.

16 18. Article 5.10 of the PMPE CC&Rs provides, in relevant part, as follows:

17 The Board may appoint an Architectural Committee to
18 perform certain architectural control functions set forth in this
19 Declaration.....

20 The Board, or the Architectural Committee if so appointed,
21 may promulgate architectural design, with particular regard
22 to the harmony of the design with the surrounding structures
23 and topography;

24 19. Section 4.4 of the PMPE Architectural Rules provides, in relevant part, as
25 follows:

26 Since roofscapes will form an important part of the visual
27 environment, they must be carefully designed. It is intended
28 that pitched roofs predominate. Pitched roofs shall be hipped
29 whenever possible and may have a maximum slope of five
30 to 12 feet (5' to 12').....

Roof projections and overhangs are encouraged as a
response to energy and climate concerns...

1 All flat roof patio areas must have parapets.
2

3 **CONCLUSIONS OF LAW**

4 1. The ADRE has authority over this matter. See A.R.S. Title 32, Ch. 20,
5 Art. 11.

6 2. At an administrative hearing, the party asserting a claim, right, entitlement,
7 or affirmative defense has the burden of proof, and the standard of proof on all issues in
8 this matter is that of a preponderance of the evidence. Arizona Administrative Code R2-
9 19-119.

10 3. A preponderance of the evidence is:

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

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

19 4. The CC&Rs are a contract between the parties and the parties are
20 required to comply with its terms. See *Johnson v. The Pointe Community Association*,
21 205 Ariz. 485, 73 P.3d 616 (App. 2003).

22 5. In Arizona, when a restrictive covenant is unambiguous, it is enforced to
23 give effect to the intent of the parties. See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9,
24 125 P.3d 373, 376 (2006); see also *Grubb & Ellis Management Services, Inc. v. 407417*
25 *B.C., L.L.C.*, 213 Ariz. 83, 138 P.3d 1210 (App. 2006) (the tribunal must give effect to a
26 contract's clear and unambiguous terms).

27 6. An association shall not unreasonably withhold approval of a construction
28 project's architectural plans. See A.R.S. § 33-1817(3).

29 7. Mr. Archer submitted plans to the Board for the construction of
30 a garage addition with a flat roof that would exceed 9 feet in height. The weight of the
evidence shows that PMPE Architectural Rules provide that pitched roof were should
predominate, and that Mr. Archer's plans to construct a flat roof was not harmonious
with the surrounding structures, including, but not limited to, the pitched roof on

1 Mr. Archer's existing garage.

2 8. The preponderance of the evidence provided at hearing established that
3 the Board reviewed the plans and specifications submitted by Mr. Archer for the
4 construction of the garage addition and reasonably determined that the plans for were
5 not consistent with the CC&Rs and Architectural Rules.

6 9. Upon consideration of all of the evidence presented at hearing, the
7 Administrative Law Judge concludes that Mr. Archer failed to prove by a preponderance
8 of the evidence that PMPE violated A.R.S. § 33-1817(3).

9 **ORDER**

10 In view of the foregoing,

11 **IT IS ORDERED** that Respondent be deemed the
12 prevailing party in this matter.

13 **IT IS FURTHER ORDERED** that this petition be dismissed.

14 **NOTICE**

15 Pursuant to A.R.S. § 32-2199.02(B), this Order is binding on the parties unless a
16 rehearing is granted pursuant to ARIZ. REV. STAT. section 32-2199.04. Pursuant to
17 A.R.S. § 41-1092.09, a request for rehearing in this matter must be filed with the
18 Commissioner of the Department of Real Estate within 30 days of the service of
19 this Order upon the parties.

20 Done this day, September 3, 2019.

21 /s/ Velva Moses-Thompson
22 Administrative Law Judge

23 Transmitted electronically to:

24 Judy Lowe, Commissioner
25 Arizona Department of Real Estate
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