

1 7. Mr. Nickell and his wife bought a lot at 4835 Marina View in August 2018.
2 Mr. Nickell also owns other property within the Association.

3 8. The Marina View lot formerly had a house on it and it still has a garage.

4 9. Mr. Nickell requested approval to build a home with an attached RV
5 garage that would have a height of seventeen feet. That request was denied.

6 10. Mr. Nickell asserts that the Association has allowed others to build homes
7 with heights greater than fifteen feet and he asserts that the Association previously
8 considered the "lot grade" to be the "highest buildable point."

9 11. In support of his position, Mr. Nickell presented photographs showing
10 houses with RV garages that are more than fifteen feet in height.

11 12. Mr. Nickell presented evidence showing that the home next to his lot is at a
12 higher elevation and that if his home is built as he requests, it will be six to eight feet
13 lower than the neighboring home.

14 13. Mr. Nickell testified to the effect that considering the elevation difference
15 between his lot and the neighboring lots, a home that is seventeen feet in height will not
16 affect his neighbors' views.

17 14. The Association enforces the CC&Rs' height restriction not to preserve
18 any member's views, but rather as a matter of fairness.

19 15. The Association allows members to excavate down from the lot grade to
20 accommodate buildings that are more than fifteen feet tall. The lots that Mr. Nickell
21 identifies as having structures that are more than fifteen feet tall have done so in
22 compliance with the CC&Rs by excavating down from the lot grade.

23 16. Correspondence that Mr. Nickell included with his petition shows that the
24 Association considers the grade at which the original house was located to be the lot
25 grade and the highest buildable point. Through its letter, the Association informed Mr.
26 Nickell that he could excavate down from that grade and build the house and garage
27 with a total height of seventeen feet two inches and remain in compliance with the
28 CC&Rs.

29 17. Mr. Nickell asserts that he cannot excavate to accommodate a seventeen
30 foot building because the lot would not drain properly.

1 18. Mr. Nickell testified that the Association has suggested that he reverse the
2 footprint of the proposed house, but that would affect his own views and it would affect
3 his ability to use a bathroom in the existing garage, so he has rejected that idea.

4 19. The Association considers the highest buildable point or elevation to be an
5 area inside the required setbacks that can accommodate a structure with 800 square
6 feet of livable space.

7 20. Mr. Nickell presented plans purporting to show that the lot had been
8 excavated down by about 3.4 feet from the highest buildable point. As such, he argues
9 that he should be allowed to build a home that is 18.4 feet high.

10 21. Mr. Clark provided credible and un rebutted testimony that the "highest
11 buildable point" identified by Mr. Nickell is not within the required setbacks.

12 22. The Association acknowledges that it granted a waiver to allow a home to
13 be built that was seventeen feet high as measured from the lot grade. That home was
14 one of six waterfront lots on the west side of Highway 95.

15 **CONCLUSIONS OF LAW**

16 1. The Department of Real Estate has authority over this matter. ARIZ. REV.
17 STAT. Title 32, Ch. 20, Art. 11.

18 2. Mr. Nickell bears the burden of proof, and the standard of proof on all
19 issues in this matter is that of a preponderance of the evidence. ARIZ. ADMIN. CODE § R2-
20 19-119.

21 3. A preponderance of the evidence is:

22 The greater weight of the evidence, not necessarily established
23 by the greater number of witnesses testifying to a fact but by
24 evidence that has the most convincing force; superior
25 evidentiary weight that, though not sufficient to free the mind
26 wholly from all reasonable doubt, is still sufficient to incline a fair
27 and impartial mind to one side of the issue rather than the other.
28 BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

29 4. "Notwithstanding any provision in the community documents: ... 3.
30 Approval of a construction project's architectural designs, plans and amendments shall
not unreasonably be withheld." ARIZ. REV. STAT. § 33-1817(B).

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Done this day, December 6, 2019.

/s/ Thomas Shedden
Thomas Shedden
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile December 6, 2019 to:

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By FDS