

1 6. Section 11 allows the Association to waive or vary the height restriction in
2 "its discretion" in circumstances where the height restriction "would cause extreme or
3 material hardship" to the parcel owner.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 **CONCLUSIONS OF LAW**

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

22 2. Mr. Nickell bears the burden of proof, and the standard of proof on all
23 issues in this matter is that of a preponderance of the evidence. ARIZ. ADMIN. CODE § R2-
24 19-119.

25 3. A preponderance of the evidence is:

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

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

4 5. The CC&Rs are a contract between the parties and the parties are
5 required to comply with its terms. See *Johnson v. The Pointe Community Association*,
6 205 Ariz. 485, 73 P.3d 616 (App. 2003).

7 6. In exercising its authority under the CC&Rs, the Association must act
8 reasonably. See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165
9 P.3d 173 (App. 2007).

10 7. Section 6 of the CC&Rs limits the height of structures to fifteen feet above
11 lot grade. The preponderance of the evidence shows that the Association considers the
12 lot grade to be the highest buildable point, which in this case is the elevation at which
13 the former house was located. The Association allows members to excavate down from
14 the highest buildable point to accommodate structures that are taller than fifteen feet,
15 and it has informed Mr. Nickell that he could excavate down and build his house without
16 violating the CC&Rs. This was not unreasonable, and Mr. Nickell has not proven that
17 the Association violated ARIZ. REV. STAT. section 33-1817(B)(3).

18 8. Section 11 of the CC&Rs allows the Association to grant a waiver from the
19 fifteen foot limit in cases of "extreme or material hardship." Mr. Nickell has not proven
20 that adhering to the height restriction of section 6 presents an extreme or material
21 hardship.

22 9. Because Mr. Nickell has not met his burden to show that the Association
23 violated ARIZ. REV. STAT. section 33-1817(B)(3), his petition should be dismissed.

24 **ORDER**

25 **IT IS ORDERED** that Robert S. Nickell's petition is dismissed.

26 **NOTICE**

27 **Pursuant to ARIZ. REV. STAT. section 32-2199.02(B), this Order is binding on the**
28 **parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. section 32-**
29 **2199.04. Pursuant to ARIZ. REV. STAT. section 41-1092.09, a request for rehearing**
30 **in this matter must be filed with the Commissioner of the Department of Real**
Estate within 30 days of the service of this Order upon the parties.

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Done this day, December 9, 2019.

/s/ Thomas Shedden
Thomas Shedden
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile December 10, 2019 to:

Judy Lowe, Commissioner
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By FDS