

1 8. Sun Harbor upheld the denial.

2 9. On May 9, 2018, Sun Harbor notified Mr. Audette that he was in violation
3 of Sun Harbor Covenants, Conditions, and Restrictions (CC&R) Article IV, Section 2(a)
4 because he converted his wrought iron fences into block walls without obtaining prior
5 approval from Sun Harbor (violation notice).

6 10. On or about September 4, 2019, Mr. Audette filed a petition with the
7 Arizona Department of Real Estate (ADRE) alleging that Sun Harbor had improperly
8 denied his request to replace the fences on his property with block walls. In the petition,
9 Mr. Audette alleged that Sun Harbor had violated Sun Harbor CC&R Article IV, Section
10 2(a). Mr. Audette also alleged that Sun Harbor inconsistently enforces Sun Harbor
11 rules. Mr. Audette provided the May 9, 2018 violation notice with his petition.

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

14 12. On or about On October 9, 2019, the ADRE issued a Notice of Hearing
15 which provided, in relevant part, "The Petitioner alleges that [Sun Harbor] is in violation
16 of community document CC&Rs Article IV, Section 2(a) and the guidelines in a single-
17 issue petition."

18 13. A hearing was held on December 5, 2019.

19 14. At hearing, Mr. Audette testified on behalf of himself. Sun Harbor
20 presented the testimony of Yvette Rushford and Bud Levey.

21 15. Mr. Audette asserted that Sun Harbor unreasonably denied his
22 construction plan. Mr. Audette argued that his immediate left and right approved of the
23 modification. Mr. Audette explained that his neighbors that own properties to his
24 immediate left and right approved of his plan to replace the iron fences with block walls.
25 Mr. Audette explained that he had obtained permission from the sub-association before
26 he began construction. Mr. Audette stated that he previously served on the Sun Harbor
27 board and that Sun Harbor routinely granted requests which were previously granted by
28 a sub-association. Mr. Audette asserted that no other homeowners can see his block
29 walls other than his immediate neighbors. Mr. Audette had admitted into evidence
30 several photographs of the home and yard of several homeowners in Sun Harbor.

1 Mr. Audette asserted that the photographs showed that several other homeowners were
2 in violation of Sun Harbor Guidelines that prohibit a structure, fence or shrubs with a
3 solid height greater than 3 feet in the 15 foot setback of the concrete shoreline.

4 16. Mr. Audette provided no written or oral testimony to establish that Sun
5 Harbor had not enforced the guidelines against the other homeowners.

6 17. Sun Harbor Architectural Guidelines provide, in relevant part, as follows:¹

7 As set forth below, written notification of any proposed
8 changes must be submitted to the Committee for its
9 consideration **prior to undertaking the project**. The
10 Committee will take into consideration the suitability of the
11 proposed alteration, the material to be used (including type
12 and color), the site (including location, topography, finished
13 grade elevation) upon which it is proposed to be erected, the
14 harmony thereof with the surroundings and the effect of the
15 alteration as planned on any adjacent or neighboring property.

16 18. Mr. Audette was required to obtain prior written approval from the Sun
17 Harbor Architectural Committee before he removed the wrought iron fences on his
18 property and replaced them with block walls. See Sun Harbor CC&Rs Article IV, Section
19 2(a).

20 19. No structure, fence or shrubs with a solid height greater than 3 feet are
21 allowed in the 15-foot setback of the concrete shoreline, with the exception of approved
22 docks. See Respondent's Exhibit 3, Sun Harbor Architectural Guidelines adopted
23 September 2002, Specific Guidelines, pg. 11.

24 20. Mr. Levey testified that Sun Harbor denied Mr. Audette's request for
25 approval because no structures above three feet are permitted within 15 feet of the
26 setback. Furthermore, Mr. Levey testified to the effect that replacing the iron fences
27 with block walls was inharmonious with the surroundings and obscured the view of the
28 lake.

29 21. Ms. Rushford testified that the construction of the block walls obscured the
30 view of the lake. Ms. Rushford explained that homeowners on lots 1 through 9 could

¹ See Respondent's Exhibit 3, Sun Harbor Architectural Guidelines adopted September 2002, Specific Guidelines, pg. 6.

1 see the block walls. Ms. Rushford explained that no other homeowners in Sun Harbor
2 have removed the wrought iron fences and replaced them with five foot high block walls.
3 Ms. Rushofrd asserted that Sun Harbor was concerned with creating a precedent for
4 other homeowners.

5 CONCLUSIONS OF LAW

6 1. The ADRE has authority over this matter. See Arizona Revised Statutes
7 (A.R.S.) Title 32, Ch. 20, Art. 11.

8 2. At an administrative hearing, the party asserting a claim, right, entitlement,
9 or affirmative defense has the burden of proof, and the standard of proof on all issues in
10 this matter is that of a preponderance of the evidence. Arizona Administrative Code R2-
11 19-119.

12 3. A preponderance of the evidence is:

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

20 4. The CC&Rs are a contract between the parties and the parties are
21 required to comply with its terms. See *Johnson v. The Pointe Community Association*,
22 205 Ariz. 485, 73 P.3d 616 (App. 2003).

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

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

30 7. Mr. Audette removed the wrought iron fences and replaced them with

1 block walls without obtaining permission from the Sun Harbor Architectural Committee.
2 It is the duty of the Architectural Committee to review proposed changes and consider
3 among several factors, the harmony of the proposed change to the surroundings.

4 8. Sun Harbor established by a preponderance of the evidence that it
5 reasonably determined that Mr. Audette's construction was not consistent with the
6 CC&Rs and Architectural Guidelines.

7 9. Mr. Audette provided no written evidence or testimony to establish that
8 Sun Harbor violated Article 4, Section 2(a) of the CC&Rs.

9 10. Mr. Audette failed to establish that Sun Harbor selectively enforced its
10 governing documents.

11 11. Upon consideration of all of the evidence presented at hearing, the
12 Administrative Law Judge concludes that Mr. Audette failed to prove by a
13 preponderance of the evidence that Sun Harbor violated A.R.S. § 33-1817(B)(3).

14 **ORDER**

15 In view of the foregoing,

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

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

18 **NOTICE**

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

24 Done this day, December 25, 2019.

25 /s/ Velva Moses-Thompson
26 Administrative Law Judge

27 Transmitted electronically to:

28
29 Judy Lowe, Commissioner
30 Arizona Department of Real Estate

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