

1 3. On or about October 18, 2019, the Association filed its ANSWER with the
2 Department whereby it denied all complaint items in the petition.³

3 4. Per the October 25, 2019, NOTICE OF HEARING, the Department referred this
4 matter to the Office of Administrative Hearings (“OAH”), an independent state agency, for
5 an evidentiary hearing on March 21, 2019, regarding the following issues based on
6 Petitioner’s petition:

7 **Whether Foothills Community Association (Respondent) violated**
8 **Association Bylaws Article IV, Section P.**

9 **THE PARTIES AND GOVERNING DOCUMENTS**

10 5. Respondent is a homeowners’ association whose members own properties
11 in a residential real estate development located in Phoenix, Arizona. Membership for the
12 Association is compromised, in part, by the Club House Estates subdivision.

13 6. Petitioner is a Club House Estates subdivision property owner and a
14 member of the Association.

15 7. The Association’s Declaration of Covenants, Conditions and Restrictions
16 (“Declaration” or “CC&Rs”) were recorded with the Maricopa County Recorder’s Office on
17 April 10, 1987.⁴ The CC&Rs empower the Association to control certain aspects of
18 property use within the development. When a party buys a residential unit in the
19 development, the party receives a copy of the CC&Rs and agrees to be bound by their
20 terms. Thus, the CC&Rs form an enforceable contract between the Association and each
21 property owner.

22 8. Bylaws Article I, Definitions, Section N states, in pertinent part, that
23 “Common Area and Common Areas” shall mean (a) all Association Land; (b) all land
24 within The Foothills which the Declarant, by this Declaration or other Recorded
25 instrument, makes available for use by Members of the Association and evidences its
26 intent to convey to the Association at a later date; and (e) areas on a Lot or Parcel within
27 easements granted to the Association or its Members for the location, construction,
28 maintenance, repair and replacement of a wall or fence or of landscaping, which

29 ³ See Department Record, page 2.

30 ⁴ See Respondent Exhibit A.

1 easement may be granted or created on a Recorded subdivision plat or Tract Declaration
2 or by a Deed or other conveyance accepted by the Association.

3 9. Bylaws Article I, Definitions, Section R states that “Declarant” shall mean
4 and refer to the Foothills Joint Venture, an Arizona general partnership, its successors
5 and any person to whom any part or all of Declarant’s rights under this Declaration are
6 assigned by a written, Recorded instrument.

7 10. Bylaws Article IV, Land Use Classifications; Permitted Use and Restrictions,
8 Section 4.2(p) states, in pertinent part, that the rights and duties of Owners with respect to
9 Party Walls between Lots and Parcels or Party Fences between Lots and Parcels shall be
10 as follows: (i) The Owners of contiguous Lots or Parcels who have a Party Wall or Party
11 Fence shall both equally have the right to use such wall or fence, provided that such use
12 by one (1) Owner does not interfere with the use and enjoyment of same by the other
13 Owner; and (vi) In the case of Party Fences (1) between Common Areas and Lots or
14 Parcels, or (2) constructed by the Declarant or the Association on Common Areas within a
15 Lot of Parcel, the Association shall be responsible for all maintenance thereof, subject to
16 the provisions of Article 10, Sections 10.3⁵ and 10.4⁶, except that each Owner of a Lot or
17 Parcel shall be responsible for painting the portion of the Party Fence facing his Lot or
18 Parcel or the portion thereof which is not a portion of the Common Area.

19 11. Bylaws Article IV, Land Use Classifications; Permitted Use and Restrictions,
20 Section 4.5 states, in pertinent part, that the Golf Course Land shall not be part of the
21 Common Area, and no Owner shall acquire any right, title or interest whatsoever in the
22

23 ⁵ Bylaw Article X, Maintenance, Section 10.3 states that in the event that the need for maintenance or repair
24 of Common Areas and other areas maintained by the Association is caused through the willful or negligent
25 act of any Member, his family, guests, invitees or Designees, the cost of such maintenance or repairs shall
26 be added to, and become a part of, the Assessment to which such Member and the Member’s Lot or Parcel
27 is subject and shall be secured by the Assessment Lien.

28 ⁶ Bylaw Article X, Maintenance, Section 10.4 state, in pertinent part, that in the event any portion of any
29 Lot or Parcel is so maintained as to present a public or private nuisance the Board may make a finding to
30 such effect, specifying the particular condition or conditions which exist, and pursuant thereto give notice
thereof to the offending Owner that unless corrective action is taken within fourteen (14) days, the Board
shall be authorized and empowered to cause such action to be taken and the cost therefor shall be asses
to, and become a part of, the Assessment to which the offending Owner and the Owner’s Lot or Parcel is
subject and shall be secured by the Assessment Lien.

1 Golf Course Land or the use of the Golf Course Land solely by reason of owning any Lot,
2 Parcel or other property in The Foothills.

3 12. Bylaws Article XV, Miscellaneous, Section 15.7 states that any reference in
4 this Declaration to Declarant shall include any successors or assignees of Declarant's
5 rights and powers hereunder provided that Declarant's rights and powers may only be
6 assigned by a written, Recorded instrument expressly assigning such rights and powers.

7 **HEARING EVIDENCE**

8 13. Petitioner testified on his own behalf and submitted one exhibit. Respondent
9 called Patricia Ann Wontor as a witness and submitted five exhibits. The Department's
10 electronic file was also admitted into the record.

11 Petitioner's testimony

12 14. Petitioner is the Owner of Lot 22 located within the Club House Estates Unit
13 1 at The Foothills.⁷

14 15. There is a retaining wall along the back perimeter of Petitioner's property,
15 which separates Petitioner's property from the Foothills Golf Course.

16 16. Per Petitioner, the retaining wall at issue has sustained significant water
17 damage due to a latent defect caused by a flaw in its design. Specifically, the anchors in
18 the wall are failing and the wall is leaning towards the golf course as a result.

19 17. After consulting with a local engineering firm, Petitioner was advised to
20 secure the assistance of a geotechnical engineer to evaluate soil conditions prior to
21 moving forward with a proposed "shotcrete wall" reinforcement/incorporation remediation
22 project.⁸

23 18. The approximate cost to repair the retaining wall is between \$30,000.00 and
24 \$40,000.00.

25 19. When Petitioner raised his concerns regarding the retaining wall with the
26 Association, he was rebuffed and told to provide an indicia of evidence to establish the
27 Association's maintenance and repair liability for the retaining wall.

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29 ⁷ See Respondent Exhibit B.

30 ⁸ See Department Record, pages 26-39.

1 20. Petitioner presented the Association with copies of the CC&Rs, a
2 Reservation of Easement (“Easement Agreement”)⁹ recorded with the Maricopa County
3 Recorder on June 15, 1988, and a Special Warranty Deed (“Deed”)¹⁰ recorded with the
4 Maricopa County Recorder on December 20, 1995, but was unable to convince the
5 Association to cover the costs of remediations for the retaining wall.

6 21. Petitioner testified that he understood the Easement Agreement to have
7 been conveyed to the Association in perpetuity.

8 22. Petitioner conceded that he was unsure whether the Association was a
9 successor or assign of Dell E. Webb. Petitioner also conceded that the Lot 22 was not
10 located on Tract A, that Association did not own any of the land located underneath the
11 underlying retaining wall, and that the retaining wall was not located in a Common Area.
12 Petitioner further conceded that he did not have an engineer investigate a possible
13 underground water leak because he did not notice any abnormal increases to his monthly
14 water bill.

15 23. Overall, Petitioner’s position at the hearing was that, pursuant to the
16 Easement Agreement and the Deed, that the Association is liable for the maintenance of
17 the retaining wall to the rear border of Petitioner’s residence.

18 Ms. Wontor’s testimony

19 24. Ms. Wontor is the Association’s onsite Community Manager. Her job duties
20 include, but are not limited to: overseeing the daily operations and finances of the
21 Association, implementing Board rules, maintaining Common Areas, issuing
22 assessments, and reviewing reports.

23 25. The Club House Estates subdivision is defined in the CC&Rs, Tract
24 Declaration¹¹, and Plat Map.¹²

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28 ⁹ See Department Record, pages 7-8.

29 ¹⁰ See Department Record, pages 17-25.

30 ¹¹ See Respondent Exhibit D.

¹² See Respondent Exhibit B.

1 planned community association. The owner or association may petition the department
2 for a hearing concerning violations of community documents or violations of the statutes
3 that regulate planned communities as long as the petitioner has filed a petition with the
4 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

5 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
6 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested
7 case at bar. OAH has the authority to interpret the contract between the parties. See
8 *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App.
9 2007).

10 3. In this proceeding, Petitioner bears the burden of proving by a
11 preponderance of the evidence that Respondent violated a community document.¹⁷

12 4. "A preponderance of the evidence is such proof as convinces the trier of fact
13 that the contention is more probably true than not."¹⁸ A preponderance of the evidence is
14 "[t]he greater weight of the evidence, not necessarily established by the greater number of
15 witnesses testifying to a fact but by evidence that has the most convincing force; superior
16 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
17 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
18 the other."¹⁹

19 5. The material facts in the record are clear.

20 6. Based upon a review of the credible and relevant evidence in the record,
21 Petitioner has failed to sustain his burden of proof.

22 7. Petitioner has not established that the Association is a successor or assign
23 of the Declarant who signed the Easement Agreement.

24 8. Here, the Deed conveys Tract A to the Association but does not convey an
25 easement.

26 9. It is undisputed that the retaining wall at issue is located on property owned
27 by Petitioner and an adjoining golf course, which is not owned by the Association.

28 ¹⁷ See ARIZ. ADMIN. CODE R2-19-119.

29 ¹⁸ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

30 ¹⁹ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

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