

1 **Final agency action regarding decision below:**

2  
3 **ALJCERT ALJ decision certified as final**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6  
7 John Klemmer,  
8 Petitioner

**No. 16F-H1616006-BFS**

9 vs

**ADMINISTRATIVE LAW JUDGE**

10 Caribbean Gardens Association  
11 Respondent

**DECISION**

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13  
14 **HEARING:** August 2, 2016

15 **APPEARANCES:** John D. Klemmer, Petitioner; Alexis Firehawk, Respondent's  
16 Attorney; John A. Klemmer, Petitioner's witness; Michael Busby and Alex Gonzalez,  
17 Respondent's witnesses; Kathryn Bergamon, observer

18 **ADMINISTRATIVE LAW JUDGE:** Dorinda M. Lang

19 **FINDINGS OF FACT**

20 1. Respondent is an association of homeowners in the State of Arizona.  
21 Petitioner is the owner of a unit within Caribbean Gardens Association.

22 2. Petitioner filed a Petition the Department of Fire, Building and Life Safety<sup>1</sup>  
23 in which he alleged violations A.R.S. §§ 33-1212(1) and (2), 33-1247(B), 33-1251(C),  
24 33-1221(1), 33-1253(A)(1) and (2), and 33-1253(H) and third amendment, Article 3,  
25 section 3.8, and Article 7, section 7.1, exhibit "B" (the plat) number 2 of Legend of plat  
26 page 1 or 2 of the Covenants, conditions and Restrictions ("CC&R's") by Respondent.  
27 Specifically, Petitioner alleged that Respondent is responsible to repair alleged damage  
28 to the area between Complainant's unit and the unit above him.

29 3. At hearing, Petitioner offered testimony that the unit above his unit  
30 experienced flooding that damaged his unit. Petitioner argued that Respondent is

<sup>1</sup> As of July 1, 2016, the Department of Fire, Building and Life Safety no longer exists. Rather, this matter now falls under the jurisdiction of the Arizona Department of Real Estate.

1 responsible for common areas, which, according to the definition of common areas in  
2 Respondent's CC&R's, encompasses the area above Petitioner's ceiling and below the  
3 upstairs unit's flooring. Petitioner offered photographs of the area that he argued as  
4 damaged.<sup>2</sup> It showed some discoloration of the upper unit's subfloor and some staining  
5 on the sewer pipe.

6 4. Respondent did not dispute its responsibility for the areas, but it presented  
7 the testimony of Michael Busby, a licensed contractor and former handyman for  
8 Respondent. He testified that he inspected the area and found that the discoloration did  
9 not amount to structural damage. He further testified that even if the subfloor was  
10 structurally damaged, it would only require bracing. He noted the staining to the wood  
11 of the subfloor as well; however, he testified that the water staining to that area (below a  
12 toilet) is not uncommon. He admitted he did not test it for mold or bacteria but  
13 maintained that, even after a catastrophic flood that occurred later, it was not  
14 structurally damaged.

15 5. Regarding that testimony, Petitioner argued that Respondent should be  
16 required to replace the stained wood. He was concerned that the sewer pipe was dirty  
17 and that it was crooked, but he offered no legal authority that Respondent is responsible  
18 for cleaning the area or any evidence that the pipe must be perfectly straight to function  
19 properly.

20 6. Respondent argued that, even if Respondent were to be found  
21 responsible for repairs previously, the catastrophic flood rendered the issue moot.

### 22 **CONCLUSIONS OF LAW**

23 1. The Office of Administrative Hearings has jurisdiction to hear and decide  
24 the petition pursuant to A.R.S. § 41-1092.02.

25 2. Petitioner has the burden of proof in this matter and the standard of proof  
26 on all issues is by a preponderance of the evidence. See A.A.C. R2-19-119. A  
27 preponderance of the evidence is "such proof as convinces the trier of fact that the  
28 contention is more probably true than not." MORRIS K. UDALL, ARIZONA LAW OF  
29 EVIDENCE § 5 (1960). Proof by preponderance of the evidence "is evidence which is of

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30 <sup>2</sup> See Exhibit 3.

1 greater weight or more convincing than the evidence which is offered in opposition to it;  
2 that is, evidence which as a whole shows that the fact sought to be proved is more  
3 probable than not.” BLACK’S LAW DICTIONARY 1182 (rev. 6<sup>th</sup> ed. 1990).

4 3. Here, Petitioner alleged violations of Arizona law and Respondent’s  
5 CC&R’s due to Respondent’s refusal to replace the stained subfloor above his unit.  
6 While Petitioner’s legal arguments were undisputed that Respondent is responsible for  
7 the common areas and that the space in question was a common area, Petitioner failed  
8 to establish his factual allegation that the area was damaged to the extent that repairs  
9 were necessary. Petitioner was concerned that there was mold and bacteria in the  
10 area, but he did not establish that the area had a level of bacteria or mold that required  
11 remediation. Photos of the area show staining but do not support a finding that the  
12 wood must be replaced. Petitioner also failed to establish that the sewer pipe is  
13 malfunctioning or in need of remediation. Respondent offered to brace the area, but  
14 Petitioner declined. Therefore, the Petition should be dismissed.

15 **ORDER**

16 Based on the above, IT IS ORDERED that the Petition in this matter be  
17 dismissed in its entirety.

18 *In the event of certification of the Administrative Law Judge Decision by the*  
19 *Director of the Office of Administrative Hearings, the effective date of the Order will be*  
20 *five days from the date of that certification.*

21 Done this day, August 19, 2016.

22 /s/ Dorinda M. Lang  
23 Administrative Law Judge

24 Transmitted electronically to:

25 Judy Lowe, Commissioner  
26 Arizona Department of Real Estate  
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