

1 behind his neighbor's property to haul large items and let the workers through. Neither
2 Respondent nor his neighbor complained about Petitioner's use of the path.

3 5. In April 2019, construction of a wall began on Petitioner's neighbor's yard.
4 The wall blocked Petitioner's pathway to the guest parking lot and front yard. Petitioner
5 was unaware of any such construction until it began. When Petitioner notified Mr. Sorock,
6 he informed Petitioner that there was nothing Respondent could do. Petitioner filed this
7 Petition as a result of the wall blocking his path.

8 6. Petitioner argued that the wall prevented him from maintaining his home.
9 Specifically, that the window company could not bring in the large windows through the
10 back anymore and the windows would not fit through the front door and hallway.

11 7. Additionally, Petitioner argued that the wall affected his and Mrs. Hopper's
12 health, safety, and welfare due to a lack of an exit. The wall prevented Mrs. Hopper from
13 exiting through the backyard away from the house in the event of a fire. Mrs. Hopper had a
14 medical condition similar to Vertigo that prevented her from walking on rough and steep
15 terrain that was directly behind their home and the only place they could walk to safely.
16 Prior to the wall being built, Petitioner and Mrs. Hopper used the flat pathway, through
17 their neighbor's patio, to gain access to the front. No one complained of Petitioner's use of
18 his neighbor's patio as a pathway.

19 8. Petitioner opined that the wall also affected the value of the property
20 because it prohibited him from maintaining his property by not being able to install his
21 windows or maintain basic landscape. Petitioner's real estate agent informed Petitioner
22 that his property lost value when the wall was built because Petitioner would have to
23 disclose the fact that there was no access to the west side of the home. Petitioner argued
24 that the By-Laws were implemented to protect homeowners from actions that decreased
25 the property value.

26 9. Even though Petitioner argued lack of notice of the construction of the wall,
27 at the hearing, Petitioner did not cite to any CC&Rs or By-Laws violated by Respondent.

28 10. At hearing, Mr. Sorock testified that Respondent was a townhome
29 community that was established in 1972 and contained 14 townhomes. Respondent
30 hardly had meetings until Petitioner's Petition because everyone got along.

1 11. On or about March 26, 2019, Respondent conducted a board meeting
2 whereby plans to mitigate erosion on Petitioner's neighbor's property were discussed.
3 The project included the construction of an adobe wall that would close off the patio. The
4 project was solely on Petitioner's neighbor's property. The plans were unanimously
5 approved and were in conformity with Respondent's common scheme and design.

6 12. The townhomes in Respondent's community were similarly situated.
7 Everyone had similar backyards and walkways. Nobody complained about exits and
8 entries to their home except Petitioner because Petitioner used their neighbor's yard as a
9 walkway. That area was not a common area.

10 13. Petitioner complained that he was unable to bring in large windows to be
11 replaced. Other townhomes have replaced large windows despite having similar layouts.

12 14. Respondent's witnesses testified that there was a walkway behind
13 Petitioner's townhome that was considered a common area. Even though that common
14 area was a bit steep, it was used for walking by the residents.

15 CONCLUSIONS OF LAW

16 1. Arizona statute permits an owner or a planned community organization to
17 file a petition with the Department for a hearing concerning violations of planned
18 community documents or violations of statutes that regulate planned communities.
19 A.R.S. § 32-2199 et seq. That statute provides that such petitions will be heard before the
20 Office of Administrative Hearings.

21 2. Petitioner bears the burden of proof to establish that Respondent committed
22 the alleged violations by a preponderance of the evidence.² Respondent bears the burden
23 to establish affirmative defenses by the same evidentiary standard.³

24 3. "A preponderance of the evidence is such proof as convinces the trier of fact
25 that the contention is more probably true than not."⁴ A preponderance of the evidence is
26 "[t]he greater weight of the evidence, not necessarily established by the greater number of
27 witnesses testifying to a fact but by evidence that has the most convincing force; superior

28 ² See ARIZ. REV. STAT. section 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*,
29 74 Ariz. 369, 372, 249 P.2d 837 (1952).

30 ³ See A.A.C. R2-19-119(B)(2).

⁴ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
2 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
3 the other.”⁵

4 4. Article VII, Section 3 of the CC&Rs, entitled “Exterior Maintenance” provides
5 that:

6 All maintenance and repair of the individual townhouse units shall be the
7 sole obligation and expense of the individual unit Owners.

8 5. Article VIII, Section 4 of the CC&Rs, entitled “Interior And Other
9 Maintenance” provides that:

10 An owner shall do no act nor any work that will impair the structural
11 soundness or integrity of the Single-Family Dwelling nor that will impair any
12 easement or inherited Properties, nor do any act, nor allow any condition to
13 exist which will adversely affect the other townhouse units or their Owners.

14 6. Article II, Section 1(b) and 1(C) of the By-Laws, entitled “Purpose And
15 Powers Of The Association” provides that:

16 Section 1. Purpose: This Association does not contemplate monetary gain
17 or profit to the Owner(s), and the specific purposes for which it is formed are:

18

19 b) to promote the health, safety, and welfare of the residents within
20 the above described Properties;

21 c) to protected the property value for each Single-Family Dwelling
22 and the Association.

23 7. It is undisputed that Petitioner’s neighbor constructed a wall that obstructed
24 Petitioner’s use of his normal path. The evidence established that the path was on
25 Petitioner’s neighbor’s private property and was not a common area. Petitioner failed to
26 establish that Respondent violated Article VII, Section 3 of the CC&Rs; Article VIII,
27 Section 4 of the CC&Rs; and Article II, Section 1(b) and 1(c) of the By-Laws when it
28 approved construction of the wall. Work done on Petitioner’s neighbor’s property was
29 done solely at the neighbor’s expense and on their private property.

30 8. In this case, Petitioner was unhappy that his use of his neighbor’s patio
ended. While Petitioner enjoyed that use, and it was presumably done with the neighbor’s

⁵ BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

1 consent for some time. Petitioner was not entitled to continued uninterrupted use of his
2 neighbor's private property.

3 9. Petitioner argued that the CC&R's and By-Laws specifically address his
4 property rights and prevented Respondent from adversely affecting his property value or
5 adversely affecting his right to maintain his property. Petitioner maintained Respondent
6 violated his rights when it approved plans to build the wall.

7 10. According to Respondent, all of the townhomes were similarly situated, the
8 wall was in conformity with other walls, and the wall was entirely on Petitioner's neighbor's
9 private property.

10 15. At hearing, Petitioner argued lack of notice of the construction of the wall.
11 However, Petitioner did not cite to any CC&Rs or By-Laws violated by Respondent with
12 respect to lack of notice.

13 11. Furthermore, Petitioner failed to present evidence that he had a legal right of
14 access to his neighbor's patio as a pathway. While Respondent may have affected
15 Petitioner's convenience when it approved plans to build the wall, it did not violate any
16 rules and procedures. Petitioner's neighbors were nice enough to allow Petitioner access
17 through their patio for some time. Petitioner was well aware of the construction of the
18 townhomes, the closeness of the homes, and placement of the property lines when he
19 purchased it.

20 12. While Respondent has the *right* to enforce homeowner's duties as set forth
21 in the CC&Rs and the By-Laws, nothing in the citations provided by Petitioner obligate
22 Respondent to do so.

23 13. Thus, Petitioner failed to establish by a preponderance of the evidence that
24 Respondent violated Article VII, Section 3 of the CC&Rs; Article VIII, Section 4 of the
25 CC&Rs; and Article II, Section 1(b) and 1(c) of the By-Laws.

26 **ORDER**

27 In view of the foregoing, IT IS ORDERED that the Petition be dismissed.

28 **NOTICE**

29 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties**
30 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S.**

1 **§ 41-1092.09, a request for rehearing in this matter must be filed with the**
2 **Commissioner of the Department of Real Estate within 30 days of the service of**
3 **this Order upon the parties.**

4 Done this day, December 29, 2019.

5 /s/ Antara Nath Rivera
6 Administrative Law Judge

7 Transmitted electronically to:

8 Judy Lowe, Commissioner
9 Arizona Department of Real Estate

10 Transmitted through US Mail to:

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