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Petitioner

Respondent

# ADMINISTRATIVE LAW JUDGE DECISION

**APPEARANCES:** John Krahn appeared on behalf of the John R Krahn Living Trust and Janet Krahn Living Trust. Steve Gauer appeared on behalf of Tonto Forest Estates Homeowners Association.

**EXHIBITS ADMITTED INTO EVIDENCE:** Hearing File submitted by the Arizona Department of Real Estate.

## THE PARTIES AND GOVERNING DOCUMENTS

2. The Association is governed by its Covenants, Conditions, and Restrictions (CC&Rs), and overseen by a Board of Directors (the Board). The Association is also regulated by Title 33, Chapter 16, Article 1 of the ARIZ. REV. STAT.

### BACKGROUND AND PROCEDURE

3. The Arizona Department of Real Estate (Department) is authorized by statute to receive petitions for hearings from members of homeowners' associations and from homeowners' associations in Arizona.

4. On August 23, 2023, John Krahn, trustee of Petitioner and hearing representative, filed a single issue petition with the Department which alleged Respondent failed to comply with a December 1, 2022, and July 26, 2023, request for financial records of Respondent, specifically the check registers, pursuant to Arizona Revised Statutes (ARIZ. REV. STAT.) § 33-1805.<sup>1</sup>

5. On October 3, 2023, Respondent returned its ANSWER to the Department whereby it denied Petitioner's claim.<sup>2</sup> The Department referred this matter to the Office of Administrative Hearings (OAH), an independent state agency, for an evidentiary hearing on November 29, 2023, to determine whether a violation of ARIZ. REV. STAT. § 33-1805 occurred.

### HEARING EVIDENCE

6. On December 1, 2022, Mr. Krahn submitted a written request to Respondent for a copy of the November 2022 check register, a financial document. On April 6, 2023, Mr. Krahn sent a follow up email to Respondent's attorney asking for an update on his December 1, 2022, check register request. On April 13, 2023, Respondent replied to Mr. Krahn's April 6, 2023, email and attached the November 2022 check register pursuant to Mr. Krahn's December 1, 2022 request.

7. On July 26, 2023, Mr. Krahn submitted a written request to Respondent to obtain copies of the Respondent's January through July 2023 check registers. A member of the Board replied to Mr. Krahn and informed him the requested financial documents were available through the online portal. On July 27, 2023, Mr. Krahn informed Respondent's board member the check registers were not available through the online portal. On August 10, 2023, the tenth business day from his written request, Mr. Krahn emailed Respondent's attorney attempting to obtain the January through July 2023 check

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<sup>1</sup> See Department's electronic file at 24F-H013-REL ADRE Petitioner Form – Krahn Check Register.pdf.

<sup>2</sup> See Department's electronic file at. 24F-H013-REL Initial Response 24F-H013.pdf.

1 registers. Mr. Krahn informed Respondent's attorney of the original written request on July  
2 26, 2023. On August 16, 2023, Mr. Krahn again emailed Respondent's attorney  
3 attempting to receive the requested check registers. On the same day, a member of the  
4 Board replied to Mr. Krahn and stated he must submit a written request by certified mail  
5 and reiterated the financial documents were available through the online portal. At the  
6 time, the check registers were not available through the online portal. On November 21,  
7 2023, the check registers were published through the online portal.

8 8. Steve Gauer, President of the homeowner's association, testified "we were  
9 remiss in responding in the ten days" in reference to Mr. Krahn's request for financial  
10 documents.<sup>3</sup> Mr. Gauer admitted the Board made mistakes in the past, but was doing their  
11 best to comply with the CC&Rs and Arizona statutes. The management company hired by  
12 Respondent uploaded all of Respondent's financial documents to the online portal for  
13 homeowners to review.

#### 14 **CONCLUSIONS OF LAW**

15 1. This matter lies within the Department's jurisdiction pursuant to ARIZ. REV.  
16 STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a  
17 planned community association. The owner or association may petition the department  
18 for a hearing concerning violations of community documents or violations of the statutes  
19 that regulate planned communities as long as the petitioner has filed a petition with the  
20 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

21 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),  
22 32-2199.02, and 41-1092 et seq.; OAH has the authority to hear and decide the contested  
23 case at bar. OAH has the authority to interpret the contract between the parties.<sup>4</sup>

24 3. In this proceeding, Petitioner bears the burden of proving by a  
25 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1805.<sup>5</sup>  
26 Respondent bears the burden of establishing any affirmative defenses by the same  
27 evidentiary burden.<sup>6</sup>

28 <sup>3</sup> See Mr. Gauer's testimony at 46:30.

29 <sup>4</sup> See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

30 <sup>5</sup> See Arizona Administrative Code ("ARIZ. ADMIN. CODE") R2-19-119.

<sup>6</sup> *Id.*

1           4.       A preponderance of the evidence is “[t]he greater weight of the evidence, not  
2 necessarily established by the greater number of witnesses testifying to a fact but by  
3 evidence that has the most convincing force.”<sup>7</sup>

4           5.       In Arizona, when construing statutes, we look first to a statute's language as  
5 the best and most reliable index of its meaning. If the statute's language is clear and  
6 unambiguous, we give effect to that language and apply it without using other means of  
7 statutory construction, unless applying the literal language would lead to an absurd result.  
8 Words should be given “their natural, obvious, and ordinary meaning.”<sup>8</sup>

9           6.       Statutes should be interpreted to provide a fair and sensible result.<sup>9</sup>

10          7.       When the legislature uses a word or words in one section of a statute, but  
11 not another, the tribunal may not read those words into the section where the legislature  
12 did not include them.<sup>10</sup> Unless defined by the legislature, words in statutes are given their  
13 ordinary meaning.<sup>11</sup>

14          8.       Each word, phrase, clause, and sentence of a statute or rule must be given  
15 meaning so that no part will be void, inert, redundant, or trivial.<sup>12</sup>

16          9.       ARIZ. REV. STAT. § 33-1805 provides, in relevant part, as follows:

17           A. Except as provided in subsection B of this section, ***all financial and***  
18 ***other records of the association shall be made reasonably available***  
19 ***for examination by any member*** or any person designated by the member  
20 in writing as the member's representative. The association shall not charge  
21 a member or any person designated by the member in writing for making  
22 material available for review. ***The association shall have ten business***  
23 ***days to fulfill a request for examination. On request for purchase of***  
24 ***copies of records by any member*** or any person designated by the  
25 member in writing as the member's representative, ***the association shall***  
***have ten business days to provide copies of the requested records.***  
***An association may charge a fee for making copies of not more than***  
***fifteen cents per page.***<sup>13</sup>

26 <sup>7</sup> BLACK'S LAW DICTIONARY (11th ed. 2019).

27 <sup>8</sup> *Arpaio v. Steinle*, 201 Ariz. 353, 355 ¶ 5, 35 P.3d 114, 116 (App. 2001) (footnotes and citations omitted).

28 <sup>9</sup> *Gutierrez v. Industrial Commission of Arizona*; see also *State v. McFall*, 103 Ariz. 234, 238, 439 P.2d 805,  
29 809 (1968) (“Courts will not place an absurd and unreasonable construction on statutes.”).

30 <sup>10</sup> See *U.S. Parking v. City of Phoenix*, 160 Ariz. 210, 772 P.2d 33 (App. 1989).

<sup>11</sup> *Id.*

<sup>12</sup> See *Deer Valley v. Houser*, 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007).

<sup>13</sup> Emphasis added.

10. Mr. Krahn requested, in writing, a copy of Respondent's check register. It was undisputed that a check register is a financial record within the meaning of ARIZ. REV. STAT. § 33-1805. Thus, Mr. Krahn was entitled to the requested financial record.

11. Based upon a review of the credible and relevant evidence in the record, Petitioner sustained its burden of proof. Mr. Gauer admitted Respondent failed to provide Mr. Krahn with the check registers within the ten business days. Mr. Krahn's December 1, 2022, document request was fulfilled on April 6, 2023. Mr. Krahn's July 26, 2023 request was fulfilled on November 21, 2023. Both requests were fulfilled beyond the ten business day statutory requirement. Therefore, the Administrative Law Judge concludes that Respondent's conduct, as outlined above, was in violation of the charged provision of ARIZ. REV. STAT. § 33-1805.

12. Petitioner failed to provide sufficient evidence that Respondent's actions warranted the issuance of civil penalties. "The administrative law judge may order any party to abide by the statute, condominium documents, community documents or contract provision at issue and may levy a civil penalty on the basis of each violation. . . . If the petitioner prevails, the administrative law judge shall order the respondent to pay to the petitioner the filing fee required by section 32-2199.01."<sup>14</sup> Thus, civil penalties ought to be denied.

## ORDER

**IT IS ORDERED** that Petitioner's petition in this matter be affirmed.

**IT IS FURTHER ORDERED** that Petitioner's request to levy a civil penalty against Respondent is denied.

**IT IS FURTHER ORDERED** Respondent shall reimburse Petitioner's filing fee of \$500.00 pursuant to ARIZ. REV. STAT. § 32-2199.02(A).

## NOTICE

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

<sup>14</sup> ARIZ. REV. STAT. § 32-2199.02(A).

**Pursuant to A.R.S. § 41-1092.09, a request for rehearing 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.**

Done this day, December 19, 2023.

/s/ Brian Del Vecchio  
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile December 19, 2023 to:

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