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No. 24F-H018-REL

ADMINISTRATIVE LAW JUDGE DECISION

V

Respondent

APPEARANCES: Petitioner Margaret Lewis appeared on her own behalf. Respondent Florence Gardens Mobile Home Association was represented by Marcus Perez, Esq. who appeared via Google Meet.

EXHIBITS ADMITTED INTO EVIDENCE: Petitioner's Exhibits which were
ed in the hearing packet from the Department of Real Estate and Respondent's
ts A through D were admitted into evidence.

FINDINGS OF FACT

1. The Department is authorized by statute to receive and to decide petitions for hearings from members of homeowners' associations and from homeowners' associations in Arizona.

1 2. On or about September 5, 2023, Petitioner filed a single-issue petition
2 against the Association with the Department. Petitioner tendered \$500.00 to the
3 Department with his petition.

4 3. On or about September 27, 2023, the Florence Gardens Mobile
5 Homeowners Association ("Association") filed its ANSWER with the Department whereby it
6 denied all complaint items in the petition.

7 4. Per the NOTICE OF HEARING, the Department referred this matter to the
8 Office of Administrative Hearings ("OAH"), an independent state agency, for an
9 evidentiary hearing on December 11, 2023, regarding the following issue based on
10 Petitioner's petition:

11 Petitioner alleged Respondent of violating ARS 33-1808 by, 'SENDING
12 [Petitioner] A CEASE AND DESIST LETTER.'

13 **THE PARTIES AND GOVERNING DOCUMENTS**

14 5. Respondent is a homeowners' association whose members own properties
15 in a residential real estate development located in Mohave Valley, Arizona.

16 6. Petitioner is a property owner and a member of the Association.

17 7. The Association is governed by its Covenants, Conditions, and Restrictions
18 ("CC&Rs"), and overseen by a Board of Directors ("the Board"). The Association is also
19 regulated by Title 33, Chapter 16, Article 1 of the Arizona Revised Statutes ("ARIZ. REV.
20 STAT.")

21 **HEARING EVIDENCE**

22 8. Petitioner testified on her own behalf, and called Dennis Legere as a
23 witness. Respondent called Yasmin Rodriguez as a witness and submitted three exhibits
24 into evidence. The Agency Record from the Department and NOTICE OF HEARING were
25 also admitted into the evidentiary record.

26 Petitioner's testimony

27 9. Petitioner testified that she publishes a newsletter about the community and
28 disburses the same to community members.

10. Petitioner testified that she received a “cease and desist” letter on July 28, 2023, from the Association, instructing her to refrain from making false statements and accusing the Board of violating Arizona law.¹

11. Further, Petitioner testified that by sending this letter, the Association violated ARIZ. REV. STAT. § 33-1808(L), as it was limiting her ability to write and distribute her newsletter. However, Petitioner acknowledged that the newsletter did not take place in a common area, but argued that the newsletter constituted a “meeting”.

12. Petitioner also testified that since receiving the letter, she had written and distributed two further newsletters without repercussion, but was hesitant to do so in fear of retribution.

Dennis Legere’s testimony

13. Mr. Legere testified that he was a lobbyist and helped to draft the statute in question first in 2020, and again in 2022, when it was ultimately signed into law by then Governor Doug Ducey.

14. Mr. Legere testified that the purpose of the legislation was to protect a homeowner’s right to free speech without interference from an association. Mr. Legere testified that a common area would also constitute a newsletter.

Yasmin Rodriguez’s testimony

15. Ms. Rodriguez was the Community Manager for the Association and was familiar with Petitioner’s newsletters.

16. Ms. Rodriguez testified that the cease and desist letter was sent to address concerns, and Petitioner continues to send out newsletters.

17. Finally, Ms. Rodriguez testified that the Association supports freedom of expression.

CONCLUSIONS OF LAW

1. This matter lies within the Department’s jurisdiction. Pursuant to ARIZ. REV. STAT. §§ 32-2102 and 32-2199 et al., regarding a dispute between an owner and a planned community association, the owner or association may petition the department for

¹ See Respondent’s Exhibit C.

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

4 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(D), 32-2199.02,
5 and 41-1092, OAH has the authority to hear and decide the contested case at bar.

6 3. In this proceeding, Petitioner bears the burden of proving by a
7 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1808(L).²

8 4. “A preponderance of the evidence is such proof as convinces the trier of fact
9 that the contention is more probably true than not.”³ A preponderance of the evidence is
10 “[t]he greater weight of the evidence, not necessarily established by the greater number of
11 witnesses testifying to a fact but by evidence that has the most convincing force; superior
12 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
13 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
14 the other.”⁴

15 5. ARIZ. REV. STAT. § 33-1808(L) provides, in relevant part, as follows:

16 L. Notwithstanding any provision in the community documents, an
17 association may not prohibit or unreasonably restrict a member's
18 ability to peacefully assemble and use common areas of the planned
19 community if done in compliance with reasonable restrictions for the
20 use of that property adopted by the board of directors. An individual
21 member or group of members may assemble to discuss matters
22 related to the planned community, including board elections or
23 recalls, potential or actual ballot issues or revisions to the community
24 documents, property maintenance or safety issues or any other
25 planned community matters. A member may invite one political
26 candidate or one non-member guest to speak to an assembly of
27 members about matters related to the community. The association
28 shall not prohibit a member from posting notices regarding those
29 assemblies of members on bulletin boards located on the common
30 areas or within common area facilities. An assembly of members
prescribed by this subsection does not constitute an official
members' meeting unless the meeting is noticed and convened as
prescribed in the community documents and this chapter.

28 ² See ARIZ. ADMIN. CODE R2-19-119.

29 ³ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

30 ⁴ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

1 6. The material facts in this matter are not in dispute.

2 7. Petitioner distributed a newsletter that was filled with her opinions, as well
3 as her commentary on what she perceived to be violations of Arizona law by the Board.
4 Respondent sent the cease and desist letter as a warning to Petitioner that a claim may be
5 made for defamation should those specific comments continue. There was no evidence
6 presented that a court case was filed or that Petitioner had been fined as a result of her
7 newsletter. In fact, two additional newsletters were written and distributed without
8 incident.

9 8. Further, the tribunal disagrees that the newsletter can be read as satisfying
10 the “peacefully assemble and use common areas” of the community. If the legislature had
11 intended to include newsletters or social media posts, it had at least three opportunities,
12 since the legislation was drafted every year from 2020 until it ultimately passed and was
13 signed into law in 2022.

14 9. Based upon the foregoing, Petitioner did not meet her burden of proof in
15 demonstrating that the Association was in violation of ARIZ. REV. STAT. § 33-1808(L).

16 **ORDER**

17 **IT IS ORDERED** that Petitioner’s petition in this matter be denied.

18 **IT IS FURTHER ORDERED** pursuant to ARIZ. REV. STAT. § 32-2199.02(A),
19 Respondent shall not reimburse Petitioner’s filing fee as required by ARIZ. REV. STAT. §
20 32-2199.01.
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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. 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, February 9, 2024.

/s/ Adam D. Stone
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile February 9, 2024 to:

Susan Nicolson
Commissioner
Arizona Department of Real Estate
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