

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of

No. 24F-H032-REL

4 Laura R. Braglia,
5 PETITIONER,

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 v.

7 Palo Verde Estates Homeowners
8 Association, Inc.
9 RESPONDENT.

10 **HEARING:** April 12, 2024 at 9:00 AM.¹

11 **APPEARANCES:** Laura R. Braglia ("Petitioner") appeared on her own behalf.
12 Jacqueline Zipprich appeared on behalf of Palo Verde Estates Homeowners Association,
13 Inc. ("Respondent" and "Association").

14 **ADMINISTRATIVE LAW JUDGE:** Jenna Clark.

15 **EXHIBITS ADMITTED INTO EVIDENCE:** The NOTICE OF HEARING, including the
16 attached agency file from the Arizona Department of Real Estate ("Department"),
17 Petitioner Exhibits 1-4, and April 02, 2024, Minute Entry were admitted into the evidentiary
18 record.

19
20 After review of the hearing record in this matter, the undersigned Administrative
21 Law Judge makes the following Findings of Fact and Conclusions of Law, and issues this
22 ORDER to the Commissioner of the Department.

23 **FINDINGS OF FACT**

24 **BACKGROUND AND PROCEDURE**

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

28
29 ¹ The hearing record was held open until Monday, April 15, 2024, for the receipt of the underlying petition in
30 the above-captioned matter from the Department, which was timely received.

1 2. On or about December 15, 2023, Petitioner filed a single issue petition with
2 the Department which alleged that Respondent violated Arizona Revised Statutes ("ARIZ.
3 REV. STAT.") § 33-1258 by failing to comply with a formal records request regarding
4 damage to her unit "for which they and/or the previous owner may be responsible or
5 partially responsible for the cost of repair work." Petitioner requested an ORDER from the
6 Department that levied a civil penalty against Respondent and required Respondent to
7 abide by the aforementioned statute.

- 8 a. On an unknown date, Petitioner tendered \$500.00 to the Department as a
9 filing fee for the petition at issue.

10 3. On January 10, 2024, the Department issued an HOA NOTICE OF PETITION t
11 the Association.²

12 4. On an unknown date, Respondent returned its ANSWER³ to the Department
13 whereby it provided the following information:

- 14 a. The Association's contracted pest control contractor reviewed its records
15 and could not locate any treatments for Unit 40.
16 b. A termite inspection is conducted annually. No formal report is issued
17 unless activity is located in the community.⁴
18 c. A records search on February 10, 2024, at the Arizona Structural Pest
19 Control Board did not yield any results.⁵
20 d. The Association's insurance carrier informed Respondent that there is an
21 exclusion clause in their policy for infestation by insects or animals.⁶

22 5. Per the NOTICE OF HEARING, the Department referred this matter to the
23 Office of Administrative Hearings ("OAH"), an independent state agency, for an
24 evidentiary hearing on October 18, 2023,⁷ regarding the following issue:

25
26
27 ² See Department's electronic file at Notice of Petition.pdf.

28 ³ See Department's electronic file at AZDRE-Reply.pdf.

29 ⁴ See attached Exhibit A, an October 13, 2023, Service Summary Report from Burns Pest Elimination.

30 ⁵ See attached Exhibit B; see also <https://azlibrary.gov/content/structural-pest-control-board>.

⁶ See attached Exhibit B, page 3 of 10 from Respondent's insurance policy.

⁷ At the request of Petitioner, the matter was continued and reset for hearing on November 14, 2023.

1 **Whether Respondent violated ARIZ. REV. STAT. § 33-1258 because the “HOA**
2 **has not complied witha [sic] formal records request ... regarding damage to**
3 **homeowner's unit.”**

4 **THE PARTIES AND GOVERNING DOCUMENTS**

5 6. Respondent is a nonprofit homeowners' association⁸ whose members own
6 properties in the Palo Verde Estates residential real estate development located in
7 Phoenix, Arizona. Membership for the Association is comprised of Palo Verde Estates
8 condominium owners.

9 7. Petitioner owns condominium unit 40 within Palo Verde Estates and is a
10 member of the Association.

11 8. The Association is governed by its CC&Rs and overseen by a Board of
12 Directors (“the Board”). The CC&Rs empower the Association to control certain aspects of
13 property use within the development. When a party buys a residential unit in the
14 development, the party receives a copy of the CC&Rs and agrees to be bound by their
15 terms. Thus, the CC&Rs form an enforceable contract between the Association and each
16 property owner.

17 9. The Association is managed by Desert Realty Association Management
18 (“DRAM”), also located in Phoenix, Arizona. Jacqueline Zipprich is employed by DRAM.
19 Ms. Zipprich has served as the Association’s Community Property Manager for 10 years.

20 **HEARING EVIDENCE**

21 10. Petitioner testified on her own behalf. Ms. Zipprich testified on behalf of
22 Respondent. The substantive evidence of record is as follows:

23 11. Petitioner purchased 610 E. Montebello Ave., Unit 40 Phoenix, Arizona
24 85012 in July 2022. At that time, Petitioner received all community documents from
25 Respondent through its agent, DRAM.

26 12. The morning of October 12, 2023, Petitioner emailed the Board and DRAM
27 regarding a water leak discovered in her unit during a window installation.⁹ Specifically,
28 Petitioner advised, “Heads up, there is evidence of a water leak and they suspect some

29 ⁸ See Department's electronic file at Arizona Corporations Commission.pdf.

30 ⁹ See Department's electronic file at Yahoo Mail – Re_RECORDS REQUEST.pdf.

1 minor water damage to the beams under the upstairs front windows. Because of this, they
2 can't finish the install on those 2 windows until a contractor comes out to take a look and
3 fix any damage as needed, so the front windows will be mismatched for a short while.
4 Working on resolving ASAP.”¹⁰ Petitioner also provided photographs of her windows and
5 surrounding frames.¹¹

6 13. The afternoon of October 12, 2013, DRAM scheduled pest inspection for
7 Petitioner’s unit.¹² Subsequent inspection by pest control did not note any “live activity.”
8 Afterwards, Petitioner issued the following correspondence to the Board and DRAM:

9 “[An individual] mentioned that the older termite damage I am seeing was a known
10 issue in the building and she had to have repairs previously as a result that the
11 HOA was responsible for. I was wondering if you had any of the records pertaining
12 to that as the previous owner did not disclose this in the sale contract as required,
13 as there may need to be legal action taken against the seller.”¹³

14 14. The evening of October 12, 2013, DRAM issued the following
15 correspondence to Petitioner and the Board:

16 “I wonder if [Individual] might be thinking of the on the exterior, [Board president]
17 correct me if I am wrong, the wood was between windows called T1-11 that the
18 community had replaced and installed stucco. But I don’t recall having to do
19 anything major....As far as I know the windows you had were the original....and
20 many owners did not maintain their windows...If you have damage at the bottom of
21 the sill [it] is usually from poor maintenance.... If I am not mistaken the buildings
22 was built in 1973.

23 [Petitioner]; the windows are the unit owners; if it was leaking it would have been an
24 owners [sic] responsibility to maintenance.”¹⁴

25 15. On October 13, 2023, Petitioner issued the following correspondence to the
26 Board and DRAM, in pertinent parts:

27 As we have opened the walls today to better survey the damage and assess
28 required repairs, the damage in not water related or a result of having the older
29 windows but rather damage to the external walls caused by a termite infestation.
30

31 ¹⁰ *Id.*

32 ¹¹ *Id.*

33 ¹² *Id.*

34 ¹³ *Id.*

35 ¹⁴ *Id.*

1 Based on what I am reading in the CC&Rs, the repair costs are at the expense of
2 the HOA because this is outside damage to a common area (the main walls).

3 Please advise on how we need to proceed - the required demo has been
4 completed and they are looking to replace the damaged structural beams next
5 week. I will not be able to finish the window replacement and the plywood will
6 remain in place out front until that happens, the ETA for the second attempt at
7 installation is looking like it will be the week of 10/24.

8 The contractor took many photos of the damage and I can forward those as well
9 once he sends them over to me.¹⁵

10 16. On October 27, 2023, Petitioner issued the following correspondence to the
11 Board and DRAM:

12 Following up on the below as I have not heard back yet on next steps. I have
13 attached the invoicing and payments made for the repairs that I believe should be
14 reimbursed for.

15 [The contractor] will be back out on Wednesday, 11/1 to finish installing the
16 windows and remove the plywood. The contractor will be out shortly after to finish
17 the repairs to the stucco.¹⁶

18 17. On November 28, 2023, Petitioner issued the following correspondence to
19 the Board and DRAM:

20 Pursuant to AZ 33-1258, I am making a formal records request. Please provide the
21 following records within 10business days from this request, on or before Tuesday,
22 12/12/2023:

- 23 - All records relating to building termite services dating back 10 years including but
24 not limited to: Service Invoices, Visit Reports, any claims from homeowners
25 regarding termite infestations
- 26 - A copy of our HOA termite warranty
- 27 - Our HOA Insurance Policy Information¹⁷

28 18. On December 12, 2023, Petitioner issued the following correspondence to
29 the Board and DRAM:

30 ¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

1 I am following up on this request as I have not yet received these records that are
2 legally due to me today. As much I would like to avoid having to do so, due to the
3 continued lack of any response by the management company and HOA in regards
4 to this matter and subsequently this request, I will be filing a complaint with the
[Department] if I do not hear back by tomorrow.

5 19. On February 13, 2024, Petitioner received all of the records that she
6 requested from Respondent, save the Association's insurance policy and termite
7 warranty.

8 20. On February 23, 2024, Petitioner requested the aforementioned
9 outstanding documentation from Respondent.

10 **ADDITIONAL EVIDENCE**

11 21. The Association does not have a termite warranty, and did not during the
12 relevant time period.

- 13 a. The Association has a pest control treatment plan, whereby the community
14 is inspected annually and treated as necessary. Documentation is created
15 only if treatment is undertaken.

16 As much was explained to Petitioner at the Association's January 2024 Board meeting.

17 22. Because DRAM was unclear about Petitioner's insurance policy request,
18 only the Declaration and Exclusion pages were provided.

19 **CLOSING ARGUMENTS**

20 23. Both parties declined to provide closing arguments before the Tribunal.

21 **CONCLUSIONS OF LAW**

22 1. This matter lies within the Department's jurisdiction pursuant to ARIZ. REV.
23 STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a
24 planned community association. The owner or association may petition the department
25 for a hearing concerning violations of community documents or violations of the statutes
26 that regulate planned communities as long as the petitioner has filed a petition with the
27 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.
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2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D), 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested case at bar. OAH has the authority to interpret the contract between the parties.¹⁸

3. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1258. Respondent bears the burden to establish factors in mitigation and affirmative defenses by the same evidentiary standard.¹⁹

4. “A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not.”²⁰ A preponderance of the evidence is “[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”²¹

5. A fundamental rule of statutory construction requires that every word or term in a statute be given meaning so that construction of certain terms in a statute does not render any of its other terms superfluous.²² Statutes shall be liberally construed to affect their objects and to promote justice.²³ In interpreting a statute, “[w]e first consider the language of the statute and, if it is unclear, turn to other factors, including ‘the statute’s context, subject matter, historical background, effects, consequences, spirit, and purpose.’”²⁴

¹⁸ See *Tierra Ranchos Homeowners Ass’n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

¹⁹ See ARIZ. ADMIN. CODE R2-19-119(B)(2).

²⁰ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

²¹ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

²² See, e.g., *State v. Hoggatt*, 199 Ariz. 440, 443 ¶ 10, 18 P.3d 1239, 1242 (App. 2001).

²³ See ARIZ. REV. STAT. § 1-211(B).

²⁴ *McMurren v. JMC Builders, Inc.*, 204 Ariz. 345, 350 ¶ 12, 63 P.3d 1082, 1087 (App. 2003) (citing *Norgord v. State ex rel. Berning*, 201 Ariz. 228, P7, 33 P.3d 1166, ¶ 7 (App. 2001), quoting *Hobson v. Mid-Century Ins. Co.*, 199 Ariz. 525, P8, 19 P.3d 1241, ¶ 8 (App. 2001)).

1 6. Statutes should be interpreted to provide a fair and sensible result.²⁵ “In
2 applying a statute its words are to be given their ordinary meaning unless the legislature
3 has offered its own definition of the words or it appears from the context that a special
4 meaning was intended.”²⁶

5 7. ARIZ. REV. STAT. § 33-1258(A) provides, notwithstanding enumerated
6 exceptions in subsection B, as follows:

7 [A]ll financial and other records of the association shall be made reasonably
8 available for examination by any member or any person designated by the
9 member in writing as the member's representative. The association shall not
10 charge a member or any person designated by the member in writing for making
11 material available for review. The association shall have ten business days to
12 fulfill a request for examination. On request for purchase of copies of records by
13 any member or any person designated by the member in writing as the
14 member's representative, the association shall have ten business days to
15 provide copies of the requested records. An association may charge a fee for
16 making copies of not more than fifteen cents per page.

17 8. Based upon a review of the credible and relevant evidence in the record,
18 Petitioner has sustained her burden of proof.

19 9. Here, the relevant and credible evidence of record reflects that Petitioner
20 submitted a records request for three (3) separate and distinct items on November 28,
21 2023, which means that Respondent had until December 12, 2023, to comply. The record
22 also reflects that although Petitioner follow-up with Respondent on December 12, 2023,
23 regarding her request, Respondent did not comply until February 13, 2024, nearly two (2)
24 months late. While Petitioner contends that she only received some of the documents she
25 requested, the record further reflects that she never asked for the Association's entire
26 insurance policy, only “HOA Insurance Policy Information,” which was vague and
27 ambiguous. Additionally, because the Association never had a “termite warranty,”
28 Respondent was unable to provide Petitioner with something that did not exist. Nothing in
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30

²⁵ See *Gutierrez v. Industrial Commission of Arizona*, 226 Ariz. 395, 249 P.3d 1095 (2011)(citation omitted);
State v. McFall, 103 Ariz. 234, 238, 439 P.2d 805, 809 (1968) (“Courts will not place an absurd and
unreasonable construction on statutes.”).

²⁶ *Mid Kansas Federal Savings and Loan Ass'n of Wichita v. Dynamic Development Corp.*, 167 Ariz. 122,
128, 804 P.2d 1310, 1316 (1991).

1 the record establishes a viable justification or excuse for Respondent's inaction and/or
2 lack of performance on Petitioner's records request during the applicable time period.

3 10. Thusly, the Tribunal finds that Petitioner has established Respondent's
4 violation of ARIZ. REV. STAT. § 33-1258 by a preponderance of the evidence.

5 11. As such, the undersigned Administrative Law Judge concludes that the
6 underlying petition must be granted.

7 **ORDER**

8 Based on the foregoing,

9 **IT IS ORDERED** that Petitioner's petition is granted.

10 **IT IS FURTHER ORDERED** that Respondent shall reimburse Petitioners' filing fee
(e.g. \$500.00) in certified funds.

11 **IT IS FURTHER ORDERED** that Respondent shall henceforth comply with ARIZ.
12 REV. STAT. § 33-1258.

13 **IT IS FURTHER ORDERED** that a civil penalty shall not be assessed against
14 Respondent in this matter.

15 **NOTICE**

16 ***Pursuant to ARIZ. REV. STAT. §32-2199.02(B), this ORDER is binding on the***
17 ***parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. § 32-2199.04.***
18 ***Pursuant to ARIZ. REV. STAT. § 41-1092.09, a request for rehearing in this matter***
19 ***must be filed with the Commissioner of the Department of Real Estate within thirty***
20 ***(30) days of the service of this ORDER upon the parties.***

21 Done this day, April 17, 2024.

22
23 **Office of Administrative Hearings**

24 **/s/ Jenna Clark**
25 **Administrative Law Judge**

26
27 Transmitted by either mail, e-mail, or facsimile to:
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29
30

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