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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Lisa Marx,
Petitioner,
v.
Tara Condominium Association,
Respondent.

No. 24F-H054-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARING: August 29, 2024

APPEARANCES: Lisa Marx represented herself. Mark Gottmann, Chairman of the Board, represented Tara Condominium Association.

ADMINISTRATIVE LAW JUDGE: Kay A. Abramsohn

EXHIBITS ADMITTED INTO EVIDENCE: Notice of Hearing Packet, containing Petition and its attachments, and other background procedural documents; Tara Exhibit A; regarding Petitioner's "Example 13" issue, Exhibits 1 through 15 and 26 through 30 (including a full copy of Tara Condominium Association's Worker's Compensation and Employers Liability Insurance Policy); regarding Petitioner's "Records" issue, Exhibits 1 through 11.

FINDINGS OF FACT

BACKGROUND

1. Pursuant to Arizona Revised Statutes (A.R.S.) § 33-1801 et seq., the Arizona Department of Real Estate (Department) is authorized by statute to receive and to decide Petitions for Hearings from members of planned community associations in Arizona.

2. Petitioner is a homeowner within the Tara Condominium Association (TARA).¹ Since 2021, Petitioner has been involved in TARA as an officer, including having held offices, at various times, of Chairman of the Board of Management (Board), Vice-Chairman, and Secretary. However, in January 2024, after she had been elected to

¹ TARA includes fifty (50) units.

1 the Board in January 2024, Petitioner resigned from the Board “after seeing the direction”
2 in which the Board was going.²

3 3. On February 1, 2024, Mark Gottmann assumed the role of Chairman of
4 the Board after Tina Marie Shepherd resigned on January 31, 2024.³

5 4. On February 1, 2024, Petitioner was informed by the Board that she was
6 not on a landscaping committee because that committee did not exist.⁴

7 PROCESS

8 5. On or about May 29, 2024, Petitioner filed an HOA Dispute Process
9 Petition (Petition) with the Arizona Department of Real Estate (Department) indicating that
10 she had two issues with Tara Condominium Association (TARA). With that filing,
11 Petitioner paid the total fee of \$1,000.00 for two issues (*i.e.*, \$500.00 per issue).⁵

12 6. The matter was referred to the Arizona Office of Administrative Hearings
13 (Tribunal) for conduct of an administrative hearing regarding the Petition.

14 7. In the instant Petition, Petitioner alleged that TARA was in violation of the
15 following: Arizona Revised Statutes (A.R.S.) § 33-1258(A); A.R.S. § 33-1248 (A), (D), (E),
16 and (F); and, Tara CC&Rs Section 9(E).

17 8. In the Petition, Petitioner set forth, as to A.R.S. § 33-1258(A), five instances
18 on multiple dates of the alleged denials or partial denials of allowing review, or provision,
19 of requested documents.

20 9. Additionally, Petitioner set forth, as to A.R.S. § 33-1248(A), (D), (E), and (F),
21 and Tara CC&Rs Section 9(E), thirteen instances on eleven different dates of alleged and
22 various violations of A.R.S. § 33-1248(A), (D), (E), and (F), lumping them together under
23 all of the stated A.R.S. § 33-1248 subsections.

24 10. On or about June 29, 2024, TARA had filed with the Department a
25 Response to the Petition, summarily denying all of the allegations.

26 ² Generally, see Petitioner’s “Example 13” Exhibit 4. Those January 20, 2024 meeting minutes indicate,
27 among other items, that Petitioner gave a landscaping report, that volunteers were sought for a landscaping
28 committee to be chaired by “[Petitioner] from the Board;” and, that Petitioner read into the record her
29 resignation letter and gave the letter to Ms. Shepherd.

30 ³ See Petitioner’s “Example 13” Exhibit 1.

⁴ See Petitioner’s “Example 13” Exhibit 2.

⁵ See A.R.S. Section 32-2199.01.

11. On August 8, 2024, TARA filed with the Tribunal an Amended Response to Petitioner's Petition. In that Amended Response, TARA admitted to the alleged violations of A.R.S. § 33-1248(A), (D), (E), and (F) on or about February 1, 2024.⁶ Additionally, TARA admitted to the alleged violations of A.R.S. § 33-1258(A) on February 22, 2024, March 26, 2024, and April 4, 2024.⁷ Finally, TARA stipulated to make a \$1,000.00 payment to Petitioner reimbursing her for her filing fees and requested that the Tribunal vacate the scheduled August 29, 2024 hearing.

12. On August 8, 2024, Petitioner filed a Reply to Respondent's motion and requested that the Tribunal not vacate the hearing. Petitioner argued that the "numerous" issues in her two complaints required "a ruling that is binding and definite" to "hopefully prevent further violations." Petitioner argued that the Amended Response was "only a partial acceptance of the violations."

13. By ORDER dated August 16, 2024, the Tribunal ordered Petitioner to narrow her Petition to two issues.

14. The Tribunal's ORDER informed the parties that the alleged five separate violations of A.R.S. § 33-1258(A) would be categorized as one allegation of a "records" violation and thus, would be treated at the administrative hearing as one issue.

15. The Tribunal's ORDER further informed the parties that the thirteen alleged violations of A.R.S. § 33-1248(A), (D), (E), and (F) and CC&RS Section 9 could not be categorized as one issue due to the allegations of multiple instances of various actions over five or six different dates.

16. On August 19, 2024, Petitioner selected the "one" other issue to proceed to hearing to be her "Example 13" on the Petition documents, regarding her allegation of TARA violation of A.R.S. § 33-1248(A), (D), (E), and (F) and CC&RS Section 9(E).

17. Petitioner's "Example 13" reads as follows:

Contrary to the provisions of [A.R.S. 33-1248(A)(D)(E) and (F)] relative to actions of the board being done in an open meeting with a notice and agenda provided and allowing members to speak before the board takes

⁶ February 1, 2024 is the date Mark Gottmann assumed the role of Chairman of the Board; it is a date that is one of the eleven instances of which Petitioner alleged violations.

⁷ Those dates are three of the five instances on which Petitioner alleged violations.

1 formal action, and contrary to the Tara Condominium Association C,C,
2 and Rs point9e. [Quote omitted herein]: Additional projects have been in
3 progress on the property including but not limited to Mark and Dennis
4 spraying weeds when we have a contract in place for weed treatment that
5 is not being utilized during the warranty period[.] Mark, Tina and Dan
6 working on digging up the grass around the base of trees and putting
7 down mulch and Dennis Anderson refinishing the wood shutters in Del
8 Mar Court. None of these actions have been on an agenda and
addressed in an open meeting allowing members to make comments
before the board takes formal action. None of these projects are in
meeting minutes and no formal vote of the board is documented in an
open meeting authorizing such activities. No emergency was declared.

9 **“Records” Issue**

10 18. On February 19, 2024, Petitioner requested the following documents for
11 the months of January and February of 2024:⁸

- 12 a. All vouchers for payment for January and February 2024;
- 13 b. The contract and all other documents that were involved with the
- 14 digging of the trench on Newcastle by Mark Gottmann and Dennis
- 15 Anderson;
- 16 c. Documents regarding the roof repair on 13609 N. Newcastle;
- 17 d. All Architectural Change Forms; and,
- 18 e. All violation letters.

19 19. On February 22, 2024, the Board responded as follows:⁹

20 A member of the Association is entitled to see reasonable financial information
21 only. A member does not have a right to see contracts entered into by the Board
22 nor information concerning specific members. We respectfully refuse your request
23 to see the above information.

24 20. Petitioner’s subsequent requests were for the same documents but with
25 elaboration on specific dates as to some items and she added multiple other items
26 supporting and documenting various repairs, lawn/yard work, tree work, and volunteer
27 work and insurance coverage therefor.¹⁰

28 ⁸ See Petitioner’s “Records” Exhibit 1.

29 ⁹ See Petitioner’s “Records” Exhibit 2.

30 ¹⁰ See Petitioner’s “Records” Exhibits 4 and 10. Petitioner’s March 21, 2024 request set forth a request for a
multitude of information (photographs, supply invoices, emails, committee minutes, and any other records
about roof repairs, facia repairs, tree work, pipe issues, drip nozzles and volunteers’ requests). The Board’s

21. At hearing, Petitioner argued that she had not received documents she had requested on February 19, 2024, on March 21, 2024, on March 29, 2024, and on April 27, 2024. Petitioner argued that Mr. Gottmann was “blocking transparency.” Petitioner noted that the Board used various excuses, arguing none of which were statutorily appropriate as to preventing her (or any homeowner) from having access to see/inspect TARA’s homeowner’s associations (HOA) records. Petitioner presented evidence of her requests and the HOA responses each time denying to provide access to some of the documents.¹¹

22. At hearing, TARA did not deny that it had not provided all the requested records within the statutorily required time frame. TARA explained that the Board was a new Board and, believing it was acting in the Board's best interest, was in the process of learning the procedures for better governing practices. TARA stated that, as to some of the later requests, TARA had, in fact, provided monthly balance sheet reports, budget comparison reports, and reserve statement reports to all members. However, TARA further explained that the company which coordinated/compiled the general ledger and distribution reports had been sold/purchased in November or December of 2023 and was not providing certain reports back to TARA in a timely manner; TARA indicated that when it received the "late" reports and looked them over, those documents were then distributed to all members.

23. Based on advisory information from a trade association, the Board also believed it was “over-providing” documents to the members, and was not simply refusing to provide some documents to Petitioner. In this regard, TARA cited to CC&Rs Section 12, which provides as follows:

The Board of Management shall have the following rights and powers:

...

N. To render to the owner's semi-annual statements of receipts and expenditures.

“Example 13” Issue

subsequent responses contained denials for other reasons, none of which met the exceptions from access set forth in A.R.S. § 33-1258(B).

¹¹ See Petitioner's "Records" Exhibits 3, 5, 8, and 11.

1 24. Petitioner essentially argued that all the volunteer work performed by
2 those HOA members should have been on agendas to be discussed at open meetings
3 before the Board took “formal action.” Further, that such work had not been voted on,
4 approved and authorized by the Board, was not “emergency” work, and was not reflected
5 in meeting minutes.¹² Petitioner argued that, because each homeowner had a 1/50
6 interest in TARA, each member had a right to know about common area items being done
7 and to be assured that things were done in accord with the rules. Petitioner
8 acknowledged that as to an individual’s home there would not be a right for others to see
9 such information.¹³ However, Petitioner insisted that as to some repairs, there would have
10 been a contract and a warranty in place, and she argued that all of the work should have
11 been documented in meeting minutes.

12 25. TARA argued that the work Petitioner referenced in Example 13 was
13 simply being done by volunteers at no cost to the HOA, and, generally, being done to save
14 money for the HOA. TARA volunteers sprayed weeds with a donated different weed killer
15 to test its effectiveness. TARA volunteers removed grass and then put donated mulch
16 around the trees to prevent the tree trunks from being further damaged by the
17 landscaper’s work. TARA acknowledged that there were no “documents” as to this
18 volunteer work and that such volunteer work had not been placed on a meeting agenda, or
19 discussed by members, or “approved” by the Board, but simply was some Board
20 members enthusiastically working together to get a few things done.

21 26. A.R.S. § 33-1258, Association financial and other records, provides in
22 pertinent part:

23 A. Except as provided in subsection B of this section, all financial and
24 other records of the association shall be made reasonably available for
25 examination by any member or any person designated by the member in
26 writing as the member’s representative. The association shall not charge
27 a member or any person designated by the member in writing for making
28 material available for review. The association shall have ten business
29 days to fulfill a request for examination. ...

30

¹² Meetings had been held on January 20, 2024, February 17, 2024, and March 16, 2024. See Petitioner’s
“Example 13” Exhibits 3 and 4, Exhibits 6 and 7, and Exhibits 12 and 14, respectively.

¹³ In one of her requests, Petitioner stated that such information could be “redacted” of the personal
information.

1 27. A.R.S. § 33-1248, Open Meetings provides, in pertinent part:

2 A. Notwithstanding any provision in the declaration, bylaws or other
3 documents to the contrary, all meetings of the unit owners' association
4 and the board of directors, and any regularly scheduled committee
5 meetings, are open to all members of the association or any person
6 designated by a member in writing as the member's representative and
7 all members or designated representatives so desiring shall be allowed
to attend and speak at an appropriate time during the deliberations and
proceedings. ...

8

9 D. Notwithstanding any provision in the declaration, bylaws or other
10 condominium documents, for meetings of the board of directors that are
11 held after the termination of declarant control of the association, notice to
12 unit owners of meetings of the board of directors and meeting agendas
13 shall be given at least forty-eight hours in advance of the meeting by
14 newsletter, conspicuous posting or any other reasonable means as
15 determined by the board of directors. ... Notice to unit owners of
16 meetings of the board of directors is not required if emergency
17 circumstances require action by the board before notice can be given.
18 Any notice of a board meeting shall state the date, time and place of the
19 meeting. *The failure of any unit owner to receive actual notice of a
20 meeting of the board of directors or a meeting agenda does not affect the
21 validity of any action taken at that meeting.*¹⁴

22 E. Notwithstanding any provision in the declaration, bylaws or other
23 condominium documents, for meetings of the board of directors that are
24 held after the termination of declarant control of the association, all of the
25 following apply:

- 26 1. The agenda shall be available in advance for all unit owners
27 attending.
- 28 2. An emergency meeting of the board of directors may be
29 called to discuss business or take action that cannot be
30 delayed for the forty-eight hours required for notice. At any
emergency meeting called by the board of directors, the board
of directors may act only on emergency matters. The minutes
of the emergency meeting shall state the reason necessitating
the emergency meeting. The minutes of the emergency
meeting shall be read and approved at the next regularly
scheduled meeting of the board of directors.
3. A quorum of the board of directors may meet by means of a
telephone conference if a speakerphone is available in the

¹⁴ Emphasis added here.

meeting room that allows board members and unit owners to hear all parties who are speaking during the meeting.

4. Any quorum of the board of directors that meets informally to discuss association business, including workshops, shall comply with the open meeting and notice provisions of this section without regard to whether the board votes or takes any action on any matter at that informal meeting.

F. It is the policy of this state as reflected in this section that all meetings of a condominium, whether meetings of the unit owners' association or meetings of the board of directors of the association, be conducted openly and that notices and agendas be provided in advance for those meetings that contain the information that is reasonably necessary to inform the unit owners of the matters to be discussed or decided and to ensure that unit owners have the ability to speak after discussion of agenda items, but before a vote of the board of directors or members is taken. Toward this end, any person or entity that is charged with the interpretation of these provisions, including members of the board of directors and any community manager, shall take into account this declaration of policy and shall construe any provision of this section in favor of open meetings.

28. TARA CC&R Section 9(A) provides:

That, in order to promote and maintain efficiency and cooperation for the full enjoyment of any of the grantees of the units ... a Board of Management be, and the same is hereby established and created ...

...

(E). A majority vote of the Managers shall entitle the Board to carry out action on behalf of the owners of the units.

29. Based on consideration of the evidence presented, the Administrative Law Judge finds as follows:

a. TARA acknowledged that it had not provided access to requested records, noting that, in some few instances, TARA had not yet received the "monthly" information from its management company. Thus, as to records in its possession at the time of the request(s), TARA is found to have not timely provided access to records.

b. Petitioner acknowledged that she had received some of the requested records (specifically, the Balance Sheet, Budget Comparison,

and Reserve Statement), likely at the “monthly” time when TARA sent them out.¹⁵

c. TARA sent out “late-received” information after TARA received it.

d. As to some of the requested documents, there simply were no TARA documents: TARA did not have any architectural change forms and had not issued any violation notices; and, TARA did not have any “contracts” with its volunteers for the donated time and supplies given/utilized in those volunteer projects.

e. The “Board” consists of three Managers.¹⁶ With regard to CC&Rs Section 9(E), only 2 of the 3 Managers have to agree to take action on behalf of the homeowners. The CC&R’s do not require votes by homeowners except for elections, under the rules adopted by the Board.¹⁷

f. Open meeting laws require that notice be given to members of meetings and that members be allowed to speak, with reasonable time limits, on agenda items. Based on the hearing record, the process by which and for which any particular matters are placed on a TARA agenda for the TARA monthly meetings is not in evidence.

g. In the instant case, based on the hearing record, TARA gave notice to members of the January, February and March meetings and issued Agendas for those meetings.¹⁸

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CONCLUSIONS OF LAW

¹⁵ Petitioner’s records requests of March 29, 2024 and April 27, 2024 had included a request for PDF’s of those documents, along with a request for PDF’s of the General Ledger report and AP Distribution report. See Petitioner’s “Records” Exhibits 6 and 10

¹⁶ While Petitioner indicated that she had served in other offices, the CC&Rs do not address any other officers. No other governing documents were provided to the hearing record.

¹⁷ See TARA Exhibit A at Section 9(C) and (D).

¹⁸ See Petitioner’s “Example 13” Exhibits 3, 6, and 12.

1 1. This matter lies within the Department's jurisdiction. Pursuant to A.R.S. §§
2 32-2102 and 32-2199 *et al.*, regarding a dispute between an owner and a planned
3 community association, the owner or association may petition the department for a
4 hearing concerning violations of condominium documents or violations of the statutes that
5 regulate condominiums as long as the petitioner has filed a petition with the department
6 and paid the appropriate filing fee as outlined in A.R.S. § 32-2199.05.

7 2. Pursuant to A.R.S. §§ 32-2199(2), 32-2199.01(D), 32-2199.02, and 41-
8 1092, OAH has the authority to consider and decide the contested petitions, the authority
9 to order any party to abide by the statute, community documents and contract provisions
10 at issue, the authority to interpret the contract *between the parties*, and the authority to
11 levy a civil penalty on the basis of each proven violation. *See also Tierra Ranchos*
12 *Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

13 3. In these proceedings, a petitioner bears the burden of proving by a
14 preponderance of the relevant evidence that a respondent had violated the planned
15 community document(s') provisions or statutes alleged to have been violated.¹⁹

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

23 5. Petitioner's Petition was brought based on her belief that the Board was not
24 acting appropriately (a) within the statutory records requirements when they *refused* to
25 provide documents *for the reasons that TARA stated* and (b) within the open meeting
26 requirements when work was performed on a volunteer basis without going through an
27 open meeting and agenda process to discuss and approve the work. This statutory

28 ¹⁹ See ARIZ. ADMIN. CODE (A.A.C) R2-19-119; see also A.A.C. R2-19-116 regarding the conduct of
29 administrative hearings.

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

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

process permits disputes between homeowners and an association solely as to alleged violations of governing documents or alleged violations of applicable statutory provisions.

6. Regarding the alleged violation of A.R.S. § 33-1258, the hearing record demonstrates that TARA did not have some documents that were requested on February 19, 2024, such as violation letters or architectural change forms for the requested time period. Additionally, TARA believed that Petitioner did not have the right to see contracts entered into by the Board or information regarding specific member's [homes]. As to the next request on March 21, 2024 for a plethora of information about a multitude or work activity in the community, TARA declined to provide such, stating that Petitioner was no longer a Board member. Finally, as to the later requests for HOA financial documents, TARA had indicated to Petitioner that the financial documents would be provided as soon as they were available.

7. A.R.S. § 33-1258(B)(4) provides an exception to the requirement to provide records for "personal, health or financial records of an individual member ... including records of the association directly related to the personal, health or financial information about an individual member In this case, because some of the requested "repair" contract information for repairs at certain addresses may have contained personal information of another member, TARA was likely within its statutory authority to refuse to provide that particular information.²²

8. TARA has a defense, although unsupported, regarding the time frame only as to the financial documents for which TARA was waiting from its management company. While the evidence was not detailed with regard to any specific dates, Petitioner acknowledged that she did receive certain of the financial records.

9. Overall, as to A.R.S. § 33-1258, there is no evidence that, within the ten day time frame, TARA provided access to the TARA HOA records it did have and which were required to have been provided to Petitioner; therefore, the Administrative Law Judge concludes that TARA violated A.R.S. § 33-1258.

²² Neither party provided testimony or documents about the specific addresses.

10. Regarding the alleged violation of A.R.S. § 33-1248(A), (D), (E), and (F); and, Tara CC&Rs Section 9(E), the hearing record failed to support a finding of a violation of the open meeting laws for the Example 13 circumstances. Based on the hearing record, TARA conducted meetings in compliance with the open meeting laws; the hearing record contains notices and the hearing record contains minutes reflecting the Board allowing members to speak at the meetings on agenda items. There is no evidence in the hearing record that, prior to the volunteer work described in Example 13, that those work circumstances, or any projected volunteer work circumstances, were required by statute or the CC&Rs to be placed on a TARA agenda for discussion and/or for “formal action” by the Board at the TARA monthly meetings.

11. Given an exhaustive review of the admitted hearing records for consideration, the Administrative Law Judge concludes that Petitioner has sustained her burden as to the “Records” issue but has failed to sustain her burden as to the “Example 13” issue.

12. TARA failed to comply with A.R.S. § 33-1258 regarding provision of access to TARA HOA records. The Administrative Law Judge concludes Petitioner is the prevailing party regarding the “Records” issue.

13. Tara did not violate the open meeting laws of A.R.S. § 33-1248(A), (D), (E), and (F) and/or Tara CC&Rs Section 9(E) with regard to the “Example 13” circumstances. The Administrative Law Judge concludes TARA is the prevailing party regarding the “Example 13” issue and Petitioner bears the filing fee on this issue.

ORDER

IT IS ORDERED that Petitioner’s Petition is sustained as to TARA violation of A.R.S. § 33-1258 and Petitioner’s Petition is dismissed as to alleged violations by TARA of A.R.S. § 33-1248(A), (D), (E), and (F) and/or Tara CC&Rs Section 9(E).

IT IS ORDERED that TARA reimburse Petitioner in the amount of \$500.00.

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NOTICE

1 Pursuant to A.R.S. § 32-2199.02(B), this ORDER is binding on the parties
2 unless a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S. §
3 41-1092.09, a request for rehearing in this matter must be filed with the
4 Commissioner of the Arizona Department of Real Estate within 30 days of the
5 electronic service of this ORDER upon the parties.

6 Done this day, September 20, 2024.

7 OFFICE OF ADMINISTRATIVE HEARINGS

8
9 /s/ Kay Abramsohn
10 Administrative Law Judge

11 Transmitted electronically to:

12
13 Susan Nicolson, Commissioner
14 Arizona Department of Real Estate
15 Arizona Department of Real Estate
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