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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

R.L. Whitmer,
Petitioner,

v.
Hilton Casitas Council of Homeowners,
Respondent.

No. 25F-H001-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARING: October 25, 2024.

APPEARANCES:

For Petitioner: R. L. Whitmer.

For Respondents: Attorney Emily Mann.

ADMINISTRATIVE LAW JUDGE: Samuel Fox

EXHIBITS ADMITTED INTO EVIDENCE: Notice of Hearing File, provided by the
Department of Real Estate. Petitioner's Exhibits. Respondent's Exhibits.

FINDINGS OF FACT

PETITIONER'S CLAIM

1. Hilton Casitas Council of Homeowners ("Respondent") was a condominium
association in Scottsdale, Arizona.

2. R.L. Whitmer ("Petitioner") owns a home located at 6333 N. Scottsdale Rd.,
Casita 12, and was a member of Respondent.

3. On or about June 27, 2024, Petitioner filed a Petition with the Arizona
Department of Real Estate ("Department") alleging that Respondent had violated A.R.S. §
33-1215(A)(1). The Petition provided as follows:

The Hilton Casitas condominium was created on May 22, 1972 with
the recording of the Declaration of Horizontal Property Regime for Hilton
Casitas [("Declaration")] pursuant to A.R.S.[.] § 33-551 et seq[.], the
Horizontal Property Regime Act. The Declaration created the Hilton Casitas
Council of Co-Owners, an unincorporated association.

1 In 1985 the Legislature repealed the Horizontal Regime Act and
2 enacted the Condominium Act (A.R.S.] § 33-1201 et seq[.])[,], which
3 included A.R.S.] § 33-1215. A.R.S.] § 33-1215(A)(1) requires: "A. The
4 declaration shall contain: 1. The name of the condominium, which shall
5 include the word 'condominium' or be followed by the words 'a
6 condominium', and the name of the association.["]

7 In 1994 president of Council of Co-Owners was the sole incorporator
8 of the Hilton Casitas Council of Homeowners, a non-profit corporation, but
9 did not amend the Declaration, as required by A.R.S.] § 33-1227, to comply
10 with A.R.S.] § 33-1215(A)(1).

11 The Petitioner has on multiple occasions request[ed] the board of the
12 non-profit corporation to amend the Declaration to make the non-profit a
13 party to Declaration and the amended subleases of the unit owners.

14 4. On or about June 29, 2024, Respondent, denied the complaint items in the
15 Petition.

16 5. The Department referred the Petition to the Office of Administrative
17 Hearings, an independent state agency, for an evidentiary hearing. The Notice of
18 Hearing, dated September 20, 2024, set the hearing for October 25, 2024.

19 6. On October 1, 2024, Respondent filed a motion to dismiss, making three
20 claims (1) the Declaration was compliant with A.R.S. § 33-1215(A)(1); (2) the claim was
21 time barred under A.R.S. § 12-550; and (3) the Tribunal lacked authority to grant relief.
22 The Tribunal denied the motion.

23 7. A hearing was held on October 25, 2024. Administrative Notice was taken
24 of the agency record. Petitioner and Respondent provided arguments at hearing. Given
25 the nature of the issue, testimony was not necessary and was not taken.

26 8. The parties provided some history about the name of the association and
27 litigation surrounding the issue. The association was formerly named "Council of Co-
owners." At the hearing, the association was named "Hilton Casitas Council of
Homeowners." The Declaration was not amended to reflect the name change.

9. The name of the condominium was "Hilton Casitas."

1 10. The plat contained the following: "HILTON CASITAS A CONDOMINIUM
2 DEVELOPMENT. . . ."

3 11. Section 1.4 of the Declaration defined "Council" as "the Council of Co-
4 owners as defined in the Horizontal Property Regime Act, and consists of all the Owners
5 of the Casitas."

6 12. Respondent argued that the name of the condominium followed by "a
7 condominium" in the plat was sufficient for compliance. Respondent also argued that the
8 defined term "Council" was sufficient for compliance because it represented the name of
9 the association. Accordingly, Respondent argued that all of the components were
10 contained in the Declaration.

11 13. Respondent argued that the claims were time barred. Petitioner had access
12 to the Declaration as of 2014; accordingly, more than 4 years had passed since the cause
13 of action accrued. Petitioner responded that the statutory violation was an ongoing harm;
14 it may even be a cloud on his title, which may negate a statute of limitations claim.

15 14. Respondent also argued that if the Tribunal ordered compliance, the
16 Association would not be able to cure the issue because amending the Declaration would
17 require a vote of the membership. In response, Petitioner stated that if the Respondent
18 made a good faith effort to amend the Declaration, he would not seek to enforce the order.

19 CONCLUSIONS OF LAW

20 1. This matter lies within the Department's jurisdiction. A member of a
21 condominium may file a petition with the Department for a hearing concerning the
22 condominium association's alleged violations as set forth in Title 33, Chapter 9. The
23 Department may then refer the matter to the Office of Administrative Hearings, which is
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1 authorized to “adjudicate complaints regarding and ensure compliance with . . . [t]itle 33,
2 chapter 9 and condominium documents.”¹

3 2. The administrative law judge may “order any party to abide by the statute,
4 condominium documents, community documents or contract provision at issue and may
5 levy a civil penalty on the basis of each violation.”²

6 3. Petitioner bore the burden of proof to establish that Respondent violated
7 applicable statutes by a preponderance of the evidence.³ Respondent bore the burden to
8 establish affirmative defenses by the same evidentiary standard.⁴

9 4. “A preponderance of the evidence is such proof as convinces the trier of fact
10 that the contention is more probably true than not.”⁵ A preponderance of the evidence is
11 “[t]he greater weight of the evidence, not necessarily established by the greater number of
12 witnesses testifying to a fact but by evidence that has the most convincing force; superior
13 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
14 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
15 the other.”⁶

16 **COMPLIANCE WITH A.R.S. § 33-1215(A)(1):**

17 5. A.R.S. 33-1215(A)(1) states: “The declaration shall contain. . . . [t]he name
18 of the condominium, which shall include the word “condominium” or be followed by the
19 words “a condominium”, and the name of the association.” The declaration “means any
20 instruments, however denominated, that create a condominium and any amendments to
21 those instruments,” and it includes the plat.”⁷

22 ¹ A.R.S. § 32-2199, *et seq.*

23 ² *Id.*

24 ³ See A.A.C. R2-19-119(A) and (B)(1); *see also Vazzano v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952).

25 ⁴ See A.A.C. R2-19-119(B)(2).

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

27 ⁶ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

⁷ A.R.S. §§ 33-1202(15); 33-1219(A).

1 6. That set forth two requirements: (1) the name of the condominium, which
2 had offset with commas further specific requirements, and (2) the name of the
3 association. The offset requirements for the name of the condominium were that the
4 name of the condominium shall include the word "condominium" or be followed by the
5 words "a condominium."

6 7. The statute requires "the name of the association," not merely a reference to
7 it. The name of the association as stated in the defined term "Council" is not the name of
8 the association. Even if the current association was the entity with standing, its name was
9 not present in the Declaration.⁸

10 8. The preponderance of the evidence established that the plat satisfied the
11 name of the condominium requirements.

12 9. The preponderance of the evidence established that the Declaration did not
13 contain the name of the association as required by A.R.S. § 33-1215(A)(1).

14 **STATUTE OF LIMITATIONS:**

15 10. Respondent argued that the general statute of limitations, A.R.S. § 12-550,
16 precluded this proceeding.

17 11. The general statute of limitations, A.R.S. § 12-550, stated as follows:
18 "[a]ctions other than for recovery of real property for which no limitation is otherwise
19 prescribed shall be brought within four years after the cause of action accrues, and not
20 afterward."

21 12. Pursuant to A.R.S. § 1-215, an action "includes any matter or proceeding in
22 a court, civil or criminal."

23 13. The Arizona Office of Administrative Hearings is an office of the executive
24 branch, not a court. Throughout Title 12, which created the Arizona court systems, the

25 ⁸ Assuming that there is some purpose for the statutory requirement, a reader should be able to identify the
26 association from the declaration. Accordingly, the Tribunal is not willing to accept constructive compliance.

1 Legislature uses the word “court.” In A.R.S. § 41-1092, *et seq.*, which created the Office
2 of Administrative Hearings, by contrast, the word “court” was only used in reference to the
3 Arizona court systems or as part of “court reporter.”⁹

4 14. Accordingly, proceedings before OAH are not “actions” as defined by the
5 legislature, and the general statute of limitations does not apply.

6 **UNILATERAL ACTION IMPOSSIBILITY:**

7 15. Respondent argued that the association was unable to amend the
8 Declaration without a vote of the membership. Therefore, an order to amend the
9 Declaration would be inappropriate because the remedy would not be unilaterally
10 achievable by the association.

11 16. In proceedings such as these, it is ordinary that the board or membership
12 would have to vote to enact compliance with a statute. Technical procedures and
13 responsibility for amending the Declaration, under a condominium’s documents and
14 Arizona statutes, is not a legal defense in this matter.

15 17. In this matter, the Tribunal is responsible for determining whether the
16 Declaration is compliant with A.R.S. § 33-1215(A)(1), and if it is not compliant, the
17 Tribunal’s responsibility is to order compliance and award the filing fee to Petitioner.

18 18. At hearing, Petitioner stated that he would not file a contempt order if the
19 association moved forward, in good faith, to attempt to make the amendment.

20 **ORDER**

21 **IT IS ORDERED** that Petitioner be deemed the prevailing party in this matter.

22 **IT IS ORDERED** that Respondent pay Petitioner the filing fee of \$500.00, to be
23 paid directly to Petitioner within thirty (30) days of this Order.

24 _____
25 ⁹ Some references to the Arizona court systems contradict an assertion that OAH is a court. For example,
26 A.R.S. § 41-1092.07(F)(4) says, “[f]ees for attendance as a witness shall be the same as for a witness in
27 court. . . .”

