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No. 17F-H1717027-REL

ADMINISTRATIVE LAW JUDGE DECISION

HEARING: June 7, 2017

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

2. Mark Virden (Petitioner) filed a petition with the Arizona Department of Real Estate (Department) on or about March 23, 2017, alleging that Respondent had violated the provisions of A.R.S. § 33-1811 when it allowed the construction of a light duty internet service tower on the common area property of the HOA.¹ Petitioner specifically alleged, in relative part, as follows:

To make things worse, the board member whose spouse paid the upfront fee to the tower company is a licensed realtor, Susan Talarico. If anyone should understand the fiduciary responsibility to owners of a HOA, it's a realtor serving on a Board of that HOA. She clearly shouldn't do something that benefits her and her family over other homeowners without their knowledge. She has since resigned but her husband has taken her place on the board.

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007
(602) 542-9826

1 To this day, the only owners in our subdivision that have the service from
2 this tower are the two board members...The Talaricos, our Treasurer and
3 Carl Rygg our Vice President who are receiving the free service forever.
4 They have stated that since they made a cash contribution to the tower
5 company, they are entitled to this free service.....however; their contribution
6 would only pay the equivalent of about 1-2 years of service for the two
7 households. Also, to this day, these board members have refused to let us
8 see their contract for their compensation. IT could be more than the fee
9 service but we don't know. When we initially asked the VP what their
10 compensation was, he stated "it's none of your business".

11 All errors in original.

12 3. Respondent's Answer to the petition denying all allegations.

13 4. On April 19, 2017, the Department issued a Notice of Hearing to the parties
14 notifying them that a hearing on the Petition would be conducted by the Office of
15 Administrative Hearings.

16 5. On June 7, 2017, a hearing was held on the Petition and the parties
17 presented evidence and argument regarding the violations alleged in the Petition.

18 6. At the hearing, the underlying facts were not in dispute.

19 7. Initially, it must be noted that Respondent does not have a traditional Board.
20 Instead, the members act as the Board. Respondent's Bylaws provide that "[t]he affairs of
21 the Association will be managed by the Members, who by the Association's Articles of
22 Organization are authorized to exercise all powers normally exercised by a board of
23 directors." Respondent Exhibit 2.

24 8. Respondent's Declaration of Covenants, Conditions, Restrictions and
25 Easements (CC&Rs) provides that "[t]he Architectural Committee may permit one or more
26 aerial satellite dishes or satellite communication systems, and/or other apparatus and
27 equipment for an antenna or cable system for the benefit of all or portions of the Project."
28 Respondent Exhibit 1.

29 9. At some point, AireBeam approached Respondent to determine if there was
30 a demand for the installation of a tower to provide high speed internet, phone, and internet
31 television. Normally, AireBeam pays for the installation of the tower once it receives
32 commitments from a sufficient number of subscribers to make the project profitable.

1 10. Respondent's Officers sent out notification to the members regarding the
2 opportunity and indicated that they believed they would need commitments from
3 approximately half of the members to move the project forward. Respondent Exhibit 3.

4 11. Respondent did not obtain the requisite number of subscribers. At that
5 point, Lou Talarico, whose wife was on the Architectural Committee, offered to pay the
6 upfront cost of the tower. In exchange, Mr. Talarico and Carl Rygg were to receive
7 internet service as long as the tower was operational. Respondent Exhibit 4.

8 12. Upon Mr. Talarico's offer to pay the upfront cost, the Architectural
9 Committee approved the construction of the tower on Respondent's common area.

10 13. AireBeam built the tower within 150 feet of Petitioner's front door, and
11 Petitioner found the tower to be "a huge eye sore."

12 **CONCLUSIONS OF LAW**

13 1. The Department has jurisdiction to hear disputes between a property owner
14 and a condominium owners association. A.R.S. § 32-2199 *et seq.*

15 2. In this proceeding, Petitioner bears the burden of proving by a
16 preponderance of the evidence that Respondent violated A.R.S. § 33-1804. A.A.C. R2-
17 19-119.

18 3. A preponderance of the evidence is "[e]vidence which is of greater weight or
19 more convincing than the evidence which is offered in opposition to it; that is, evidence which
20 as a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW
21 DICTIONARY 1182 (6th ed. 1990).

22 4. A.R.S. § 33-1811 provides, in pertinent part, as follows:

23 If any contract, decision or other action for compensation taken by or on
24 behalf of the board of directors would benefit any member of the board of
25 directors or any person who is a parent, grandparent, spouse, child or
26 sibling of a member of the board of directors or a parent or spouse of any of
27 those persons, that member of the board of directors shall declare a conflict
28 of interest for that issue. The member shall declare the conflict in an open
29 meeting of the board before the board discusses or takes action on that
30 issue and that member may then vote on that issue. Any contract entered
into in violation of this section is void and unenforceable.

1 5. Petitioner asserted that, because Mr. Talarico received compensation in
2 exchange for paying the upfront cost of the tower, the compensation had to be disclosed
3 in an open meeting “of the board” prior to a vote to approve the tower.

4 6. As previously noted, the Architectural Committee was empowered by the
5 CC&Rs to permit one or more aerial satellite dishes or satellite communication systems
6 for the benefit of all or portions of the HOA. Nothing in the CC&Rs requires that the
7 Architectural Committee’s decision must be ratified by the members acting as a board.

8 7. Therefore, the evidence established that the Architectural Committee had
9 the authority to approve the tower pursuant to the CC&Rs and that Mr. Talarico’s
10 agreement with AireBeam, assuming *arguendo*, that it was compensation, did not have to
11 be disclosed to the members acting as a board.

12 8. Alternatively, Petitioner argued that because people outside the HOA may
13 subscribe for the service resulting from the tower, the tower was not “for the benefit of all
14 or portions” of the HOA, and therefore, the Architectural Committee did not have the
15 authority to approve the tower. However, the language of the CC&R does not require that
16 the satellite dish or other system may benefit *exclusively* all or portions of the HOA.

17 9. This Tribunal concludes that the Architectural Committee’s approval of the
18 AireBeam tower was proper under Respondent’s governing documents.

19 **RECOMMENDED ORDER ON REHEARING**

20 In view of the foregoing, it is ORDERED that Petitioner’s petition in this matter is
21 denied. Pursuant to A.R.S. § 32-2199.02(B), this Order is binding on the parties unless a
22 rehearing is granted pursuant to A.R.S. § 32-2199.04 based on a petition setting forth the
23 reasons for the request for rehearing, in which case the order issued at the conclusion of
24 the rehearing would be binding on the parties.

25 *In the event of certification of the Administrative Law Judge Decision by the*
26 *Director of the Office of Administrative Hearings, the effective date of the Order will be five*
27 *days from the date of that certification.*

28 Done this day, June 27, 2017

29 /s/ Tammy L. Eigenheer
30 Administrative Law Judge

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Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate