

BEFORE THE DEPARTMENT OF REAL ESTATE
OFFICE OF ADMINISTRATION
IN AND FOR THE STATE OF ARIZONA

William M. Brown,	)	
	)	CASE NO. HO 17-17/032
Petitioner,	)	
	)	DOCKET NO. 17F-H1717032-REL
vs.	)	
	)	FINAL ORDER
Terravita Country Club, Inc.	)	
	)	
Respondent.	)	

Pursuant to Arizona Revised Statutes ("A.R.S.") § 41-1092.08, the attached Administrative Law Judge ("ALJ") Decision is adopted by the Commissioner of the Department of Real Estate ("Commissioner") and is accepted as follows:

ORDER

The Commissioner accepts the ALJ decision that Petitioner be deemed the prevailing party in this matter. It is further **Ordered** that Respondent comply with the applicable provisions of A.R.S. § 33-1805 regarding Petitioner's request of Respondent's records within 10 days of the Order entered in this matter. It is further **Ordered** that Respondent pay Petitioner his filing fee of \$500.00, to be paid directly to Petitioner within thirty (30) days of the ALJ order.

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 within thirty (30) days after the service of this final Order. A written request for rehearing should be addressed to Abby Hansen, 2910 N. 44th Street, Suite 100, Phoenix, Arizona, 85018.

This Order is a final administrative action and is effective immediately from the date service is complete. A party may appeal this final administrative decision by filing a complaint for judicial review pursuant to title 12, chapter 7, article 6. The Order will not be stayed unless a stay is obtained from the court in conjunction with the judicial review action.

1
2 **DATED this 24th day of July 2017.**

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4 
5 **Judy Lowe, Commissioner**
DEPARTMENT OF REAL ESTATE

6 **The foregoing mailed this 24th day of July 2017,**
7 **via certified mail receipt number 91 7199 9991 7037 6594 5158 to:**

8 William M. Brown
9 6751 E. Amber Sun Drive
10 Scottsdale AZ 85266

11 Copy sent via certified mail receipt no. 91 7199 9991 7037 6594 5141 to:

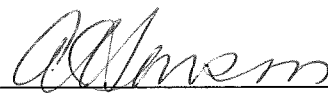
12 Carpenter, Hazlewood, Delgado & Bolen, PLC
13 1400 E. Southern Ave. Suite 400
14 Tempe AZ 85282

15 Copy sent via certified mail receipt no. 91 7199 9991 7037 6594 5134 to:

16 Terravita Country Club, Inc.
17 34034 N 69th Way
18 Scottsdale AZ 85266

19 COPY electronically transmitted to:

20 The Office of Administrative Hearings
21 1400 W Washington St, Suite 101
22 Phoenix, AZ 85007

23 By: 
24 Abby Hansen
25 HOA Coordinator
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Petitioner

vs.

Terravita Country Club, Inc.

Respondent

No. 17F-H1717032-REL

ADMINISTRATIVE LAW JUDGE DECISION

HEARING: June 26, 2017

APPEARANCES: Petitioner William M. Brown appeared on behalf of himself. Joshua Bolen, Esq. appeared on behalf of Respondent Terravita Country Club, Inc.

ADMINISTRATIVE LAW JUDGE: Velva Moses-Thompson

1. At all times relevant to this matter, Petitioner William M. Brown was a member of Respondent Terravita Country Club, Inc., (hereinafter "Terravita").
2. On February 6, 2017, Mr. Brown requested records of Terravita.
3. Terravita received Mr. Brown's records request.
4. On February 14, 2017, Terravita sent Mr. Brown an electronic mail message which stated, "The records that you request are part of the pending criminal litigation against you. As a result, TCC, pursuant to A.R.S. [A]§33-1805(B)(2), will not disclose these records to you until your criminal litigation is resolved."
5. Terravita did not fulfill Mr. Brown's February 6, 2017 records request within 10 business days.
6. On April 13, 2017, the Arizona Department of Real Estate, (hereinafter "Department"), received a Petition for Hearing from Mr. Brown alleging that Terravita failed to timely respond to his February 6, 2017 records request, pursuant to A.R.S. § 33-1805(A).
7. On May 2, 2017, Terravita filed a response to Mr. Brown's Petition for Hearing. In its Answer, Terravita affirmatively alleged that it received Mr. Brown's

1 February 6, 2017 records request, but did not disclose the records due to the pending
2 criminal litigation against Mr. Brown, pursuant to A.R.S. § 1805(B)(2).

3 8. On May 3, 2017, the Department issued a Notice of Hearing setting the
4 above-captioned matter for hearing on June 26, 2017 at 9:00 a.m. The May 3, 2017
5 Notice of Hearing provides, in relevant part, as follows:

6 YOU ARE HEREBY NOTIFIED that pursuant to Arizona Revised Statutes
7 ("A.R.S."), § 41-1092.01, your request for hearing upon the charges made in the
8 Petition for Hearing will be conducted through the Office of Administrative
9 Hearings, an independent agency...."

10 9. At hearing, Mr. Brown's position was that Terravita violated A.R.S. § 33-
11 1805(A) when it failed to fulfill his February 6, 2017 records request within 10 business
12 days. Mr. Brown contended that A.R.S. § 33-1805(B)(2) applies to pending litigation in
13 which the association is a party. Mr. Brown also contended that A.R.S. § 33-1805(B)(2)
14 was amended to remove the phrase, "contemplated litigation."

15 10. Mr. Brown argued that Terravita was not exempt from fulfilling his
16 February 6, 2017 records request because Terravita was not a party in the criminal
17 case.

18 11. Terravita's position was that the plain meaning of A.R.S. § 33-1805(B)(2)
19 does not require that the association be a party to pending litigation. Terravita argued
20 the criminal case was based upon an allegation that Mr. Brown threatened Terravita's
21 board members and property.

22 **CONCLUSIONS OF LAW**

23 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization
24 to file a petition with the Department for a hearing concerning violations of planned
25 community documents or violations of statutes that regulate planned communities. That
26 statute provides that such petitions will be heard before the Office of Administrative
27 Hearings.
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2. Petitioner bears the burden of proof to establish that Respondent violated A.R.S. § 33-1805(A) by a preponderance of the evidence.¹ Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.²

3. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."³ 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."⁴

A.R.S. § 33-1805 provides in pertinent part follows:

A. Except as provided in subsection B of this section, all financial and other records of the association shall be made reasonably available for examination by any member or any person designated by the member in writing as the member's representative. The association shall not charge a member or any person designated by the member in writing for making material available for review. The association shall have ten business days to fulfill a request for examination. On request for purchase of copies of records by any member or any person designated by the member in writing as the member's representative, the association shall have ten business days to provide copies of the requested records. An association may charge a fee for making copies of not more than fifteen cents per page.

B. Books and records kept by or on behalf of the association and the board may be withheld from disclosure to the extent that the portion withheld relates to any of the following:

1. Privileged communication between an attorney for the association and the association.

2. Pending litigation.

¹ See A.R.S. § 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952).

² See A.A.C. R2-19-119(B)(2).

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

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

1 3. Meeting minutes or other records of a session of a board
2 meeting that is not required to be open to all members pursuant to
section 33-1804.

3 4. Personal, health or financial records of an individual member of
4 the association, an individual employee of the association or an
5 individual employee of a contractor for the association, including
6 records of the association directly related to the personal, health
7 or financial information about an individual member of the
association, an individual employee of the association or an
individual employee of a contractor for the association.

8 5. Records relating to the job performance of, compensation of,
9 health records of or specific complaints against an individual
10 employee of the association or an individual employee of a
11 contractor of the association who works under the direction of the
association.

12 C. The association shall not be required to disclose financial and
13 other records of the association if disclosure would violate any
14 state or federal law.

15 4. "In applying a statute . . . its words are to be given their ordinary meaning
16 unless the legislature has offered its own definition of the words or it appears from the
17 context that a special meaning was intended."⁵ Each word, phrase, clause, and
18 sentence must be given meaning so that no part of the legislation will be void, inert, or
19 trivial. *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 204, ¶ 17 (App. 2007). Legislation must
20 also be given a sensible construction that avoids absurd results. *State v. Gonzales*, 206
21 Ariz. 469, 471, ¶ 12 (App. 2003). If the words do not disclose the legislative intent, the
22 court will scrutinize the statute as a whole and give it a fair and sensible meaning.
23 *Luchanski v. Congrove*, 193 Ariz. 176, 178, ¶ 9.

24 5. Terravita's interpretation of A.R.S. § 33-1805(B)(2) would allow the
25 association to deny records request of documents that relate to pending litigation
26 between any parties. Such an interpretation would lead to the absurd result of denying
27 records requests of all documents that relate to pending litigation anywhere, between
28 any two parties. The plain meaning of A.R.S. § 33-1805(B)(2) is that while
29 homeowners' associations must provide access to financial and other documents to its

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

1 members within 10 business days, an association may withhold documents that relate
2 to pending litigation between the association and the member.

3 7. At the time of Mr. Brown's request, Mr. Brown was facing criminal charges
4 by the City of Scottsdale and Terravita was not a party to the criminal case.

5 8. Mr. Brown established by a preponderance of the evidence that Terravita
6 failed to fulfill his February 6, 2017 records request within 10 business days.

7 9. This Tribunal concludes that Terravita violated the charged provision of
8 A.R.S. § 33-1805.

9 **RECOMMENDED ORDER**

10 In view of the foregoing, it is ORDERED that Petitioner be deemed the prevailing
11 party in this matter.

12 It is further ORDERED that Terravita comply with the applicable provisions of
13 A.R.S. § 33-1805 regarding Petitioner's request of Terravita's records within 10 days of
14 the Order entered in this matter.

15 It is further ORDERED that Terravita pay Petitioner his filing fee of \$500.00, to be
16 paid directly to Petitioner within thirty (30) days of this Order.

17 No Civil Penalty is found to be appropriate in this matter.

18 *In the event of certification of the Administrative Law Judge Decision by the*
19 *Director of the Office of Administrative Hearings, the effective date of this Order will be*
20 *five (5) days from the date of that certification.*

21 Done this day, July 14, 2017

22 Velva Moses-Thompson
23 Administrative Law Judge
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27 Transmitted electronically to:

28 Judy Lowe, Commissioner
29 Arizona Department of Real Estate
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