

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 William M. Brown

4 Petitioner

5 VS.

6 Terravita Country Club, Inc.

7 Respondent

No. 17F-H1717032-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

8
9
10
11 **HEARING:** June 26, 2017

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

14 **ADMINISTRATIVE LAW JUDGE:** Velva Moses-Thompson

15
16 1. At all times relevant to this matter, Petitioner William M. Brown was a
17 member of Respondent Terravita Country Club, Inc., (hereinafter "Terravita").
18 2. On February 6, 2017, Mr. Brown requested records of Terravita.
19 3. Terravita received Mr. Brown's records request.
20 4. On February 14, 2017, Terravita sent Mr. Brown an electronic mail
21 message which stated, "The records that you request are part of the pending criminal
22 litigation against you. As a result, TCC, pursuant to A.R.S. [A]§33-1805(B)(2), will not
23 disclose these records to you until your criminal litigation is resolved."

24 5. Terravita did not fulfill Mr. Brown's February 6, 2017 records request
25 within 10 business days.

26 6. On April 13, 2017, the Arizona Department of Real Estate, (hereinafter
27 "Department"), received a Petition for Hearing from Mr. Brown alleging that Terravita
28 failed to timely respond to his February 6, 2017 records request, pursuant to A.R.S. §
29 33-1805(A).

30 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...."

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

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

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

21 **CONCLUSIONS OF LAW**

22 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization
23 to file a petition with the Department for a hearing concerning violations of planned
24 community documents or violations of statutes that regulate planned communities. That
25 statute provides that such petitions will be heard before the Office of Administrative
26 Hearings.
27
28
29
30

1 2. Petitioner bears the burden of proof to establish that Respondent violated
2 A.R.S. § 33-1805(A) by a preponderance of the evidence.¹ Respondent bears the burden
3 to establish affirmative defenses by the same evidentiary standard.²

4 3. “A preponderance of the evidence is such proof as convinces the trier of fact
5 that the contention is more probably true than not.”³ A preponderance of the evidence is
6 “[t]he greater weight of the evidence, not necessarily established by the greater number of
7 witnesses testifying to a fact but by evidence that has the most convincing force; superior
8 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
9 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather
10 than the other.”⁴

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

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

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

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

30 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
3 section 33-1804.

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

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

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

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

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

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
24
25
26

27 Transmitted electronically to:

28 Judy Lowe, Commissioner
29 Arizona Department of Real Estate
30