

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Brian Sopatyk,

4 Petitioner,

5 vs.

6 The Lakeshore Village Condo. Association,
7 Inc.

8 Respondent.

No. 17F-H1716004-REL-RHG

**ADMINISTRATIVE LAW JUDGE
DECISION**

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11 **HEARING:** June 9, 2017

12 **APPEARANCES:** Nathan Andrews, Esq. and Jill Kennedy, Esq. for Petitioner;
13 Bradley Jardine, Esq. for Respondent

14 **ADMINISTRATIVE LAW JUDGE:** Thomas Shedden

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16 **FINDINGS OF FACT**

17 1. On February 7, 2017, the Arizona Department of Real Estate issued a
18 Notice of Re-Hearing setting the above-captioned matter for hearing on March 30, 2017
19 at the Office of Administrative Hearings in Phoenix, Arizona. The matter was continued
20 and the hearing was conducted on June 9, 2017.

21 2. The Notice of Re-Hearing shows that the issue is whether Respondent
22 Lakeshore Village Condominium Association violated ARIZ. REV. STAT. section 33-1260.

23 3. More specifically, in a Petition filed on August 9, 2016, Petitioner Brian
24 Sopatyk alleged that the Association charged a fee in excess of the maximum allowable
25 under section 33-1260.¹

26 4. The Association denies the charge and explains that the fee Mr. Sopatyk is
27 complaining of was one collected pursuant to CC&R section 8.13 ("Transfer Fee and
28 Working Capital Fund") for use as part of a working capital fund.

29 5. The original hearing on Mr. Sopatyk's petition was conducted on
30 November 14, 2016. After the Department adopted the Administrative Law Judge

¹ Mr. Sopatyk and his wife Judy purchased the condominium unit at issue; because Mr. Sopatyk is the sole petitioner, only his name is used in this Decision.

1 Decision in that matter, Mr. Sopatyk requested a rehearing, which led to this matter
2 being conducted.

3 6. At this hearing, Mr. Sopatyk testified and called Association manager Amy
4 Telnes and Association president Michael Cibellis to testify.²

5 7. When Mr. Sopatyk bought his unit, section 33-1260 required that the
6 Association provide him with certain information/disclosures, with the Association
7 authorized to charge the owner of the unit the no more than \$400 for the preparation of
8 these materials.

9 8. Through his petition, Mr. Sopatyk alleged that the Association had been
10 charging a transfer fee of \$660 and that when he purchased his unit, "the transfer fees
11 were \$660, which was split between the seller and the buyer."³ Mr. Sopatyk requested
12 reimbursement of \$330 to him and \$330 to the seller (less hard costs incurred).

13 9. The Association acknowledges that it assessed what it called a transfer
14 fee of \$660, but it presented evidence showing that this was actually a working capital
15 fee that had been mislabeled as a transfer fee.

16 10. CC&R section 8.13 provides that each new unit owner is to be assessed a
17 transfer fee of at least twice the average monthly assessment and that these fees will
18 be deposited into the working capital fund. The Association refers to the working capital
19 fund as the Reserve Fund.

20 11. Mr. Sopatyk had entered into evidence a March 2, 2015 "Disclosure Form"
21 from the Association to him as the buyer. Ms. Telnes did not create the Form, but she
22 entered the information about Mr. Sopatyk's transaction into the exhibit.

23 12. As pertinent to this matter, the Form shows that the monthly assessment is
24 \$328.83 and that Mr. Sopatyk was required to pay a transfer fee of \$660 and a
25 statement fee of \$30.

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27 ² Mr. Cibellis did not testify at the original hearing. In his request for rehearing, Mr. Sopatyk asserted that
28 Mr. Cibellis's testimony was essential because he had knowledge of facts that were necessary for Mr.
29 Sopatyk to prove his claim. This was not true and Mr. Cibellis could provide no evidence that was not
30 available through other sources.

³ Despite this sworn statement from Mr. Sopatyk, at the hearing he testified that he had in fact paid the
entire \$660 as part of the negotiated price of the unit; either Mr. Sopatyk's sworn statement or his
testimony must be false.

1 13. Mr. Sopatyk had entered into evidence the HUD-1 disclosure statement for
2 his purchase. The HUD-1 shows that this \$660 was assessed as a Transfer Fee to the
3 Association, with \$330 Paid from Mr. Sopatyk's (Borrower's) Funds at Settlement and
4 \$330 Paid From the Seller's Funds at Settlement.

5 14. The HUD-1 also shows that the Seller paid \$30 as a Resale Statement
6 Fee to the Association.

7 15. At a Board meeting on May 18, 2016, the Board addressed an allegation
8 by Mr. Sopatyk that the Board had violated section 33-1260 by charging a transfer fee
9 of more than \$400. Mr. Sopatyk had admitted into evidence Board Meeting Minutes
10 from that date. Those minutes show:

- 11 a. The Board reviewed a legal opinion prepared by its attorney
12 addressing directly whether it was in violation of state law by assessing
13 as a transfer fee an amount over \$400.⁴
- 14 b. The Board was advised by its attorney that it was not in violation
15 because there were three distinct charges that it could impose: a
16 working capital fee, a transfer fee, and a disclosure fee.
- 17 c. The Association's records show that the property manager prior to Ms.
18 Ternes collected more than \$400 and transferred the money into the
19 Reserve Account as if it were a working capital fee.
- 20 d. When Ms. Ternes took over as the Association manager, the working
21 capital fund was not properly explained, and she received the
22 erroneous information that the \$660 assessment was a transfer fee;
23 the fee has been mislabeled since that time.
- 24 e. The Board concluded that it was collecting what was intended to be a
25 working capital contribution, [in accordance with CC&R section 8.13],
26 but was erroneously calling it a transfer fee.
- 27 f. The Board concluded that it was not in violation of the law.

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30 ⁴ The record does not show what law firm or attorney prepared that opinion.

1 g. To correct the error, Ms. Telnes was directed to account for all the
2 working capital fees collected after October 1, 2013 and transfer those
3 funds to the Reserve Account.

4 h. The Board determined that its system was confusing and unfair. The
5 Board voted to assess a single transfer fee of \$400 (and no other fees)
6 on all future transactions.

7 16. Consistent with the Meeting Minutes, Ms. Telnes testified to the effect that
8 the \$30 charged to the Seller was the fee assessed under section 33-1260 and that the
9 \$660 was a working capital fee that was improperly labeled as a transfer fee.

10 17. Ms. Telnes conducted the required accounting and transferred the \$660
11 fee assessed in Mr. Sopatyk's purchase and all other such fees to the Reserve Fund.
12 Mr. Sopatyk's Exhibit J-1 is an accounting of the transactions.

13 **CONCLUSIONS OF LAW**

14 1. The Department of Real Estate has authority over this matter. ARIZ. REV.
15 STAT. Title 32, Ch. 20, Art. 11.

16 2. Mr. Sopatyk bears the burden of proof to show that the Association
17 committed the alleged violation. The standard of proof on all issues in this matter is that
18 of a preponderance of the evidence. ARIZ. ADMIN. CODE § R2-19-119.

19 3. A preponderance of the evidence is:

20 The greater weight of the evidence, not necessarily established
21 by the greater number of witnesses testifying to a fact but by
22 evidence that has the most convincing force; superior
23 evidentiary weight that, though not sufficient to free the mind
24 wholly from all reasonable doubt, is still sufficient to incline a fair
25 and impartial mind to one side of the issue rather than the other.
26 BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

27 4. Condominium owners "may petition the department for a hearing
28 concerning violations ... of the statutes that regulate condominiums or planned
29 communities." ARIZ. REV. STAT. § 32-2199.01.

30 5. If the petitioner proves the alleged violation, "The administrative law judge
may order any party to abide by the statute ... and may levy a civil penalty on the basis
of each violation.... If the petitioner prevails, the administrative law judge shall order the
respondent to pay to the petitioner the filing fee...." ARIZ. REV. STAT. § 32-2199.02.

6. ARIZ. REV. STAT. section 33-1260 provides:

.... the [condominium] association shall mail or deliver to a purchaser or a purchaser's authorized agent within ten days after receipt of a written notice of a pending sale that contains the name and address of the purchaser all of the following

The association may charge the unit owner a fee of no more than an aggregate of four hundred dollars to compensate the association for the costs incurred in the preparation of a statement or other documents furnished by the association pursuant to this section for purposes of resale disclosure, lien estoppel and any other services related to the transfer or use of the property.

An association shall not charge or collect a fee relating to services for resale disclosure, lien estoppel and any other services related to the transfer or use of a property except as specifically authorized in this section.

7. The Association argues to the effect that because Mr. Sopatyk did not personally pay over \$400, his claim fails on its face. This argument is not persuasive because ARIZ. REV. STAT. section 33-2199.01 does not require this type of particularized harm, but rather applies to all statutory violations.

8. The Association charged the seller of Mr. Sopatyk's unit a \$30 fee in accordance with section 33-1260(A).

9. The Association has authority under ARIZ. REV. STAT. § 33-1242(A)(2) to "collect assessments for common expenses from unit owners" and authority under CC&R section 8.13 to collect a working capital fee. The Association charged Mr. Sopatyk a \$660 fee in accordance with CC&R section 8.13.⁵ Section 33-1260(A) is not applicable to this \$660.

10. Mr. Sopatyk did not meet his burden to show that the Association committed the alleged violation.

⁵ The HUD-1 proves that Mr. Sopatyk split that fee with the seller.

11. Mr. Sopatyk's petition should be dismissed and the Association be deemed the prevailing party in this matter.

ORDER

IT IS ORDERED that Brian D. Sopatyk's petition is dismissed.

In the event of certification of the Administrative Law Judge Decision by the Director of the Office of Administrative Hearings, the effective date of the Order is five days after the date of that certification.

Done this day, June 26, 2017

/s/ Thomas Shedden
Thomas Shedden
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate