

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Warren R. Brown,

4 Petitioner,

5 vs.

6 Mogollon Airpark, Inc.,

7 Respondent.

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10 Brad W. Stevens,

11 Petitioner,

12 vs.

13 Mogollon Airpark, Inc.

14 Respondent.

No. 18F-H1818029-REL-RHG

No. 18F-H1818045-REL

No. 18F-H1818054-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

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17 **HEARING:** September 28, 2018

18 **APPEARANCES:** Warren R. Brown on his own behalf; Brad W. Stevens on his own
19 behalf; Gregory A. Stein, Esq. and Mark K. Sahl, Esq. for Respondent

20 **ADMINISTRATIVE LAW JUDGE:** Thomas Shedden

21 **FINDINGS OF FACT**

22 1. This is a consolidated matter addressing two petitions filed by Warren R.
23 Brown and one filed by Brad W. Stevens, with the Respondent in all three matters being
24 Mogollon Airpark, Inc.

25 2. The hearing was conducted on September 28, 2018 at the Office of
26 Administrative Hearings in Phoenix, Arizona.

27 3. Mr. Brown is the petitioner in docket Nos. 18F-H1818029-REL-RHG (the
28 "029" matter) and 18F-H1818045-REL (the "045" matter), and Mr. Stevens in docket No.
29 18F-H1818054-REL (the "054" matter). Each matter was separately noticed and they
30 were consolidated while pending at the Office of Administrative Hearings.

1 4. Mogollon raised its 2018 assessment by \$325, it instituted a \$25 fee for
2 late payments, and it began charging 18% interest for past due accounts.

3 5. The \$325 increase was assessed in two parts: a \$116 increase in what
4 Mogollon classifies as the regular assessment, and \$209 that it classifies as a special
5 assessment. The previous year's assessment was \$825.

6 6. Mr. Brown alleges that as a matter of law Mogollon's actions violate ARIZ.
7 REV. STAT. section 33-1803(A). Mogollon agrees that the issues can be resolved as a
8 matter of law, but denies any violations.

9 7. Mr. Stevens alleges that the decision to raise the 2018 assessment by
10 \$325 violates section 33-1803(A), but he did not agree that the matter could be resolved
11 as a matter of law and he presented evidence in support of his position.

12 8. As pertinent to the facts of this matter, section 33-1803(A) provides that an
13 HOA cannot "impose a regular assessment that is more than [20%] greater than the
14 immediately preceding fiscal year's assessment" and "Charges for the late payment
15 of assessments are limited to the greater of fifteen dollars or ten percent of the amount
16 of the unpaid assessment"

17 9. Because an increase of \$325 over \$825 is 39.4%, Messrs. Brown and
18 Stevens assert Mogollon violated section 33-1803(A).

19 10. Mogollon argues that section 33-1803(A) applies only to "regular
20 assessments" and that the regular assessment was increased by only 14.1%, which is
21 what an increase of \$116 over \$825 is.

22 11. Messrs. Brown and Stevens argue that "regular assessment" refers to the
23 process by which assessments are created, not the type of assessment, and that
24 Mogollon has no authority to impose a special assessment.

25 12. But whether Mogollon has authority to impose special assessments is not
26 directly at issue because Mr. Brown's petition in the 029 matter and Mr. Stevens's
27 petition in the 054 matter are "single-issue petitions," limiting the hearing to their
28 respective allegations that Mogollon violated section 33-1803(A).

29 13. In the 045 matter, Mr. Brown alleged that Mogollon violated section 33-
30 1803 by charging a late fee of \$25 and interest of 18% on late payments, whereas he
asserts that the statute limits the late charges to "\$15.00 or 10%."

1 14. Although the scope of the hearing was limited to the issues set out above,
2 underlying Mr. Brown's and Mr. Stevens's petitions are allegations that Mogollon's
3 treasurer and others have committed numerous accounting improprieties to create the
4 appearance that Mogollon required the income that the increased assessment was
5 intended to produce, whereas in their view, that income is not required, which means
6 that Mogollon lacks authority to impose the increased assessment.¹

7 The 029 Matter

8 15. On May 22, 2018, the Arizona Department of Real Estate issued an Order
9 Granting Rehearing and Notice of Rehearing setting the 029 matter for a rehearing on
10 July 11, 2018.

11 16. The Notice of Rehearing in the 029 matter does not provide an issue
12 statement per se, but rather states that the rehearing is granted for the reasons set out
13 in Mr. Brown's Request for Rehearing. The Notice of Hearing in the "original" 029 matter
14 shows the issue in that matter as Mr. Brown allegation that Mogollon "is violating the
15 governing documents of the association by taking action not authorized by the
16 governing documents."

17 17. The petition in original 029 matter was filed on January 29, 2018.

18 18. In the original 029 petition, Mr. Brown alleged that Mogollon's "accounting
19 procedure was altered, ostensibly to show that the 2016 board of directors left office
20 showing a loss of funds," whereas they left the treasury about \$200,000 better off than
21 when they took office. He then listed numerous alleged improprieties in how Mogollon
22 was keeping its books and states that "it is believed that the accounting was deliberately
23 misleading and was intended to present an inaccurate picture of the HOA finances."

24 19. According to Mr. Brown, the purpose of the alleged deception was to allow
25 the Board members to claim that there was a shortage in the treasury in order to justify
26 increasing the assessment by the \$325, even though there was no need for that
27 increased assessment and no authority for the Board to impose it.

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¹ Considering the nature of Messrs. Brown and Stevens's allegations, the civil courts may be better suited
30 than an administrative tribunal to address the issues they raise. Regardless, the substance of their
allegations was not addressed in this hearing.

1 20. In the original 029 matter, Mr. Brown requested a ruling that the special
2 assessment was unenforceable and that Mogollon be ordered to return any money it
3 had collected.

4 21. In the original 029 matter, Mogollon filed a Motion to Dismiss, asserting as
5 that Mr. Brown did not allege a violation of any specific Bylaw, CC&R, or statute, but
6 rather he only alleged that the bylaws/CC&Rs did not authorize Mogollon's accounting
7 practices and imposition of a special assessment for paving, which according to
8 Mogollon left the Office of Administrative Hearings without jurisdiction over the matter.

9 22. Mr. Brown responded to the Motion to Dismiss asserting that he had no
10 other means of redress and that Mogollon had violated ARIZ. REV. STAT. section 33-
11 1803 by imposing the special assessment (because that assessment plus the increase
12 in the regular assessment was an increase of greater than 20% over the prior year's
13 assessment).

14 23. The Administrative Law Judge in the original 029 matter issued an Order
15 Granting Motion to Dismiss dated March 15, 2018. That ALJ found that Mr. Brown's
16 petition was defective because he did not name a specific CC&R or Bylaw as having
17 been violated and because by its terms, section 33-1803 deals only with regular
18 assessments, not special assessments.

19 24. The ALJ advised Mr. Brown that he could amend his petition at the
20 Department to allege that a specific CC&R, Bylaw, or statute had been violated.² In
21 effect this is what Mr. Brown has done through the rehearing where he alleges that
22 section 33-1803(A) has been violated because the \$325 dues increase is greater than
23 the allowable limit of 20%.

24 25. In his request for rehearing, Mr. Brown argued that the "additional
25 assessment" (i.e., the special assessment) violated the statute or was imposed by
26 Mogollon without the authority to do so, and that either way, there would be no remedy
27 for Mogollon's members if the ALJ's ruling stands.

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29 ² As the ALJ noted in her Order in the original 029 matter, Mr. Brown was asserting two issues: that
30 Mogollon's accounting practices were in violation and that imposing the special assessment was a
violation.

1 26. At the rehearing in the 029 matter, Mr. Brown raised the single allegation
2 (issue) that Mogollon violated ARIZ. REV. STAT. section 33-1803 because it raised its
3 assessment by more than 20% in one year.

4 27. Mr. Brown's position is that as used in 33-1803(A), "regular assessment"
5 means an assessment instituted following "regular" procedures, by which he means by
6 motion, second, and vote.

7 28. In the 054 matter, Mr. Stevens adopts this argument.

8 29. Mogollon asserts that a "regular assessment" is a type of assessment and
9 that "special assessment" is a term of art in the industry. Messrs. Brown and Stevens
10 respond that Mogollon presents no evidence or legal authority to support its position.

11 The 045 Matter

12 30. On May 23, 2018, the Arizona Department of Real Estate issued a Notice
13 of Hearing setting the 045 matter for hearing on July 19, 2018.

14 31. The Notice of Hearing in the 045 matter shows that the issue for hearing is
15 Mr. Brown's allegation that Mogollon violated section 33-1803 as outlined in his petition.

16 32. The petition in the 045 matter was filed with the Department by Mr. Brown
17 on April 19, 2018.

18 33. In that petition, Mr. Brown alleged that Mogollon had violated section 33-
19 1803 by charging a late fee of \$25 and interest of 18% on late payments, whereas he
20 asserts that the statute limits the late charges to "\$15.00 or 10%."

21 34. In the original 029 matter, Mr. Brown asserts that he was charged what he
22 says "appears" to be late fees and interest of \$26.57. Attached to his petition was an
23 invoice showing \$25 in late fees and \$1.57 in interest.

24 35. In the 045 petition, Mr. Brown requests that the "unlawful penalties and
25 interest charges" be voided.

26 The 054 Matter

27 36. On July 16, 2018, the Arizona Department of Real Estate issued a Notice
28 of Hearing setting the 054 matter for hearing on August 24, 2018.

29 37. The Notice of Hearing in the 054 matter shows that the issue for hearing is
30 Mr. Stevens's allegation that Mogollon violated section 33-1803, Bylaws Article VI at
Section 6, and CC&Rs Paragraph 34.

38. The petition in the 054 matter was filed with the Department by Mr. Stevens on June 7, 2018.

39. Mr. Stevens filed his petition as a “single issue” matter paying the filing fee of \$500, whereas arguably, he raised three issues in the petition.

40. At the hearing, Mr. Stevens acknowledged that he had filed a single-issue petition and he explained that in essence, he was only raising one issue, which was whether Mogollon violated section 33-1803, and that the other two other issues were actually information in support of this one.

41. Mr. Stevens's petition in the 054 matter is 45 pages long, with over 600 pages of exhibits.

42. In an “overview” of his petition, he alleges that Mogollon’s treasurer used deceptive and nonstandard accounting methods, including keeping two sets of books, as part of a “plan [to] execute a deceptive and false need to raise the annual assessments by 39.4%.”

43. Mr. Stevens also alleged that the Bylaws and CC&Rs support dues only as necessary for operating expenses and for approved Reserve funds, and he concluded that there was no need for a dues increase. At the hearing, Mr. Stevens testified as to his opinion that Mogollon has in excess of \$1 million, which he believes shows that it did not require an increase in its assessment.

44. In the remainder of the petition, Mr. Stevens alleges that there is no provision in the Bylaws or CC&Rs allowing a special assessment; that the \$325 assessment is far in excess of the monies required for reserves and to operate the facilities; and that the “fabricated shortfall” was used to convince the Board that a 39.4% increase in dues was required. He then lays out the purported deceptive and false accounting practices, with references to his 630 pages of exhibits.

45. Mr. Stevens includes a long prayer for relief, much of which is beyond the scope of the Office of Administrative Hearings' authority to grant.

Consolidation of the Matters

46. Mr. Brown and Mogollon agreed that the 029 and 045 matters should be consolidated, and their request to do so was granted.

1 47. Mogollon moved to consolidate the 054 matter with the 029 and 045
2 matters.

3 48. Mr. Brown objected to consolidation, but that objection was overruled
4 because the three petitions all alleged that Mogollon had engaged in deceptive
5 accounting practices.

6 49. Mr. Stevens also objected, but his objection was filed after the deadline for
7 filing responses to the motion had passed and after the Order consolidating the matters
8 had been issued.

9 The Hearing

10 50. The hearing on the consolidated matters was conducted on September 28,
11 2018 at the Office of Administrative Hearings in Phoenix, Arizona.

12 51. Mr. Brown and Mogollon agreed that the matter could be resolve solely as
13 an issue of law. Consequently although they both appeared, neither presented any
14 witnesses. Mr. Stevens appeared and presented his own testimony.

15 52. As set out above, Messrs. Brown and Stevens assert that the \$325 or
16 39.4% increase violates section 33-1803(A), whereas Mogollon asserts that the statute
17 has not been violated because it applies only to regular assessments, not special
18 assessments, and that the \$116 increase in the regular assessment represents an
19 increase of only 14.1%.

20 53. Petitioners argue that as used in section 33-1803, "regular" does not
21 define a type of assessment, but rather refers to how the assessment comes into being.
22 That is to say, these are assessments for which a motion is made, the motion is
23 seconded, and then a vote is taken.

24 54. Mogollon asserts that the term "special assessment" is a term of art in the
25 industry. Mogollon also points to section 33-1806 that includes the term "special
26 assessment" as proof that the legislature intended 33-1803 to be limited to "regular"
27 assessments.

28 55. Petitioners assert that section 33-1806 has no bearing on the matter and is
29 merely the legislature's acknowledgement that some HOAs have authority to impose
30 special assessments, but Mogollon does not because there is no explicit authority in the
bylaws or CC&Rs allowing it to do so.

1 56. Mr. Stevens testified to the effect Mogollon has sufficient money to meet
2 the needs for which it is authorized to impose assessments and, that as such, no
3 assessment is required or authorized by the governing documents.

4 57. Mr. Stevens also testified to the effect that it was known that the \$206
5 special assessment was a "trial run" and if Mogollon is successful in imposing it, it will
6 then impose additional special assessments that would be used for purposes other than
7 those allowed by the governing documents.

8 CONCLUSIONS OF LAW

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

11 2. Messrs. Brown and Stevens bear the burden of proof regarding their
12 respective allegations. The standard of proof on all issues in this matter is that of a
13 preponderance of the evidence. ARIZ. ADMIN. CODE § R2-19-119.

14 3. A preponderance of the evidence is:

15 The greater weight of the evidence, not necessarily established
16 by the greater number of witnesses testifying to a fact but by
17 evidence that has the most convincing force; superior
18 evidentiary weight that, though not sufficient to free the mind
19 wholly from all reasonable doubt, is still sufficient to incline a
20 fair and impartial mind to one side of the issue rather than the
21 other.

22 BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

23 4. Statutes should be interpreted to provide a fair and sensible result.
24 *Gutierrez v. Industrial Commission of Arizona*; see also *State v. McFall*, 103 Ariz. 234,
25 238, 439 P.2d 805, 809 (1968) ("Courts will not place an absurd and unreasonable
26 construction on statutes.").

27 5. Each word, phrase, clause, and sentence of a statute or rule must be
28 given meaning so that no part will be void, inert, redundant, or trivial. See *Deer Valley*,
29 *v. Houser*, 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007).

30 6. When a term is used in one provision of a statute and omitted from
another, that term should not be read into the section where it is omitted. *U.S. Parking*
Sys v. City of Phoenix, 160 Ariz. 210, 211, 772 P.2d 33, 34 (App. 1989) (citation
omitted).

1 7. The CC&Rs and Bylaws are a contract between the parties and the parties
2 are required to comply with its terms. See *McNally v. Sun Lakes Homeowners Ass'n #1,*
3 *Inc.*, 241 Ariz. 1, 382 P.3d 1216 (2016 App.).

4 8. ARIZ. REV. STAT. section 33-1803(A) provides in pertinent part:

5 Unless limitations in the community documents would result in
6 a lower limit for the assessment, the association shall not
7 impose a regular assessment that is more than twenty percent
8 greater than the immediately preceding fiscal year's
9 assessment without the approval of the majority of the
10 members of the association. ... Charges for the late payment
11 of assessments are limited to the greater of fifteen dollars or
ten percent of the amount of the unpaid assessment
(Underscoring added.)

12 9. Regarding the \$325 increased assessment, Messrs. Brown and Stevens
13 have not shown by a preponderance of the evidence that Mogollon violated section 33-
14 1803(A) because their definition of "regular assessment" is not supported by principles
15 of statutory construction. The reasonable assumption is that all assessments must be
16 passed following the "regular" process (i.e. motion, second, and vote), whereas under
17 Messrs. Brown and Stevens's argument, the statute would allow an HOA to pass an
18 assessment without following that process. Alternatively, if their position is that all
19 assessments must follow the regular process, the word "regular" is rendered trivial or
20 void in the statute.

21 10. Mogollon argues to the effect that a \$25 late fee charged on a special
22 assessment does not violate section 33-1803(A) because that section applies only to
23 regular assessments. This argument fails because the statute's limit on late charges
24 applies to "assessments," not "regular assessments." Under Mogollon's interpretation, it
25 is necessary to add the word "regular" where the legislature chose not to use it. This
26 violates principles of statutory construction.

27 The 029 Matter and the 054 Matter

28 11. Mr. Brown's petition in the 029 matter should be dismissed because he
29 has not shown by a preponderance of the evidence that Mogollon's decision to raise its
30 assessment by \$325 violated section 33-1803(A)

12. Mr. Stevens's petition in the 054 matter should be dismissed because he has not shown by a preponderance of the evidence that Mogollon's decision to raise its assessment by \$325 violated section 33-1803(A).

13. Mogollon is deemed to be the prevailing party in the 029 and 054 matters.

The 045 Matter

14. Mr. Brown has shown by a preponderance of the evidence that Mogollon's \$25 late charge is in violation of section 33-1803(A).

15. Mr. Brown is deemed to be the prevailing party in the 045 matter.

ORDER FOR DOCKET NO. 18F-H1818029-REL-RHG

IT IS ORDERED that Petitioner Warren R. Brown's petition in Docket No. 18F-H1818029-REL-RHG is dismissed.

Notice Regarding Docket No. 18F-H1818029-REL-RHG

This administrative law judge order, having been issued as a result of a rehearing, is binding on the parties. ARIZ. REV. STAT. section 32-2199.02(B). A party wishing to appeal this order must seek judicial review as prescribed by ARIZ. REV. STAT. section and title 12, chapter 7, article 6. Any such appeal must be filed with the superior court within thirty-five days from the date when a copy of this order was served upon the parties. ARIZ. REV. STAT. section 12-904(A).

ORDER FOR DOCKET NO. 18F-H1818045-REL

IT IS ORDERED that Petitioner Warren R. Brown is deemed the prevailing party in Docket No. 18F-H1818045-REL;

IT IS FURTHER ORDERED that Mogollon Airpark Inc. must rescind the \$25 late fee it assess against Mr. Brown;

IT IS FURTHER ORDERED that Mogollon Airpark Inc. must pay to Mr. Brown his filing fee of \$500.00 within thirty days of this Order.

Notice Regarding Docket No. 18F-H1818045-REL

Pursuant to ARIZ. REV. STAT. section 32-2199.02(B), this Order is binding on the parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. section 32-2199.04.

Pursuant to ARIZ. REV. STAT. section 41-1092.09, a request for rehearing in this matter must be filed with the Commissioner of the Department of Real Estate within 30 days of the service of this Order upon the parties.

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Notice Regarding Docket No. 18F-H1818045-REL

Pursuant to ARIZ. REV. STAT. section 32-2199.02(B), this Order is binding on the parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. section 32-2199.04.

Pursuant to ARIZ. REV. STAT. section 41-1092.09, a request for rehearing in this matter must be filed with the Commissioner of the Department of Real Estate within 30 days of the service of this Order upon the parties.

/s/ Thomas Shedden
Thomas Shedden
Administrative Law Judge

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