

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Rogelio A. Garcia,

4 Petitioner,
5 vs.

6 Villagio at Tempe Homeowners
7 Association,

8 Respondent.

No. 19F-H1918009-REL-RHG

**ADMINISTRATIVE LAW JUDGE
DECISION**

9
10 **HEARING:** February 12, 2019

11 **APPEARANCES:** Petitioner Rogelio A. Garcia appeared on behalf of himself.
12 Nathan Tennyson, Esq. appeared on behalf of Respondent Villagio at Tempe
13 Homeowners Association.

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

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16 **FINDINGS OF FACT**

17 1. On or about January 3, 2019, the Arizona Department of Real Estate
18 (“Department”) issued an order setting the above-captioned matter for rehearing on
19 February 12, 2019, at the Office of Administrative Hearings in Phoenix, Arizona.

20 2. The Notice of Re-Hearing shows that the issue is whether Respondent
21 Villagio at Tempe Homeowners Association (“Villagio”) violated ARIZ. REV. STAT.
22 (“A.R.S.”) § 33-1242.

23 3. The original hearing on Mr. Garcia’s petition was conducted on
24 October 30, 2018. After the Administrative Law Judge issued a Decision in that matter,
25 Mr. Garcia requested a rehearing.

26 4. A rehearing was held on February 12, 2019. Mr. Garcia testified on behalf
27 of himself. Villagio presented the testimony of Tom Gordon, Community Manager for
28 Villagio.

29 5. On March 8, 2018, Villagio notified Mr. Garcia in writing that his unit was
30 being rented in violation of its short term rental policy.

1 6. On March 22, 2018, Villagio notified Mr. Garcia in writing that a fine of
2 \$1,000 had posted to his account due to the violation.

3 7. On April 5, 2018, Villagio notified Mr. Garcia in writing that a \$2,000 fine
4 posted to his account for the same violation.

5 8. The March, 8, 2018, March 22, 2018, and April 5, 2018 notices contained
6 language explaining the process for contesting the notices. The notices provided,
7 "Please bring this issue into compliance within 10 days of this notice."

8 9. Mr. Garcia filed an appeal with Villagio regarding the alleged violation and
9 imposed fines. Villagio did not change its position after holding to address the alleged
10 violation and fines.

11 10. At the rehearing, Mr. Garcia contended that Villagio prevented him from
12 responding by certified mail within 21 days of the March 8, 2018, and March 22, 2018
13 notices, because Villagio failed to wait 21 days from the dates of the notices before
14 issuing an additional notice regarding the same violation, and imposing fines.
15 Mr. Garcia asserted that he believed that it would only be 10 days before he would
16 acquire another violation because the notices contained the phrase, "Please bring this
17 issue into compliance within 10 days of this notice."

18 11. Additionally, Mr. Garcia argued that Villagio violated A.R.S. § 33-1242
19 because it failed to him inform him of his option to file a petition for an administrative
20 hearing in the state real estate department.

21 12. When Villagio's counsel asked Mr. Garcia, during cross examination,
22 whether he was prohibited by a court order from sending a response to Villagio
23 regarding the alleged violation, Mr. Garcia responded, "No."

24 13. During direct examination, Mr. Gordon testified that Villagio does not
25 restrict homeowners from responding to violation notices within twenty-one days of the
26 date of the notice of violation.

27 14. When Mr. Garcia asked Mr. Gordon on cross examination whether Villagio
28 would have abided by "this statute" if Mr. Garcia had responded in twenty-one days, Mr.
29 Gordon replied, "No".

30 15. Mr. Gordon explained that homeowners are provided with 10 days to
contest the notice with Villagio pursuant to Villagio's short term rental policy.

16. Villagio asserted at hearing that Mr. Garcia never took the actions to trigger A.R.S. § 32-1242 (C), because Mr. Garcia did not submit a written response by certified mail within twenty-one calendar days of the date of each notice.

17. Villagio argued that it was not required to provide written notice of Mr. Garcia's option to petition for an administrative hearing with the state real estate department, because it informed Mr. Garcia of the appeal process in the March 8, 2018, March 22, 2018, and April 5, 2018 notices of violation.

18. Villagio further contended that A.R.S. § 33-1242 does not apply to the notices of violation because A.R.S. § 33-1242 addresses conditions of the property, not uses. Villagio argued that it notified Mr. Garcia that the use of his property violated its policy. Villagio asserted that it did not even contend that a condition of Mr. Garcia's property was in violation of a requirement of its community documents.

CONCLUSIONS OF LAW

1. The Department has authority over this matter. A.R.S. Title 32, Ch. 20, Art. 11.

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

3. A preponderance of the evidence is:

The 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.

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

4. Homeowners "may petition the department for a hearing concerning violations ... of the statutes that regulate condominiums or planned communities." A.R.S. § 32-2199.01.

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

1 of each violation.... If the petitioner prevails, the administrative law judge shall order the
2 association to pay to the petitioner the filing fee....” A.R.S. § 32-2199.02.

3 6. If the unit owner responds to a notice that the condition of the property
4 violates the condominium documents within twenty-one calendar days after the date of
5 the notice, an association must provide a unit owner with the provision of the
6 condominium documents that has been alleged violated, the date of the violation or the
7 date the violation was observed, and the process the unit owner must follow to contest
8 the notice. See A.R.S. § 33-1242 (B) and (C).

9 7. Unless the association provides the unit owner of written notice of the
10 process the unit owner must follow to contest a notice that the condition of the property
11 owned by the unit owner is in violation of a requirement of the condominium documents,
12 the association must give the unit owner written notice of the unit owner’s option to
13 petition for an administrative hearing in the state real estate department.
14 See A.R.S. § (D) and (C)(4).

15 8. Fundamental to statutory construction is the presumption that “what the
16 Legislature means, it will say.”¹ “Where the language of a statute is clear and
17 unambiguous, [Petitioner is] not warranted in reading into the law words the legislature
18 did not choose to include.” *Home Builders Association of Central Arizona v. City of*
19 *Scottsdale*, 187 Ariz. 479, 483, 930 P.2d 993, 997(1997).

20 9. The preponderance of the evidence does not show that Villagio failed to
21 allow Mr. Garcia 21 days to respond by certified mail to the March 8, 2018, March 22,
22 2018, and April 5, 2018 notices of violation.

23 10. There was no evidence at hearing provided that Villagio informed
24 Mr. Garcia that he could not respond in the 21 day period, nor that Villagio otherwise
25 prevented Mr. Garcia from submitting a response by certified mail.

26 11. Mr. Garcia failed to establish how Villagio’s issuance of the March 22,
27 2018 notice, which Villagio mailed approximately 14 days after the March 8, 2018
28 notice, prevented him from submitting a response to Villagio, by certified mail, within 21
29 days of the March 8, 2018 notice.

30 ¹ *Canon School Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994).

1 12. Mr. Garcia failed to establish how the April 5, 2018 notice, which Villagio
2 mailed approximately 14 days after the March 22, 2018 notice, prevented him
3 submitting a response to Villagio, by certified mail, within 21 days of the March 22, 2018
4 notice.

5 13. Villagio was not required to provide Mr. Garcia with the information
6 provided in A.R.S. § 33-1242 (C), because Mr. Garcia failed to submit a written
7 response to the alleged violations, by certified mail, within twenty-one days after March
8 8, 2018, March 22, 2018 and April 5, 2018.

9 14. A.R.S. § 33-1242(D) does not apply if the association notified the unit of
10 the process to contest the notice in the notice of violation. It is undisputed that Villagio
11 notified Mr. Garcia of the appeal process in the March 8, 2018, March 22, 2018, and
12 April 5, 2018 notices. Mr. Garcia failed to establish that Villagio violated A.R.S. § 33-
13 1242(D) when it failed to provide written notice of Mr. Garcia's option to petition for an
14 administrative hearing with the state real estate department.

15 15. Furthermore, Villagio's action to impose fines was not barred by A.R.S. §
16 33-1242 (D), because Villagio informed Mr. Garcia of the process for contesting the
17 notices in the notices of violation. See A.R.S. § 33-1242 (C) and (D).

18 16. Therefore, Mr. Garcia's petition should be dismissed and Villagio be
19 deemed the prevailing party in this matter.

20 **ORDER**

21 **IT IS ORDERED** that Mr. Garcia's petition is dismissed.

22 **NOTICE**

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

29 Done this day, March 4, 2019.

30 /s/ Velva Moses-Thompson
 Administrative Law Judge

1 Transmitted electronically to:

2 Judy Lowe, Commissioner
3 Arizona Department of Real Estate

4 Transmitted US Mail to:

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