

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Linda Curtin,

4 Petitioner,

5 vs.

6
7 The Ridge at Diamante del Lago
Homeowners Association, Inc.,

8
9 Respondent.

No. 19F-H1918034-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

10
11 **HEARING:** February 20, 2019, at 1:00 p.m.

12 **APPEARANCES:** Linda Curtin (“Complainant”) appeared on her own behalf;
13 The Ridge at Diamante del Lago Homeowners Association (“Respondent”) appeared
14 through Tracy Schofield, its Community Manager.

15 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

16
17 **FINDINGS OF FACT**

18 **BACKGROUND AND PROCEDURE**

19 1. The Arizona Department of Real Estate (“the Department”) is authorized by
20 statute to receive and to decide Petitions for Hearings from members of homeowners’
21 associations (“HOAs”) and from HOAs in Arizona.

22 2. Respondent is an HOA whose members own single-family houses on lots in
23 the The Ridge at Diamante del Lago in Fountain Hills, Arizona..

24 3. Petitioner owns a house in and is a member of Respondent.

25 4. On or about November 28, 2018, Petitioner filed a single-issue petition with
26 the Department that alleged that Respondent had violated Covenants, Conditions, and
27 Restrictions (“CC&Rs”) § 4.8 and A.R.S. § 33-1805 by refusing to make available
28 association records or to produce a receipt that identified the contractor and the amount
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1 paid to a contractor who had built a cinderblock wall by the community's clubhouse in
2 response to a request that Complainant had first made on August 1, 2018.¹

3 5. On or about December 10, 2018, Respondent filed a written answer to the
4 petition, stating that "[a]ll of the complaint items have been resolved" and attaching a
5 receipt from ValleyWide Custom Painting Inc. dated November 2, 2017 for \$1,000.00
6 which contained the following scope of work:

7 AC Wall Removal, various stucco repairs to be made to
8 clubhouse retaining wall in preparation for painting, and
9 expansion of existing trash can storage area with addition of
10 block wall. Wall Addition to be approximately 2.5 feet wide,
3 feet deep and 4 feet high adjoined to existing trash can
storage wall.

11 Stucco repairs to pool retaining wall, trash can storage wall
12 to be constructed using 8 inch cinder block, with stucco sand
13 finish. Job bid to include all materials and labor. Contractor
14 to facilitate site prep, clean up and material disposal.

15 Contractor contact information: Castro's Stucco. All work
16 performed by Gualberto Stucco & Repairs Cualberto Castro
[telephone number].²

17 6. Petitioner sent a letter to the Department, disputing that the issue had been
18 resolved because she was dissatisfied with and suspicious of the documents that
19 Respondent had provided.³

20 7. The Department referred the petition to the Office of Administrative Hearings,
21 an independent state agency, for an evidentiary hearing.

22 8. A hearing was held on February 20, 2019. Petitioner submitted four exhibits
23 and testified on her own behalf. Respondent submitted one exhibit and presented the
24 testimony of its Community Manager, Tracy Schofield.

25 **RELEVANT CC&R AND STATUTE**

26 9. Respondent's CC&R 4.8 provides as follows:

27 *Accounting.* The Board, at all times, shall keep, or
28 cause to be kept, true and correct records of account in

29 ¹ See Petitioner's Exhibit 1.

30 ² Petitioner's Exhibit 1 at 24-25.

³ See Petitioner's Exhibit 1 at 29.

1 accordance with generally accepted accounting principles,
2 together with recent financial statements. The Board shall
3 keep such books and records available for the inspection of
4 all Owners, First Mortgagees and Institutional Guarantors,
5 upon request, during normal business hours or other
6 reasonable ties. Required books and records shall specify in
7 reasonable detail all expenses incurred and funds
8 accumulated from assessments or otherwise.⁴

9 10.A.R.S. § 33-1805(A) provides as follows:

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

24 A.R.S. § 33-1805(B) provides certain kinds of communications that may be withheld
25 from disclosure based on privilege, closed board meetings, pending litigation, job
26 performance and compensation of employees, and personal information of members.
27 Respondent did not allege that A.R.S. § 33-1805(B) allowed it to withhold the
28 documents that Petitioner requested.

29 HEARING EVIDENCE

30 11. On August 1, 2018, Petitioner sent an email to Ms. Schofield requesting
the name of a contractor that Respondent had used in the past to help her design and
build a retaining wall. After Ms. Schofield stated that she did not know of such a
contractor, on August 2, 2018, Petitioner asked “[d]o you happen to know who installed
the garbage can walls at the clubhouse?” In an email exchange between August 2,
2018, and September 11, 2018, Ms. Schofield stated that the contractor’s name was

⁴ Petitioner's Exhibit 4 at 88.

1 Roberto, but that she did not set up the work and that she was unable to obtain his
2 number. Petitioner demanded to know how had set up the work and Ms. Schofield
3 stated that Jim Mackiewicz, Respondent's Board's Treasurer, had set up the work.⁵

4 12. Although Petitioner never specifically requested that she be allowed to
5 view or that she be provided copies of any of Respondent's records in the email
6 exchange, in the petition that she filed with the Department she characterized the
7 exchange as "evasive."⁶

8 13. On or about September 12, 2018, Petitioner sent a letter to Ms. Schofield
9 at Metro Property Management requesting "a copy of the invoice submitted to The
10 Ridge HOA for materials and services rendered for the construction of the garbage can
11 screen masonry structure in front of the community clubhouse."⁷

12 14. On or about September 24, 2018, Ms. Schofield responded to Petitioner's
13 letter on Respondent's behalf, stating that "I do not have copies of previous years'
14 invoices/payments as your community retains records in the community and not at my
15 office. I have printed a report for you with regards to work that was constructed with the
16 requested vendor."⁸

17 15. Ms. Schofield attached to her September 24, 2018 letter a printout of
18 payments that Respondent had made to Gaulberto Castro between August 19, 2015,
19 and April 5, 2018, including a check dated November 1, 2017 for \$1,000.00 for "Block
20 work – clubhouse."⁹

21 16. Petitioner did not include this document in her exhibits, although she
22 referenced it in her legal arguments by pointing out that the date of the check was the
23 day before the invoice that Respondent provided with its answer.

24 17. On November 5, 2018, Petitioner sent an email to Ms. Schofield, stating that
25 "you mentioned that the community retains records in the community" and requesting
26 that "Jim bring a copy of the invoice to the HOA board meeting today."¹⁰

27 ⁵ See Petitioner's Exhibit 1 at 8-11.

28 ⁶ Exhibit 1 at 4.

29 ⁷ Petitioner's Exhibit 1 at 6.

30 ⁸ *Id.* at 7.

⁹ Respondent's Exhibit A at 2.

¹⁰ Respondent's Exhibit A at 4.

18. Petitioner testified that the requested document was not provided to her on November 5, 2018.

19. Petitioner testified that the next week she made 15 telephone calls to Ms. Schofield, requesting a copy of the Architectural Control Committee meeting minutes in which the garbage can enclosure wall at the clubhouse had been approved. Since she did not get a satisfactory response, she filed the petition with the Department on November 28, 2018.

20. On December 10, 2018, Ms. Schofield sent an email to Complainant, to which she attached Mr. Castro's invoice.¹¹

21. On December 11, 2018, Petitioner asked for "a copy of the cashed check (front and back) and the payee's mailing address, as well as the completed Architectural Control Committee Application that was submitted that includes the contractor's address, License Number and Insurance Company."¹² Petitioner testified that Ms. Schofield stated that the requirement of Architectural Control Committee approval was not applicable to work that Respondent had performed on common areas.

22. Ms. Schofield eventually provided a copy of the cancelled check dated November 1, 2017, made payable to Mr. Castro in the amount of \$1,000.00.¹³

23. Petitioner continued to complain that she was not satisfied with the documents that Respondent provided because Mr. Castro did not comply with the Registrar of Contractors statutes in that he was not a licensed contractor, the clubhouse job was a commercial project, and the amount of the job was not less than \$1,000.00 for the Registrar of Contractors' exemption to apply.¹⁴

24. Petitioner also opined that November 2, 2017 receipt appeared to have two different kinds of handwriting and might be a forgery. The Administrative Law Judge did not see different handwriting and Complainant did not present the opinions of a handwriting expert.

25. Petitioner acknowledged that the workmanship on the garbage can enclosure wall at the clubhouse appeared to be adequate.

¹¹ See Respondent's Exhibit A at 5.

¹² Respondent's Exhibit A at 5.

¹³ See Respondent's Exhibit A at 11.

¹⁴ See Petitioner's Exhibit 1 at 29, Exhibit 2 (citing A.R.S. § 32-1132-1121(A)(14)(b)).

1 26. Petitioner testified that she also requested information and records that
2 Respondent possessed that pertained to comments and feedback from Respondent's
3 Board members about the garbage can enclosure wall at the clubhouse. Petitioner
4 complained at the hearing the minutes of Board meetings did not authorize the
5 \$1,000.00 garbage can enclosure project at the clubhouse.¹⁵ However, this was not the
6 issue that Petitioner raised in the single-issue petition that she filed with the
7 Department.

8 27. Petitioner also complained that the draft minutes of the November 5, 2018
9 Board meeting reflected among the new business that the Board had unanimously
10 resolved "[t]o approve \$125,000 for the pool remodel project with a 10% incidental fund
11 for unforeseen issues and to propose these projects and funding to the membership for
12 a vote"¹⁶

13 28. Ms. Schofield testified that at Respondent's January 17, 2019 general
14 membership meeting, Petitioner objected to reconvening of the November 5, 2018
15 meeting to allow membership to vote on the expenditure for the pool remodel project.
16 Ms. Schofield testified that \$125,000 is not an amount that the Board can approve on its
17 own without approval from membership. There will be a special meeting of members in
18 the spring to vote on the pool expenditure.

19 29. Ms. Schofield testified that she is not an onsite community manager, that
20 she works as a community manager for numerous associations, and that she does not
21 have any of the associations' records in her office. Ms. Schofield testified that she
22 provided what information she had to Petitioner and communicated with Petitioner on
23 every issue.

24 30. Ms. Schofield noted that all of her emails contained her office hours and,
25 during the holidays, the days on which she would not be in her office. Ms. Schofield
26 noted that Petitioner sent numerous emails in December 2018, demanding an
27 immediate response.
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30 ¹⁵ See Petitioner's Exhibit 2.

¹⁶ Petitioner's Exhibit 3 at 79.

1 31. Ms. Schofield testified that in the future, if Petitioner requests a specific
2 record, she will schedule a time for her to go through the records at Respondent's
3 records depository within ten days.

4 **CONCLUSIONS OF LAW**

5 1. A.R.S. § 32-2199(B) permits an owner or a planned community organization
6 to file a petition with the Department for a hearing concerning violations of planned
7 community documents under the authority Title 33, Chapter 16.¹⁷ Such petitions will be
8 heard before the Office of Administrative Hearings, an independent state agency.

9 2. Petitioner bears the burden of proof to establish that Respondent violated
10 CC&R § 4.8 and A.R.S. § 33-1805(A) by a preponderance of the evidence.¹⁸
11 Respondent bears the burden to establish affirmative defenses by the same evidentiary
12 standard.¹⁹

13 3. "A preponderance of the evidence is such proof as convinces the trier of fact
14 that the contention is more probably true than not."²⁰ A preponderance of the evidence is
15 "[t]he greater weight of the evidence, not necessarily established by the greater number of
16 witnesses testifying to a fact but by evidence that has the most convincing force; superior
17 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
18 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather
19 than the other."²¹

20 4. "A cardinal rule of statutory interpretation is to give full effect to each statutory
21 word or phrase so that no part is rendered void, superfluous, contradictory or

22 ¹⁷ See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce
23 the development's CC&Rs. Petitioner argued that Title 33 did not apply to Respondent because it is a
24 non-profit organization, apparently based on the arguments mentioned by the law firm of Carpenter
25 Hazlewood in Petitioner's Exhibit 4. The Administrative Law Judge does not address this argument
26 because she does not believe it has merit. She also does not believe that Petitioner contemplated the
27 legal consequences of his argument because if Title 33 did not apply to this dispute, neither the Office of
28 Administrative Hearings ("OAH") nor the Department have jurisdiction to decide the merits of Petitioner's
29 claim. Although Petitioner argued that the Department must consider his petition because he has no other
30 forum, as executive agencies, OAH and the Department can only enforce duly enacted statutes within the
authority given by such statutes. The Department may consider this argument because lack of jurisdiction
is may not be waived.

¹⁸ 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).

¹⁹ See A.A.C. R2-19-119(B)(2).

²⁰ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

²¹ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

1 insignificant.”²² Similarly, if a restrictive covenant is unambiguous, it is enforced to give
2 effect to the intent of the parties.²³ “Restrictive covenants must be construed as a whole
3 and interpreted in view of their underlying purposes, giving effect to all provisions
4 contained therein.”²⁴

5 5. CC&R § 4.8 requires the Board to keep records in accordance with generally
6 accepted accounting principles, along with recent financial statements, and to make
7 such records accessible to HOA members upon request. Although the \$1,000.00
8 expenditure for the garbage can enclosure was made ten months before Petitioner
9 asked for it and was for a nominal amount, A.R.S. § 33-1805(A) required Respondent to
10 provide access to Petitioner to view records related to the expenditure within ten days of
11 her request. A.R.S. § 33-1805(A) contains similar requirements, with the additional
12 requirement that access must be provided within ten days of a request.

13 6. Respondent established that, eventually, it provided all documents in its
14 possession related to the expenditure. However, it acknowledged that it did not provide
15 the documents or provide access to Petitioner to view the documents within ten days of
16 Petitioner’s September 12, 2018 request. Therefore, Petitioner established that
17 Respondent violated A.R.S. § 33-1805(A).

18 7. All that CC&R § 4.8 requires is that Respondent keep records and make them
19 available to members. All that A.R.S. § 33-1805(A) requires is that Respondent made
20 records available to members within ten days of members’ request for the records. The
21 legislature has not authorized the Department to enforce the Registrar of Contractors’
22 statutes in an HOA petition or that HOAs produce records that satisfy all of a members’
23 stated concerns. Petitioner’s concern with “transparency” and dissatisfaction and
24 suspicions about the records that were eventually provided do not entitle her to any
25 additional relief in this forum. The Administrative Law Judge hopes that, in the future,
26 Petitioner can set aside her concerns and suspicions to cooperatively build a better
27 community with Respondent.

28 ²² *Westburne Supply, Inc. v. Diversified Design and Construction, Inc.*, 170 Ariz. 598, 600, 826 P.2d 1224,
29 1226 (Ct. App. 1992).

²³ *See Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

30 ²⁴ *Lookout Mountain Paradise Hills Homeowners’ Ass’n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. App. 1993) (quoted in *Powell*, 211 Ariz. at 557 ¶ 16, 125 P.3d at 377).

RECOMMENDED ORDER

IT IS ORDERED that Petitioners' petition is granted because she has established that Respondent violated A.R.S. § 33-1805(A).

IT IS FURTHER ORDERED that Respondent shall reimburse to Petitioner the \$500.00 that she paid to file her single-issue petition.

NOTICE

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. Pursuant to A.R.S. § 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.

Done this day, March 5, 2019.

/s/ Diane Mihalsky
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate

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The Ridge at Diamante del Lago
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By: Felicia Del Sol