

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Patricia Wiercinski,

4 Petitioner,

5 vs.

6
7 Long Meadow Ranch East Property
8 Owners Association, Inc.,

9 Respondent.

No. 19F-H1918028-REL-RHG

**ADMINISTRATIVE LAW JUDGE
DECISION**

10 **REHEARING:** April 22, 2019, at 1:00 p.m.

11 **APPEARANCES:** Patricia Wiercinski ("Petitioner") appeared on her own behalf;
12 Long Meadow Ranch East Property Owners Association, Inc. ("Respondent") was
13 represented by Ashley N. Moscarello, Esq., Goodman Law Group.

14 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

16 **FINDINGS OF FACT**

17 **BACKGROUND AND PROCEDURE**

18 1. The Arizona Department of Real Estate ("the Department") is authorized by
19 statute to receive and to decide Petitions for Hearings from members of homeowners'
20 associations and from homeowners' associations in Arizona.

21 2. Respondent is a homeowners' association whose members own property
22 and/or residences in Long Meadow Ranch East development in Prescott, Arizona.

23 3. Petitioner and her husband, Wayne Coates, own property in Long Meadow
24 Ranch East on Puntenney Rd. on which they have built a house. Most of the lots on
25 Puntenney Rd. have not been developed. Petitioner is a member of Respondent.

26 4. On or about October 18, 2018, Petitioner filed a single-issue petition with the
27 Department that alleged that Respondent had violated A.R.S. § 33-1805 by failing to
28 produce documents regarding its deliberations, decisions, and actions with respect to
29 an incident that occurred on or about June 19, 2017, that allegedly involved Mr. Coates
30

1 being belligerent and cursing at a potential buyer of the vacant property across the
2 street from Petitioner's house.¹

3 5. Respondent filed a written answer to the petition, denying that it had violated
4 any statute by refusing to produce any records. The Department referred the petition to
5 the Office of Administrative Hearings, an independent state agency, for an evidentiary
6 hearing.

7 6. A hearing was held on January 10, 2019. Petitioner submitted an email chain
8 among members of Respondent's Board and others, whose names were redacted,
9 concerning the June 19, 2017 incident, which Respondent had voluntarily produced
10 after she filed the petition with the Department. Petitioner acknowledged that
11 Respondent had not taken any action regarding the June 19, 2017 incident, but argued
12 that the Board must have more documents because it was required to memorialize in
13 writing a formal decision not to do anything about any incident that Board members may
14 have discussed.

15 7. On January 22, 2018, the undersigned Administrative Law Judge ("ALJ")
16 issued a decision, finding that Petitioner had not established that Respondent violated
17 A.R.S. § 33-1805 because the email chain was an informal communication among
18 neighbors, not a document that Respondent maintained in the course of its business,
19 and Petitioner did not establish that Respondent had generated any official documents
20 about the incident that it had failed to produce. The ALJ also noted that Petitioner had
21 not cited any statute that required HOA Board to make a formal written decision about
22 items that they do not take any action on.

23 8. Petitioner requested a rehearing, alleging misconduct by the judge. The
24 Commissioner of the Department granted the request. The Commissioner did not note
25 any specific misconduct by the Administrative Law Judge or state why such
26 misconduct should have changed the result in this case.

27
28

¹ The petition generally alleges Respondent's failure to produce records responsive to Petitioner's records
29 request that did not provide any specific description of the records sought. The Administrative Law Judge
30 bases her statement of the issue on the evidence that the parties presented at the hearing. Petitioner
acknowledged that her records request was for documents showing the response to the June 19, 2017
incident.

1 9. A rehearing was held on April 22, 2019. Complainant submitted eight exhibits
2 and testified on her own behalf. Respondent submitted one exhibit and presented the
3 testimony of two witnesses: (1) Michael Olson, Respondent's Board's president; and
4 (2) Kathryn ("Kathy") Andrews, who was employed by Respondent's management
5 company, Hoamco, as Respondent's community manager.

6 **HEARING EVIDENCE**

7 10. John Allen owned property on Puntteney Rd. that he was trying to sell in
8 2017 that was located across the street from Petitioner and Mr. Coates' house. On
9 June 19, 2017, Mr. Allan received an email from a purchaser about someone
10 threatening the potential purchaser and his real estate agent. Mr. Allan subsequently
11 shared the email with members of Respondent's Board.

12 11. The email string that Respondent voluntarily provided as a courtesy after
13 Petitioner filed the petition with the Department is in reverse chronological order, as
14 follows:

15 On June 20, 2017, at 8:41 AM, [Redacted] wrote:

16 Thank you so much for informing me of the situation you
17 encountered yesterday with your family and Architect.
18 Again, I apologize.

19 I wrote an e-mail last night to the out-of-state owner and this
20 morning I received an e-mail back. He knows this person,
21 Wayne Coates, and said he has been an issue in the
22 neighborhood before. He has contacted Hoamco and is
23 seeking legal [counsel] to stop this menace.

24 The owner, John Allen is asking a favor of you. Can you
25 please write something to me explaining what you told me
26 on the phone of his belligerent and obnoxious behavior
27 yesterday? He would like to have "proof" to show the HOA
28 that they need to put a stop to this behavior.

29 Also, Here is a map of his property and position as it relates
30 to the lot.

John will be coming into town this coming weekend
(Sunday), and we are meeting at the lot, probably Monday.
We could coordinate a meeting with you, your wife and

1 Architect next week when you return and see if it is a good fit
2 for you.

3 From Joe Zielinski
4 Subject: Re: LMR Problem
5 Date June 20, 2017 at 7:33:41 AM
6 To: Gregg Arthur, Mike Olson, Boris Biloskirka, Kathy
7 Andrews, Jim Robertson

8 Gregg and all,
9 The YCSO [Yavapai County Sheriff's Office] may file
10 charges against Wayne for disorderly conduct/harassment,
11 based on what happened to Mr. Allan and the others in
12 attendance, given Wayne's arrest record and prison term
13 and criminal history. It would involve a trip/call by Mr. Allan
14 to YCSO and an Incident Report. It would involve testimony
15 at . . . trial, since I don't believe Wayne would ever plead
16 guilty or accept a plea. The Arizona disorderly conduct
17 statute is 13-2904. Sub Paragraphs 1.3, and 4 seem
18 applicable. Unfortunately, I am familiar with the routine,
19 because of Wayne's actions against me. I don't believe
20 Wayne (and Patricia's) aggressive and disruptive behavior
21 will stop.

22 I've been trying to get an appointment with Shelia Polk's
23 office, either with her or one of her Assistant AGs to discuss
24 my own ongoing problems with Wayne and Patricia.

25

26 From Gregg Arthur
27 To: Mike Olson, Joe Zielinski, Boris Biloskirka, Kathy
28 Andrews, Jim Robertson
29 Cc: John Allan
30 Sent Tuesday, June 20, 2017 6:34 AM
Subject: FW: LMR Problem

Dear LMR Board and HOAMCO

I was hoping that this would not be a situation we would
have to encounter with Wayne Coates and Patricia however
here it is on our door step. Many owners at LMR have
waited long and patiently for the market to recover so that
they can sell their properties or build the home that they may
have postponed until retirement and the timing was right. In
the Real Estate World, this is about as bad as it gets . . For a
property owner the same.

Wayne thru his actions appears to have interfered with and destroyed a property sale. We need to meet and take action on this matter as it will have a broad and chilling effect amongst the realtor community (effecting us all) not to mention the property owners. I feel Mr. Allen has been harmed by Wayne Coates in this matter and we could not sit by, action needs to be taken and quickly to prevent this from happening again.

. . . .

From: John Allan
Date: Tuesday, June 20, 2017 at 6:11 AM
To: Gregg Arthur
Subject: LMR Problem

Good Morning Gregg

My wife and I are coming to Prescott and will arrive late Saturday night. Will be there for 3 days or so. Wondering if you would like to get together for lunch so as to finally have a chance to meet. Please let me know. I would like to meet with my LMR friend.

As you know, I have been trying to sell our other lot at LMR with what I thought was little or no action. Yesterday, I rec'd an e-mail from my realtor whom I had prodded into action only to find that there is a major problem with a neighbor who is apparently going out of his way to scare potential buyers off. I am attaching the e-mail from my realtor and ask that you share it with the BOD in that from my point of view, an owner should not be allowed to interfere with a potential sale of another owner's property. Would appreciate your thoughts on the matter. Plan to send this to HOAMCO as well and will employ legal action if necessary.

. . . .

Mon 6/19/2017 9:36 PM
From: [Redacted]
To: John Allen

Something really weird just happened. [Redacted] the Builder went out with his wife and architect and son to look at the property again. The neighbor across the street on the west side of Puntenney came out of his house and was belligerent and cursing at them telling them nothing was for

1 sale around here and they shouldn't be snooping around.
2 His wife said there were for sale signs right there and they
3 were there to look at a lot and he was very verbally abusive
4 to them. He called to let me know as a courtesy and said
5 they are not sure if they are interested in the lot now since
6 they would have to go by that house every day...

7 I just wanted to let you guys know and I'll keep you posted if
8 anyone else has similar complaints. I planned on going out
9 tomorrow to check on Flyers and add more flyers to the
10 boxes. So I'll let you know if I hear from the guy.

11 From: [Redacted]
12 Jun 20, 2017 at 10:30 AM
13 Subject: Re: Puntenny Property
14 To: [Redacted]

15 Date: June 19th 2017, at approximately 5:00 pm.

16

17 We entered the subdivision with notification of 3 realtors that
18 we wanted to look at the property they had listed. Gate code
19 was provided and in 2 vehicles we entered.

20 At the intersection of the lot Easement from the west
21 entrance to said property listed by [redacted] my wife
22 [redacted] and my Son were parked at entrance on
23 Puntenney Dr, when an elderly man came out of a home to
24 the west and began to yell and scream questioning why [we]
25 were on premises.

26 The individual was verbally abusive and extremely
27 confrontational. Making rude remarks while cussing.

28 My wife told the individual that we were looking at property
29 and that we had notified realtors that we would be looking
30 today.

The individual continue[d] to display extreme aggressive
behavior, to include stating that there is not any properties
for sale on the area and that we needed to leave
immediately.

In an attempt to explain our situation the man continued to
display more aggressive behavior. So my wife and son

drove up to meet with myself in the other vehicle, in which myself and my architect were told us what had occurred.

In closing when we returned one thing that stands out is would we want to live next to this type of behavior of [a] neighbor? The answer is no, this lot was one that we had in our top 2 Lots as a consideration for purchase but due to the volatile potential of this man, we have decided at this point to remove it from our list.

[In] addition any property that would require us to drive past or have the chance of contact with this individual.

We are seeking a quiet, peaceful, and neighborly place to retire. Not a place with hostility and confrontation.

. . . .

12. Petitioner changed her theory of the case on rehearing. She did not argue that the Board must have made a formal decision to decide that the alleged threat by the person on Puntenney Rd. was not a matter that was anything that Respondent could or should do anything about and did not argue that the Board had refused to produce an official record upon her request.

13. Instead, she argued that the email string was an official record of Respondent's business and that A.R.S. § 33-1805 required Respondent to produce an un-redacted copy of the email at her request. Petitioner argued that since some of her neighbors knew the names of the non-members referenced in the email string, she and Mr. Coates had a right to know who was accusing Mr. Coates of belligerence and threatening persons in the neighborhood.

14. Mr. Olson again testified that the names of the potential purchasers and real estate agent were redacted because Mr. Coates had a history of bullying and intimidating people. Otherwise, Respondent had produced to Complainant the complete private communications that discussed the incident. Mr. Olson testified that all the un-redacted names on the email string were all members of Respondent. John Allen owned the property across the street from Petitioner and Mr. Coates' property and Kathy Andrews was the property manager. All of the other named persons to whom the

1 email was sent were Board members, except for Boris Biloskirka, who was a former
2 Board member.

3 15. Mr. Olson testified that the Board had never addressed the June 19, 2017
4 incident formally or in its official capacity and never voted to take any action because
5 the alleged incident did not violate Respondent's CC&Rs, bylaws, or anything else that
6 it was authorized or empowered to enforce.

7 16. Petitioner submitted Respondent's January 18, 2012 Resolution for
8 Electronic Storage of Documents, which required "the management company [to utilize]
9 a comprehensive filing system designed to electronically manage and store all
10 Association documents" ² Petitioner argued that, since the Board voluntarily
11 produced the e-mail string after she filed a petition with the Department, it must be an
12 association document.

13 17. Ms. Andrews testified that Respondent's records include anything that is a
14 matter of record regarding the Association's business, such as governing documents,
15 architectural guidelines, Board and general meeting minutes, and anything submitted to
16 the Board for action. Because the Board did not take any action regarding the June 19,
17 2017 incident, the email was not included in Respondent's archived records. Ms.
18 Andrews acknowledged that she keeps the emails that she is copied on that do not
19 involve Respondent's business in her personal emails.

20 18. Ms. Andrews testified that no compliance report was prepared about the
21 June 19, 2017 incident and Petitioner and Mr. Coates' file did not include anything about
22 the incident. Ms. Andrews testified that Respondent has no authority to become
23 involved in a personal dispute between neighbors. The Enforcement Resolution that
24 Petitioner offered into evidence that required the Board to remain fair and impartial in
25 enforcing the governing documents applied only to disputes involving the Architectural
26 Committee's approval of exterior improvements, ³ not allegations of personal threats
27 made by someone in the community against someone outside the community.

28 CONCLUSIONS OF LAW

29
30 ² See Exhibit 4.

³ See Exhibit 2.

1 1. A.R.S. § 32-2199(B) permits an owner or a planned community organization
2 to file a petition with the Department for a hearing concerning violations of Title 33,
3 Chapter 16. This matter lies with the Department's jurisdiction.

4 2. Petitioner bears the burden of proof to establish that Respondent violated
5 A.R.S. § 33-1805 by a preponderance of the evidence.⁴ Respondent bears the burden to
6 establish affirmative defenses by the same evidentiary standard.⁵

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

14 4. A.R.S. § 33-1805(A) provides as follows:

15 Except as provided in subsection B of this section, all
16 **financial and other records of the association** shall be
17 made reasonably available for examination by any member
18 or any person designated by the member in writing as the
19 member's representative . . .

20 (Emphasis added.) A.R.S. § 33-1804(E)(4) provides that "[a]ny quorum of the board of
21 directors that meets informally to discuss **association business**, including workshops,
22 shall comply with the open meeting and notice provisions of this section without regard
23 to whether the board votes or takes any action on any matter at that informal meeting."
24 (Emphasis added.)

25 5. Petitioner did not establish that the Board ever took any action regarding the
26 June 19, 2017 incident. Although the Board members informally discussed the event in
27 private emails, which were provided to Appellant as a courtesy, the mere fact that a
28 quorum of Board members may discuss a topic does not make it official Board

29 ⁴ 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
30 Ariz. 369, 372, 249 P.2d 837 (1952).

⁵ See A.A.C. R2-19-119(B)(2).

⁶ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁷ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

1 business, especially if they do not end up taking any action to make a matter board
2 business. Mr. Olson's testimony that he redacted the email because he feared that Mr.
3 Coates would harass the real estate agent and potential purchaser who declined to
4 purchase the property after the incident does not appear unreasonable, especially given
5 Mr. Coates' role in causing Petitioner to prosecute this petition at the original hearing
6 and rehearing.

7 6. Because the email string is not a record of the association, A.R.S. § 33-
8 1805(A) does not require Respondent to provide an un-redacted version of the email to
9 Petitioner. Petitioner's petition must therefore be dismissed.

10 **ORDER**

11 IT IS ORDERED that Petitioners' petition is dismissed because she has not
12 established that Respondent violated A.R.S. § 33-1805(A) by or failing to produce an
13 un-redacted version of the email string concerning the June 19, 2017 incident.

14 Done this day, May 1, 2019.

15 /s/ Diane Mihalsky
16 Administrative Law Judge

17 Transmitted electronically to:

18 Judy Lowe, Commissioner
19 Arizona Department of Real Estate
20 100 N. 15th Avenue, Suite 201
21 Phoenix, Arizona 85007

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29
30 By: Felicia Del Sol

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