

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Tom Barrs,
4 Petitioner,

5 vs.

6 Desert Ranch Homeowners Association,
7 Respondent.

No. 19F-H1918037-REL-RHG

**ADMINISTRATIVE LAW JUDGE
DECISION**

8
9 **HEARING:** August 27, 2019 at 8:30 AM.

10 **APPEARANCES:** Jonathan Dessaulles, Esq., appeared on behalf of Thomas
11 Barrs ("Petitioner") with Petitioner as a witness. Brian Schoeffler appeared on behalf of
12 Desert Ranch Homeowners Association ("Respondent" and "Association"). Gerard
13 Manieri, Stephen Barrs, and Abraham Barrs observed.

14 **ADMINISTRATIVE LAW JUDGE:** Jenna Clark.

15
16 After review of the hearing record in this matter, the undersigned Administrative
17 Law Judge makes the following Findings of Fact and Conclusions of Law, and issues
18 this ORDER to the Commissioner of the Arizona Department of Real Estate
19 ("Department").

20 **FINDINGS OF FACT**

21 **BACKGROUND AND PROCEDURE**

22 1. The Department is authorized by statute to receive and to decide petitions
23 for hearings from members of homeowners' associations and from homeowners'
24 associations in Arizona.

25 2. On or about December 17, 2018, Petitioner filed a single-issue petition
26 against the Association with the Department.¹ Petitioner tendered \$500.00 to the
27 Department with his petition.²

28
29
30 ¹ See HO19-18037_Petition_Form_dec_2018.pdf.

² *Id.*

1 3. On or about January 12, 2019, the Association filed its ANSWER with the
2 Department whereby it denied all complaint items in the petition.³

3 4. Per the NOTICE OF HEARING, the Department referred this matter to the
4 Office of Administrative Hearings ("OAH"), an independent state agency, for an
5 evidentiary hearing on March 21, 2019, regarding the following issues based on
6 Petitioner's petition:

7 **Whether Desert Ranch Homeowners Association (Respondent)**
8 **violated A.R.S. § 33-1805 by failing to fulfill a records request.**

9 5. On April 20, 2019, the undersigned Administrative Law Judge issued an
10 ORDER to the Commissioner of the Department.

11 6. On June 10, 2019, Petitioner submitted an appeal to the Department,
12 which was granted.

13 7. On June 18, 2019, the Department issued a NOTICE OF REHEARING, and
14 referred this matter back to OAH for an evidentiary hearing on August 27, 2019,
15 regarding the same issue as the previous hearing.

16 **THE PARTIES AND GOVERNING DOCUMENTS**

17 8. Respondent is a homeowners' association whose members own
18 properties in a residential real estate development located in Scottsdale, Arizona.
19 Membership for the Association is compromised of the Desert Ranch subdivision.

20 9. Petitioner is a Desert Ranch subdivision property owner and a member of
21 the Association.

22 10. The Association is governed by its Covenants, Conditions, and
23 Restrictions ("CC&Rs"), and overseen by a Board of Directors ("the Board"). The
24 Association is also regulated by Title 33, Chapter 16, Article 1 of the Arizona Revised
25 Statutes ("ARIZ. REV. STAT.")

26 **REHEARING EVIDENCE**

27 11. Prior Petitioner Exhibits 1-10 and Respondent Exhibits A-H, along with the
28 Department's Agency Record, NOTICE OF HEARING, NOTICE OF REHEARING, and 19F-
29 H1918037-REL hearing record were all admitted into the evidentiary record. Petitioner
30

³ *Id.*

1 testified on his own behalf and submitted two additional exhibits, 11-12. Respondent
2 called Brian Schoeffler as a witness and submitted three additional exhibits, I-K.

3 12. At all times relevant to the matter at bar, Mr. Schoeffler was the Chairman
4 of the Association's EDC.

5 13. On July 19, 2017, the Association's President, Catherine Overby,
6 appointed Environmental Design Committee ("EDC") the Board Director, Brian
7 Schoeffler, as Petitioner's primary records request contact.⁴

8 14. On July 18, 2018, Ms. Overby instructed Petitioner to direct all of his
9 requests to the Association's management company, Associated Asset Management
10 ("AAM"), to the attention of the Vice President of Client Services, Lori Lock-Lee.⁵

11 15. On November 01, 2018, after business hours at 9:40 p.m., Petitioner
12 submitted a records request for EDC submissions, requests, and approval letters to
13 Catherine Overby, Brian Schoeffler, and Lori Loch-Lee as follows:

14 "Pursuant to ARS 33-1805, I am requesting a copy of all EDC actions,
15 written requests, and written approvals from October 2017 through
16 October 2018. Soft copies via return **email are preferable**; otherwise,
17 **please let me know when hard copies are available for pickup.**"⁶ [sic]

18 (*Emphasis added.*)

19 Petitioner submitted his request electronically to the Association's management
20 company accounting manager, and copied the President and Vice President of the
21 Board, as well as Brian Schoeffler; then Chairman of the EDC.

22 16. Petitioner was not instructed to send his request to all Board members.

23 17. The deadline for the Association to respond to Petitioner was on
24 November 19, 2018.⁷

25 18. On November 02, 2018, Mrs. Loch-Lee notified Petitioner that she would
26 forward his request to all of the Association's Board members, and noted that AAM was
27 only the Association's accounting firm.⁸

28 ⁴ See Petitioner Exhibit 11.

29 ⁵ See Petitioner Exhibit 12.

30 ⁶ See Petitioner Exhibit 2.

⁷ See Respondent Exhibits F and F2. Pursuant to ARIZ. ADMIN. CODE R2-19-117 Administrative Notice is taken that Monday, November 12, 2018, was a Federal holiday.

⁸ See Petitioner Exhibit 6.

1 19. Again, Petitioner was not instructed to send his request to all Board
2 members.

3 20. On November 18, 2018, Petitioner received a summary table listing of
4 some, not all, EDC actions taken between October 2017 and October 2018 which did
5 not include the totality of the communications he requested including all EDC actions,
6 written requests, and written approvals for the specified timeframe.⁹ At that time,
7 Petitioner was advised that he needed to copy all Board members on records
8 requests.¹⁰

9 21. On March 06, 2019, Petitioner accused the Association of willfully failing to
10 fulfill his request, and outlined exactly what he was looking for as follows:

11 “I still as of yet, have not been offered a time to stop by and pick up/make
12 copies of the records as requested November 1, 2018 pursuant to ARS
13 33-1805. If it would be easier you can forward me copies via return email.
14 Or if you would prefer, I will gladly sort through all of the records to find the
15 ones I need. Again, as specified in my request, I am looking for not just
16 the list of actions, but also copies of the communications (letters, emails,
17 and application forms) relating to Environmental Design Review (EDC)
18 submissions, requests, complaints and approvals (or denials) pertaining to
19 the specific time period. Specifically, I am looking at items 3 & 5-10 on
20 your “EDC Decisions” List:

21 (3) Copy of correspondence sent to individual property owners notifying of
22 violation and any follow-up correspondence notifying each violator of “Full
23 Compliance”

24 (5) Copy of Complaint correspondence from homeowner regarding
25 shrubs. Any and all citations, letters, emails and follow-up correspondence
26 relating to this line item.

27 (6) Copy of submittal correspondence outlining scope of project from
28 homeowner (Mr. Schoeffler), approval correspondence from all three EDC
29 members, and final approval letter/email sent to homeowner

30 (7) Copy of original submittal correspondence for garage remodel and
septic install. Copy of correspondence granting approval for garage
remodel and septic install

 (8) Copy of Complaint correspondence from homeowner, and “notification”
letters/emails sent by EDC to homeowners

 (9) Copy of trellis addition request by homeowner and approval
email/letter sent to homeowner

 (10) Copy of request, approval and change order correspondence”¹¹

⁹ See Petitioner Exhibit 7; see also Respondent Exhibit I.

¹⁰ See Petitioner Exhibit 8.

¹¹ *Id.*; see also Respondent Exhibit I.

1 (All errors in original.)

2 22. Petitioner alleged that the Association knew how to fulfill his request
3 because he had made a similar request on October 07, 2017, which the Association
4 failed to fulfill, and the same dispute had been adjudicated at OAH as a result.¹²

5 23. On March 11, 2018, Mr. Schoeffler replied to Petitioner's March 06, 2019,
6 correspondence.¹³ In his email Mr. Schoeffler argued that Petitioner's request had been
7 complied with on November 18, 2018, and directed Petitioner to submit a new request if
8 Petitioner desired the bulleted information he identified in his March 06, 2019, email.¹⁴
9 Petitioner replied to Mr. Schoeffler's email that same day and accused him of
10 intentionally withholding the records Petitioner requested.¹⁵

11 24. In a March 17, 2019, email Mr. Schoeffler explained that Petitioner's
12 original November 01, 2018, request was only submitted to two of four Board members,
13 and that Ms. Loch-Lee had informed Petitioner in a November 02, 2018, email that he
14 had only emailed his request to two Board members.¹⁶ Mr. Schoeffler further explained
15 that providing Petitioner with additional documentation after his March 06, 2019, email
16 could be interpreted as an admission of guilt, as the Association believed it had
17 complied with Petitioner's request, which is why he asked Petitioner to submit a new
18 request.¹⁷

19 25. Respondent conceded that the Association's governing documents do not
20 have a requirement that all Board members must be copied on emails regarding records
21 requests. Respondent also conceded that Association Bylaws regarding the submission
22 of forms to the Board for records requests, in Section 1.6, are not adhered to or
23 enforced by the Association.

24
25 ¹² See Petitioner Exhibit 3 and Respondent Exhibits A-C. Respondent Exhibit A is a December 27, 2017,
26 ALJ Decision for Docket No. 18F-H1817008-REL. Respondent Exhibit B is a summary table the
27 Association provided to Petitioner in response to Petitioner's underlying records request in that case.
28 There, Petitioner submitted a records request to the Board but did not include the EDC Chairman Mr.
29 Schoeffler. Respondent Exhibit C is an August 23, 2018, ALJ Decision for Docket No. 18F-H1817008-
30 REL-RHG. The facts in that case are no different from those in Docket No. 18F-H1817008-REL.

¹³ See Petitioner Exhibit 10.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Petitioner Exhibit 9.

¹⁷ *Id.*

1 26. At the close of testimony Petitioner clarified that his dispute was regarding
2 the Association's response to his request, or lack thereof, and not with the timeliness of
3 it. Petitioner argued that the Association acted in bad faith, as the Association did not
4 offer to make the documents he requested available in one hundred forty days.
5 Petitioner prayed for an ORDER to be issued in his favor which required the Association
6 to abide by ARIZ. REV. STAT. § 33-1805, a reimbursement of his filing fee, and impose a
7 civil penalty against the Association.

8 27. Mr. Schoeffler argued that a similar dispute had previously been
9 adjudicated at OAH which had been returned in the Association's favor, and reasoned
10 that the Association addressed Petitioner's request the way it did as a result of that prior
11 decision.¹⁸ Mr. Schoeffler further argued that Petitioner acted unreasonably by failing to
12 follow-up with the Board after receiving Mrs. Loch-Lee's November 02, 2018, email.

13 28. As of the date of the hearing Petitioner has not received all of the
14 documentation he asked for in his November 01, 2018, request.

15 **CONCLUSIONS OF LAW**

16 1. This matter lies within the Department's jurisdiction. Pursuant to ARIZ. REV.
17 STAT. §§ 32-2102 and 32-2199 et al., regarding a dispute between an owner and a
18 planned community association, the owner or association may petition the department
19 for a hearing concerning violations of community documents or violations of the statutes
20 that regulate planned communities as long as the petitioner has filed a petition with the
21 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

22 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(D), 32-2199.02,
23 and 41-1092, OAH has the authority to hear and decide the contested case at bar.

24 3. In this proceeding, Petitioner bears the burden of proving by a
25 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1805.¹⁹

26 4. "A preponderance of the evidence is such proof as convinces the trier of
27 fact that the contention is more probably true than not."²⁰ A preponderance of the
28 evidence is "[t]he greater weight of the evidence, not necessarily established by the

29 ¹⁸ See Respondent Exhibits A-C.

30 ¹⁹ See ARIZ. ADMIN. CODE R2-19-119.

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

1 greater number of witnesses testifying to a fact but by evidence that has the most
2 convincing force; superior evidentiary weight that, though not sufficient to free the mind
3 wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one
4 side of the issue rather than the other.”²¹

5 5. ARIZ. ADMIN. CODE R2-19-107 provides, in relevant part, that “In computing
6 any time period, the [Office of Administrative Hearings] shall exclude the day from which
7 the designated time period begins to run. The Office shall include the last day of the
8 period unless it falls on a Saturday, Sunday, or legal holiday.”

9 6. ARIZ. REV. STAT. § 1-243 provides, in relevant part, that “[T]he time in
10 which an act is required to be done shall be computed by excluding the first day and
11 including the last day, unless the last day is a holiday, and then it is also excluded.”

12 7. ARIZ. REV. STAT. § 33-1805 provides, in relevant part, as follows:

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

25 B. Books and records kept by or on behalf of the association and the
26 board may be withheld from disclosure to the extent that the portion
27 withheld relates to any of the following:

28 1. Privileged communication between an attorney for the
29 association and the association.

30 2. Pending litigation.

3. Meeting minutes or other records of a session of a board
meeting that is not required to be open to all members pursuant to
section 33-1804.

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

1 4. Personal, health or financial records of an individual member of
2 the association, an individual employee of the association or an
3 individual employee of a contractor for the association, including
4 records of the association directly related to the personal, health or
5 financial information about an individual member of the association,
6 an individual employee of the association or an individual employee
7 of a contractor for the association.

8 5. Records relating to the job performance of, compensation of,
9 health records of or specific complaints against an individual
10 employee of the association or an individual employee of a
11 contractor of the association who works under the direction of the
12 association.

13 C. The association shall not be required to disclose financial and other
14 records of the association if disclosure would violate any state or federal
15 law.

16 *(Emphasis added.)*

17 8. "In applying a statute . . . its words are to be given their ordinary meaning
18 unless the legislature has offered its own definition of the words or it appears from the
19 context that a special meaning was intended."²² Each word, phrase, clause, and
20 sentence must be given meaning so that no part of the legislation will be void, inert, or
21 trivial.²³ Legislation must also be given a sensible construction that avoids absurd
22 results.²⁴ If the words do not disclose the legislative intent, the court will scrutinize the
23 statute as a whole and give it a fair and sensible meaning.²⁵

24 9. The material facts in the record are clear.

25 10. Petitioner's November 01, 2018, records request was not required to be
26 sent to all members of the Association's Board, as Petitioner had expressly been
27 instructed to only send his records requests to the Association's EDC Chairman, Mr.
28 Schoeffler, which he did.

29 ²²

²³ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

²⁴ *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 204, ¶ 17 (App. 2007).

²⁵ *State v. Gonzales*, 206 Ariz. 469, 471, ¶ 12 (App. 2003).

²⁶ *Luchanski v. Congrove*, 193 Ariz. 176, 178, ¶ 9.

1 11. The Association's response to Petitioner was required on or by November
2 19, 2018. On November 18, 2018, the Association only provided a summary table to
3 Petitioner.

4 12. Petitioner is correct that the Association did not fully comply with his
5 specific request, and has established by a preponderance of the evidence that the
6 summary table provided by the Association was a violation of ARIZ. REV. STAT. § 33-
7 1805.

8 13. Therefore, the Administrative Law Judge concludes that the Association's
9 conduct, as outlined above, was a violation of the charged provisions outlined in ARIZ.
10 REV. STAT. § 33-1805. As such, Petitioner has also established that the issuance of a
11 civil penalty against Respondent would be appropriate in this case pursuant to ARIZ.
12 REV. STAT. § 32-2199.02(A).

13 **FINAL ORDER**

14 **IT IS ORDERED** that Petitioner's petition in this matter be granted.

15 **IT IS FURTHER ORDERED** that Respondent shall reimburse Petitioner's
16 \$500.00 filing fee as required by ARIZ. REV. STAT. § 32-2199.01

17 **IT IS FURTHER ORDERED** that Petitioner's request to levy a civil penalty
18 against Respondent is granted. Pursuant to ARIZ. REV. STAT. § 32-2199.02(A)
19 Respondent shall tender \$500.00 to the Department in certified funds as payment for
20 the civil penalty owed in this matter.

21 **NOTICE**

22 **This Administrative Law Judge ORDER, having been issued as a result of a**
23 **rehearing, is binding on the parties.²⁶ A party wishing to appeal this order must**
24 **seek judicial review as prescribed by ARIZ. REV. STAT. § 41-1092.08(H) and title 12,**
25 **chapter 7, article 6. Any such appeal must be filed with the superior court within**
26 **thirty-five days from the date when a copy of this order was served upon the**
27 **parties.²⁷**

28 Done this day, September 12, 2019.

29
30 ²⁶ See ARIZ. REV. STAT. § 32-2199.02(B).

²⁷ See ARIZ. REV. STAT. § 12-904(A).

/s/ Jenna Clark
Administrative Law Judge

Transmitted electronically to:

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