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No. 19F-H1918042-REL-RHG

ADMINISTRATIVE LAW JUDGE DECISION

REHEARING: December 11, 2019.
APPEARANCES: Joan A. Tober appeared telephonically on her own behalf. Diana J. Elston, Esq., represented Civano 1 Neighborhood 1 Homeowners Association (HOA).
ADMINISTRATIVE LAW JUDGE: Kay Abramsohn

1. The Arizona Department of Real Estate (“the Department”) is authorized by statute to receive and to decide Petitions for hearings from members of home owners’ associations in Arizona.

2. On or about December 26, 2018, Petitioner filed a single-issue petition (“Petition”) with the Department. The Petition alleged that, despite three informal requests, HOA failed to provide to her “all information” that was discussed at a Board Meeting regarding the North Ridge wall. The Petition further states that, at that meeting, a letter (“Letter”) from the HOA attorney was “disclosed and discussed” and inquiries were made about prior “costs” regarding the wall.¹

3. At the June 5, 2019 hearing on the Petition, Petitioner presented evidence regarding her request and her various summaries and synopses of the matter. Petitioner essentially argued that the HOA had intentionally waived confidentiality when the President mentioned the Letter at the meeting and the other Board members did not object, *i.e.*, showing unanimous consent to waive confidentiality. Petitioner acknowledged that the Board provided various other documents since the meeting and her request, but argued that the HOA has not provided a copy of the Letter.

¹ The Letter had been discussed by the Board in executive session prior to the meeting.

1 4. Petitioner argued that, since the wall issue had been an issue since
2 2013, there were likely more documents she should be given under her request for “any
3 and all documents” regarding the problems with the wall. Petitioner referenced needing
4 various “background” documents regarding 2013 and 2014 items; for some, but not all,
5 she provided further explanation of what a “background” document would be.

6 5. Petitioner acknowledged that HOA has 10 days to respond with “access”
7 to requested documents. She argued that HOA gave her documents she already had
8 obtained from the city and there are other documents she was waiting for.²

9 6. HOA argued that, by its mere mention at the meeting, the Board had
10 not waived confidentiality or attorney-client privilege as to the Letter. HOA argued that
11 A.R.S. § 33-1805 deals with business records and that HOA has the right to assert
12 privilege as to attorney-client communication. Additionally, HOA essentially argued that
13 the request for “any and all” documents was too broad to know what Petitioner wanted to
14 see; however, HOA also indicated that simply by reviewing her presented proposed
15 exhibits, it could be determined that Petitioner had received copies of requested
16 documents.

17 7. Following the June 5, 2019 hearing, the Administrative Law Judge issued
18 a Decision dated July 29, 2019 in which she concluded that the Letter, a copy of which
19 Petitioner sought, was privileged communication to the Board, that the HOA had provided
20 records in compliance with A.R.S. § 33-1805, and that the HOA was the prevailing party.

21 8. On or about August 5, 2019, after issuance of the Administrative Law
22 Judge Decision, Petitioner filed a Homeowner’s Association (HOA) Dispute Rehearing
23 Request citing as particular grounds for the request that the Administrative Law Judge
24 ruling “did not address the timeliness aspect of the law.” Petitioner further indicated that,
25 although the HOA had “eventually” provided access to “some records,” the HOA had not
26

27 ² For example, Petitioner was concerned about a landscaping contract that, apparently, had expired and no
28 new contract had been demonstrated to exist. At hearing, Petitioner did not demonstrate a connection
29 between the wall issues and the landscaping maintenance; however, the President, Mr. Mastrosimone,
30 testified that the \$5.00 per person fee/budget increase was intended to cover landscaping and the North
Ridge wall area.

1 done so within the 10-business day period. Petitioner requested a rehearing to have the
2 Tribunal “reconsider the full extent of the law and find in favor of the Petitioner.”

3 9. On or about August 23, 2019, the Commissioner of the Arizona
4 Department of Real Estate issued an Order Granting Rehearing and Notice of Hearing
5 (Order). In the Order, the Commissioner indicated “the Department hereby grants the
6 Petitioner’s request for rehearing for the reasons outlined in the Petitioner’s Rehearing
7 Request,” stating that Petitioner had claimed “the findings of fact or decision is not
8 supported by the evidence or is contrary to law.”

9 10. On December 11, 2019, the Tribunal conducted a rehearing.³ Based on
10 consideration of the evidence presented at the first administrative hearing and at the
11 rehearing, the Administrative Law Judge finds as follows:

12 a. Petitioner worked for the company that developed the
13 land/homes in the association area and she purchased her home in 2001.

14 b. Since 2008, Petitioner has taped every meeting and she often
15 creates a transcript of the meetings.⁴

16 c. Documents discussed at the Board meetings are not always
17 handed out; however, the agenda and financial/budget paperwork usually is
18 handed out.

19 d. Petitioner has been a Board member in the past; the dates of her
20 volunteer service on the Board were not clarified.

21 e. In 2018, Petitioner was an alternate member on the Finance
22 Committee; the date of her accession to his position was not clarified.

23 ³ At the rehearing, the exhibits from the first hearing were admitted to the rehearing record, along with
24 several new exhibits: Petitioner’s Exhibit 39; Exhibit 40 (the original Petition dated December 26, 2018);
25 Exhibit 41 (a portion of the hearing record from the first hearing); Exhibit 42 (jury evidence instructions from
26 the Bench Book for Superior Court Judges); Exhibit 43 (an ALJ Decision in Docket No. 11F-H1112007-
27 BFS); Exhibit 44 (Petitioner’s “corrections” to HOA-prepared transcript of the first hearing); and
28 Respondent’s Exhibit 60 (Audio record of June 5, 2019 hearing) and Exhibit 61 (the HOA-prepared
29 transcript of the first hearing).

30 ⁴ Petitioner provided multiple recordings and multiple partial “transcripts” to the hearing record; these
include Board meetings held in 2013, in 2014, and in 2015 at which this area, erosion issues, and/or the
2013 or 2014 reports were mentioned or discussed. See Exhibits 16 through 27 and 29 through 31. At
hearing, Petitioner referenced portions of transcripts and particular recording moments, some of which were
not transcribed.

1 f. Petitioner was well aware of the erosion issues regarding the
2 North Ridge wall area, given her continued vigilance as to the HOA and her
3 concerns related to any financial responsibility for the HOA and for
4 members, including herself, as to dues and any assessments.

5 g. The Board meeting at issue was conducted on November 20,
6 2018.

7 h. At that meeting, the Board President (President) noted that the
8 Board had received the Letter from its attorney regarding "North Ridge."⁵
9 He indicated: "I believe we can ... send it out ... so people can have it." He
10 further indicated that the Board had received "a lot of questions regarding
11 the erosion that is occurring over there and whose responsibility it legally
12 was." The President indicated that a report came from their attorney "who
13 highly advised the HOA [was responsible] because the wall is legally a
14 homeowner's but the land below is the HOA's."

15 i. In reading through the partial transcript of that meeting (which
16 Petitioner provided as Exhibit 1), the Administrative Law Judge finds that
17 there is no other documentation or any other document referenced by the
18 President other than "a report from our attorney", *i.e.*, the Letter, and the
19 Letter's recommendation to "bring in a licensed bonded engineer to facilitate
20 what needs to be happening ... so those walls do not collapse ..." ⁶ The
21 discussion at the meeting moves on from there to member(s) discussing the
22 existing reserves and to dues and, about fifteen minutes later, to member(s)
23 discussing the possible future cost of civil engineering work.

24 j. At that meeting, Petitioner herself was involved in the discussion
25 about the reserves and the money therein and her specific knowledge
26 regarding how the money was being used; presumably, such knowledge
27 and information came to her as a member of the Finance Committee.

28
29 ⁵ See Exhibit 1 (unnumbered page 5).

30 ⁶ See Exhibit 1.

1 k. On November 26, 2018, Petitioner requested a copy of the
2 Letter.⁷ She indicated the following:

3 I would like a copy of the subject letter. Since it was discussed
4 at the Board meeting and impacts my dues in addition to being
5 an integral part of the budget decision I see no reason why I
6 should have to pay for a copy. Mario offered a copy at the
7 Board meeting but I failed to pick it up. Please email a copy to
8 me.

9 l. On November 27, 2018, Petitioner again requested a copy of the
10 Letter, stating as follows:

11 This is my second request regarding the North Ridge Wall
12 letter from the lawyer. Please respond.⁸

13 m. On November 27, 2018, the HOA responded that it was waiting
14 for clarification from its attorney regarding the communication.⁹

15 n. Petitioner responded:

16 Clarification on what? This was discussed in an open Board
17 meeting. I'm requesting the letter that was discussed at the
18 meeting. Thank you for your cooperation in this issue.¹⁰

19 o. On November 29, 2018, at 4:58 a.m., Petitioner filed a third
20 request to the HOA:

21 In spite of repeated requests the Association has not provided
22 the documentation regarding the structural integrity of the
23 North Ridge wall that was disclosed and discussed at the
24 November 20, 2018 Board meeting.

25 Therefore, in accordance with ARS 33-1805, I am requesting
26 any and all documentation to include the letter that was
27 disclosed and discussed at the November 20, 2018 Board
28 meeting regarding the structural integrity and the Association
29 members' responsibility for same *and all background*
30 *information*.¹¹

⁷ See Exhibit 3.

⁸ See Exhibit 4.

⁹ See Exhibit 5.

¹⁰ See Exhibit 6.

¹¹ See Exhibit 7. Emphasis added here.

1 p. On November 29, 2018, at 9:44 a.m., the HOA responded that it
2 had been waiting for clarification from its attorney and, further, inquired
3 whether Petitioner needed a copy of "the original engineer report."
4 Additionally, the HOA noted that the President had misspoken about being
5 able to provide copies of the "Legal Opinion from the Association's Attorney"
6 for the reason that it was legal advice to the HOA.¹²

7 q. Unfortunately, this email erroneously also indicated as follows:

8 In the past, the Association has made improvements and
9 modifications to the Common Area in this portion of the
10 community to address and stabilize areas of significant
11 erosion.¹³

12 r. In May 2016, the "Manager's Report" for the HOA specified as
13 follows:

14 The request for proposal (RFP) for drainage work on the
15 retention basins and in Northridge has been completed by
16 John Siath.¹⁴

17 s. There is no evidence in these hearing records that any work was
18 performed between 2013 and 2019 on behalf of the HOA in the common
19 area of concern with regard to the erosion issue mentioned in the Letter or
20 discussed at the November 20, 2018 meeting.

21 t. At the rehearing, Petitioner stated that she did respond to the
22 November 29, 2018 email from the HOA; she indicated that she had
23 responded "yes that would be part of the documentation."¹⁵ However, there
24 is no document supporting such a response.

25 u. When given the opportunity to locate such an email, or her exhibit
26 containing that referenced email, Petitioner was unable to find it, other than
27 stating "it would have been part of that exhibit that had the original email on

28 ¹² See Exhibit 8.

29 ¹³ See Exhibit 38.

30 ¹⁴ See Exhibit 32.

¹⁵ December 11, 2019 Audio Recording (AR) at 29:00 - 30:00.

1 it.” She subsequently indicated that her referenced “response” was not part
2 of Exhibit 6 and that she did not have it (*i.e.*, an email with such a response).

3 v. On December 13, 2018, Petitioner wrote to the Board indicating
4 as follows, in pertinent part:

5 It was made apparent at the Association Board Meeting ...
6 that the issue of the North Ridge Wall involves expenditure of
7 Members assessments and the fiduciary responsibility of the
8 Association Board. ... The lack of transparency ... with regard
9 to this issue is troubling. Therefore, at this time, all means will
10 be used to obtain the requested materials, to include a formal
11 complaint to the Office of Administrative Hearings for
12 noncompliance with the statute, engaging in social media and
13 the City of Tucson.”¹⁶

14 w. On December 26, 2018, Petitioner filed her Petition with the
15 Department.

16 x. On January 15, 2019, the Board forwarded to Petitioner the
17 information that had been contained in its November 28, 2018 email
18 regarding the Letter being privileged communication.¹⁷

19 y. On January 15, 2019, the Board forwarded to Petitioner the
20 “Civano historical erosion reports.”¹⁸

21 z. On January 16, 2019, the Board forwarded to Petitioner an
22 “invoice ... with concern to the 2014, Cypress Civil Development Study.”¹⁹

23 aa. On January 16, 2019, Petitioner responded as follows, in
24 pertinent part:²⁰

25 Thank you for your efforts. They are appreciated. What would
26 be more relevant to what I am requesting in the petition is
27 some evidence of how the Association remediated the issues
28 that were brought to their attention in the 2013 report. Also
29 what the Association did to remediate the issues brought to
30

¹⁶ See Exhibit 10.

¹⁷ See Exhibit 11.

¹⁸ See Exhibit 12. Based on the hearing record, the forwarded documents are presumed to be the 2013 and 2014 reports, of which Petitioner was already in possession.

¹⁹ See Exhibit 13; see *a/so* Exhibit 22 (the 2014 report). The hearing record does not indicate whether Petitioner already had this document.

²⁰ See Exhibit 14.

1 their attention again in 2014. Certainly there would be
2 invoices that show work completed and report of successful
3 remediation of the issues ... Inspections, emails, anything.
4 Nothing that you are sending has shown any action taken
whatsoever ... Three of the current Board members were
around during the 2013 report and 2 during the 2014 report ...

5 bb. Petitioner's specific request to the Board on January 16, 2019, a
6 request well after the filing of her Petition, finally provides clarification as to
7 the documents she was interested in obtaining.²¹

8 cc. At the rehearing, Petitioner acknowledged that she already had a
9 copy of the 2013 Engineering report and the 2014 report (which she had
10 obtained from the city in 2014) when she made the November 29, 2018
11 request; she also acknowledged that she had previously given a copy of the
12 2013 report to a Board member.²²

13 dd. At the first hearing, Petitioner indicated as follows:

14 I intend to show evidence that *even after complying with the*
15 *statute*, the Association only sent two reports that were
16 already readily available and in my possession. I intend to
17 show evidence that [the North Ridge] erosion has been an
ongoing concern issue since 2013 and by that very nature,
18 there's more than just two pieces of documentation in the
possession of the Association.²³

19 ee. When asked at the rehearing whether she was aware of any other
20 documents, she indicated that, possibly, there were, in the "pile" of
21 documents that the President had referred to in a February email.²⁴

22 ff. Therefore, at the time of the request and at the time of the
23 Petition, Petitioner was unaware of any other "background" document
24

25 ²¹ It must be noted that this specification for what she designated as "relevant" documents came after she
26 had received copies of the 2013 and 2014 reports. This particular clarification also demonstrates that
regarding "discussion" at the November 20, 2018 meeting, the Letter was the document that she sought
27 because no other documents were discussed or mentioned at the meeting in regard to the North Ridge wall.

²² See Exhibit 21 (2013 report) and Exhibit 22 (2014 report).

²³ See Exhibit 61 (as corrected by Petitioner in Exhibit 44) at 5; Petitioner did not further "correct" her
28 statement in the unofficial transcript. It would appear that Petitioner misspoke.

²⁴ Petitioner indicated that she had no prior knowledge about a "pile" of documents the President had
29 referred to in February. See Exhibit 38.

1 regarding the North Ridge wall, and any erosion there, that she did not
2 already have, with the exception of the Letter.

3 gg. The Petition was filed solely because Petitioner wanted a copy of
4 the Letter discussed at the November 20, 2018 meeting.

5 hh. At the first hearing, the Administrative Law Judge had determined
6 that the sole issue for hearing was whether the Board had violated A.R.S. §
7 33-1805 by failing to provide documentation as required by the statute.

8 ii. At the first hearing, the Administrative Law Judge cautioned
9 Petitioner that the hearing was not about her underlying concerns about
10 fees or concerns about the [North Ridge] wall structure and what might need
11 to be done in that area.

12 jj. Petitioner indicated at the rehearing, essentially based on the
13 meeting transcript, she did not know if the Letter was the transcript-
14 referenced "report" or whether there was another "report" from the lawyer.

15 kk. However, when questioned about the HOA finances and
16 budgeting, Petitioner indicated that she had not seen any expenses of the
17 HOA related to any erosion report.

18 ll. At the rehearing, Mr. Mastrosimone indicated that there were no
19 documents other than the Letter that would have been responsive to the
20 [November 29, 2018] request. He opined that Petitioner's request was
21 vague in that she appeared to want the 2013 and 2014 reports again.

22 mm. There is no evidence that there was any erosion report other than
23 the 2013 and 2014 reports.

24 nn. There is no evidence of any invoice for a recent erosion report.

25 oo. There is no evidence that the 2016 RFP resulted in any work
26 being done on behalf of the HOA in the North Ridge wall area.

27 **CONCLUSIONS OF LAW**

28 1. Arizona statute permits an owner or a planned community organization to
29 file a petition with the Department for a hearing concerning violations of planned
30 community documents or violations of statutes that regulate planned communities.

1 A.R.S. § 41-2198.01. That statute provides that such petitions will be heard before the
2 Office of Administrative Hearings.

3 2. Petitioner bears the burden of proof to establish that Respondent committed
4 the alleged violations by a preponderance of the evidence.²⁵ Respondent bears the burden
5 to establish affirmative defenses by the same evidentiary standard.²⁶

6 3. “A preponderance of the evidence is such proof as convinces the trier of fact
7 that the contention is more probably true than not.”²⁷ A preponderance of the evidence is
8 “[t]he greater weight of the evidence, not necessarily established by the greater number of
9 witnesses testifying to a fact but by evidence that has the most convincing force; superior
10 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
11 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
12 the other.”²⁸

13 4. A.R.S. § 33-1805(A) provides that the records of an association are required
14 to be made “reasonably available” for examination by members, and that the association
15 has 10 business days to fulfill that request.

16 5. A.R.S. § 33-1805(B)(1) states that “privileged communication between an
17 attorney for the association and the association” may be withheld from disclosure to
18 members. Therefore, by statute, HOA was not required to provide access to, or a copy of,
19 the Letter to Petitioner or to any member within any time period.

20 6. On rehearing, the only issue was whether HOA violated A.R.S. § 33-1805
21 by failing to provide access to the requested records within 10 business days. The
22 Administrative Law Judge concludes that the HOA is not in violation of A.R.S. § 33-
23 1805(A) for its action in not providing documents within 10 business days.

24 7. The hearing record is clear that Petitioner’s first and second request was for
25 a copy of the Letter. Her interim response (November 27, 2018) indicates that she was
26

27 ²⁵ See ARIZ. REV. STAT. section 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*,
28 74 Ariz. 369, 372, 249 P.2d 837 (1952).

29 ²⁶ See A.A.C. R2-19-119(B)(2).

30 ²⁷ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

²⁸ BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

1 seemingly perplexed by the HOA asking the attorney for clarification, because she goes
2 on to specifically ask for “the letter that was discussed at the meeting.”

3 8. The Administrative Law Judge concludes that Petitioner’s “third” request,
4 which included the request for “the letter that was disclosed and discussed at the ...
5 meeting ... and all background information,” was unreasonably broad and remained
6 unclarified by Petitioner despite the HOA asking on the same day as her request whether
7 Petitioner “still need[ed]” a copy of the original engineer report.

8 9. The rehearing record fails to demonstrate that Petitioner made any
9 response to the HOA’s clarification request. Therefore, Petitioner did not support her
10 assertion that she responded to the HOA’s November 29, 2018 email in which the HOA
11 requested clarification on whether she wanted the original engineer report. Petitioner
12 already had the two original reports and could have so advised.

13 10. Based on the hearing records in this matter, the Administrative Law Judge
14 concludes that Petitioner failed to respond to the HOA request for clarification of her
15 unreasonably broad request, preventing the HOA from being able to reasonably make
16 records available. An association is not required to guess what records are being
17 requested.

18 11. Given an exhaustive review of the hearing records and the exhibits
19 presented for consideration in both hearings, the Administrative Law Judge concludes
20 herein that there was no violation by the HOA. After concluding in the first hearing that the
21 privileged communication, *i.e.*, the Letter could be withheld, the Administrative Law Judge
22 Decision inartfully stated that the hearing record demonstrated that the HOA *had provided*
23 *requested records* in compliance with A.R.S. § 33-1805. Based on the hearing records,
24 the Decision should have simply stated that the HOA *acted* in compliance with A.R.S. §
25 33-1805.

26 12. The Administrative Law Judge concludes herein that the hearing records do
27 not demonstrate a violation by HOA of A.R.S. § 33-1805(A). Additionally, the HOA was
28 not required to provide the privileged communication, *i.e.*, the Letter, within any time
29 period. Thus, Petitioner failed to sustain her burden to establish a violation by HOA of
30 A.R.S. § 33-1805(A). The Administrative Law Judge concludes that the hearing record

1 demonstrates that the HOA acted in compliance with A.R.S. § 33-1805(A) and (B), and
2 the HOA is the prevailing party in this rehearing.

3 **ORDER**

4 IT IS ORDERED that the HOA is the prevailing party with regard to the rehearing,
5 and Petitioner's appeal is dismissed.

6 ORDERED this day, January 15, 2020.

7
8 /s/ Kay Abramsohn
9 Administrative Law Judge
10

11 **NOTICE**

12 **This administrative law judge order, having been issued as a result of**
13 **a rehearing, is binding on the parties. A.R.S. § 32-2199.02(B). A party**
14 **wishing to appeal this order must seek judicial review as prescribed**
15 **by A.R.S. § 41-1092.08(H) and title 12, chapter 7, article 6. Any such**
16 **appeal must be filed with the superior court within thirty-five days**
17 **from the date when a copy of this order was served upon the parties.**
18 **A.R.S. § 12-904(A).**

19 Transmitted electronically to:
20

21 Judy Lowe, Commissioner
22 Arizona Department of Real Estate
23

24 Transmitted through US Mail to:

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