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No. 20F-H2020055-REL

ADMINISTRATIVE LAW JUDGE DECISION

Respondent.

APPEARANCES: Petitioner Robert Tomisak appeared on his own behalf. Property Manager Terri Troy appeared on behalf of Respondent Arrowhead Lakes Condominium Association.

FINDINGS OF FACT

1. Respondent Arrowhead Lakes Condominium Association is a condominium unit owners' association whose members own the condominiums in the Arrowhead Lakes condominium development in Glendale, Arizona.

3. On April 15, 2020, Petitioner filed a single-issue petition with the Department alleging that Respondent had violated its Covenants, Conditions, and Restrictions (CC&Rs) Article 11, Section 4.8, its Bylaws, Article 10.3, and A.R.S. § 33-1258 by refusing “to provide access to the membership register” which Petitioner requested in an email dated March 11, 2020.

4. Respondent, through its property management company, AS&A Property Management, Inc. filed a written answer to the petition, denying that it had violated any CC&Rs, Bylaws, or statutory provisions by failing to comply with Petitioner's request. The

1 Department referred the petition to the Office of Administrative Hearings, an independent
2 state agency, for an evidentiary hearing.

3 5. A hearing was held on July 9, 2020. Administrative Notice was taken of the
4 agency record. Petitioner testified on his own behalf. Terri Troy, Respondent's Property
5 Manager, testified on behalf of Respondent.

6 **REFERENCED CC&RS**

7 6. Section 11.4.8 of the CC&Rs provides in relevant part as follows:

8 **Right to Inspect Documents; Audited Financial Statements.**

9 The Association shall make available to Owners, Mortgagees and insurers
10 or guarantors of First Mortgages current copies of the Declaration, Articles,
11 Bylaws, rules of the Association and the books, records, and financial
12 statements of the Association. "Available" means available for inspection
13 (and copying at the expense of the requesting part), upon request, during
14 normal business hours or under other reasonable circumstances. In
15 addition, any Mortgage holder shall be entitled to have prepared, at its
16 expense, an audited financial statement of the Association for the
17 immediately preceding year if one is not otherwise available, and the
18 Association shall have prepared and distributed such statement to such
19 Mortgage holder requesting it within a reasonable time following receipt by
20 the Association of the required request.

21 **REFERENCED BYLAWS**

22 7. Section 10.3 of the Bylaws provides in relevant part as follows:

23 **Inspection of Association's Books and Records.**

24 The membership register, current copies of the Project Documents,
25 financial statements, books of account and minutes of meeting of the
26 Members, the Board and committees of the Board and/or Associate shall be
27 made available for inspection and copying by Members of the Association,
28 First Mortgages and insurers or guarantors of First Mortgages or by their
29 duly appointed representatives, at any reasonable time and for a purpose
30 reasonably related to their interests as Members, as First Mortgages or as
insurers or guarantors of First Mortgages, at the office of the Association or
at such other place within the Project as the Board shall prescribe. Such
inspection may take place on weekdays during normal business hours
following at least forty-eight (48) hours written notice to the Board by the
Member, First Mortgagee or insurer or guarantor of a First Mortgagee
desiring to make the inspection. Any member, First Mortgagee or insurer or
guarantor of a First Mortgagee desiring copies of any document shall pay
the reasonable cost of reproduction. Every Director shall have the absolute
right at any reasonable time to inspect all books, records and documents of

1 the Association and the physical properties owned or controlled by the
2 Association. The right to inspection by a Director includes the right to make
3 extracts and copies of documents.

4 REFERENCED STATUTE

5 **8.** A.R.S. § 33-1258 provides as follows:

6 **Association financial and other records; applicability**

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

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

21

22 4. Personal, health or financial records of an individual member of the
23 association, an individual employee of the association or an individual
24 employee of a contractor for the association, including records of the
25 association directly related to the personal, health or financial information
26 about an individual member of the association, an individual employee of
27 the association or an individual employee of a contractor for the association.

28 HEARING EVIDENCE

29 9. On March 11, 2020, at 7:33 a.m., Petitioner sent an email to Respondent's
30 representative, Ms. Troy, with the subject line, "Owner Roster." The body of the email
stated the following:

1. Pursuant to the AZ Condo Act 33-1258, please provide me an electronic
copy of the Owner's Roster with emails.
2. I understand non-Owner's [sic] have been using the roster to send
emails which is quite irregular.

10. On March 11, 2020, at 8:23 a.m., Ms. Troy responded to Petitioner's email
in pertinent part:

Feel free to read the entirety of the statute that you just quoted here, particularly #4, which I have highlighted. We do not provide the personal information of the members of the association.

11. During the hearing, Petitioner acknowledged that he already has access to the mailing addresses of the units, but wanted the email addresses. Petitioner asserted at hearing that email addresses were not “personal information” and cited to “the internet” as authority for the proposition that email address were not considered “personal information.” Petitioner also cited to California case law.

12. Ms. Troy stated that Respondent would readily provide the Membership Register which included names and addresses with unit numbers, however, it did not contain email addresses. Ms. Troy explained that the Membership Register previously contained email addresses, however, beginning in 2018, emails were no longer included in the Membership Register. Ms. Troy relied on A.R.S. § 33-1258(B)(4) in denying Petitioner's request for unit owners' email addresses as she believed email addresses were the "personal records" of the respective owners.

13. Neither party cited to any relevant or persuasive legal authority to establish the definition of “personal records” as referenced in the relevant statute.

CONCLUSIONS OF LAW

1. A.R.S. § 32-2199.01 permits a condominium unit owner to file a petition with the Department for a hearing concerning the condominium association's alleged violations of the Condominium Act set forth in Title 33, Chapter 9. This matter lies within the Department's jurisdiction. That statute provides that such petitions will be heard before the Office of Administrative Hearings.

2. Petitioner bears the burden of proof to establish that Respondent violated applicable statutes, CC&Rs, and/or Bylaws by a preponderance of the evidence. See 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). Respondent bears the burden to establish affirmative defenses by the same evidentiary standard. See A.A.C. R2-19-119(B)(2).

3. “A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not.” MORRIS K. UDALL, ARIZONA LAW OF

1 EVIDENCE § 5 (1960). A preponderance of the evidence is “[t]he greater weight of the
2 evidence, not necessarily established by the greater number of witnesses testifying to a fact
3 but by evidence that has the most convincing force; superior evidentiary weight that, though
4 not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a
5 fair and impartial mind to one side of the issue rather than the other.” BLACK’S LAW
6 DICTIONARY at page 1220 (8th ed. 1999).

7 4. Section 11.4.8 of the CC&Rs provides that the Association shall make its
8 books, records, and financial statements of the Association available to its members.

9 5. Section 10.3 of the Bylaws provides that the Membership Register shall be
10 made available to the members of the Association.

11 6. A.R.S. § 33-1158 provides that all financial and other records of the
12 Association shall be made available to its members except for personal, health, or
13 financial records of an individual member.

14 7. While Petitioner has the right to enforce the requirements of the above
15 provisions, Petitioner does not have the right to a record that does not exist, *i.e.*, a
16 Membership Register containing email addresses. Further, there is no requirement in the
17 above provisions that Respondent has an obligation to create such a document.

18 8. Therefore, based on a review of the credible and relevant evidence on the
19 record, it is held that Petitioner failed to establish by a preponderance of the evidence that
20 Respondent violated the provisions of Section 11.4.8 of the CC&Rs, Section 10.3 of the
21 Bylaws, or A.R.S. § 33-1158.

22 **ORDER**

23 **IT IS ORDERED** that no action is required of Respondent in this matter and that the
24 petition is dismissed.

25 **NOTICE**

26 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties**
27 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04.**
28 **Pursuant to A.R.S. § 41-1092.09, a request for rehearing in this matter**
29 **must be filed with the Commissioner of the Department of Real Estate**
30 **within 30 days of the service of this Order upon the parties.**

1 Done this day, July 17, 2020.
2

3 /s/ Sondra J. Vanella
4 Administrative Law Judge
5

6 Transmitted electronically to:

7 Judy Lowe, Commissioner
8 Arizona Department of Real Estate

9 Transmitted through US mail to:

10 Robert Tomisak
11 7101 W. Beardsley Rd., Unit 1902
12 Glendale, Arizona 85308

13 Arrowhead Lakes Condominium Association
14 3802 N. 53rd Ave., Suite 140
15 Phoenix, AZ 85031
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