

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Michael J Stoltenberg,
4 Petitioner,

No. 20F-H2020049-REL

5 vs.

**AMENDED ADMINISTRATIVE LAW
JUDGE DECISION**

6 Rancho Del Oro Homeowners Association,
7 Petitioner.

8 **HEARING:** July 14, 2020 at 1:30 PM.

9 **APPEARANCES:** Michael Stoltenberg ("Petitioner") appeared on his own behalf.
10 Nicole Payne, Esq. appeared telephonically on behalf of Rancho Del Oro Homeowners
11 Association ("Respondent" and "Association").

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

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

17 **FINDINGS OF FACT**

18 **BACKGROUND AND PROCEDURE**

19 1. The Department is authorized by statute to receive and to decide petitions
20 for hearings from members of homeowners' associations and homeowners' associations
21 in the State of Arizona.

22 2. On or about March 02, 2020, the Department received a single-issue
23 petition from Petitioner which alleged that the Association was in violation of Arizona
24 Revised Statutes ("ARIZ. REV. STAT.") §§ 10-3842 and 10-801, and section 14.8 of the
25 Association's Declaration of Covenants, Conditions and Restrictions ("CC&Rs").¹
26 Specifically, Petitioner alleged that the Association "fail to do their job, and are acting in
27 bad faith."² Petitioner prayed for an Order compelling the Association to abide by statutes
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29 ¹ See Department's electronic file at HO20-20049_Petition.pdf.

30 ² *Id.*

and section(s) of the CC&Rs specified in the complaint, and also sought the issuance of a civil penalty against the Association.³

3. On March 03, 2020, Petitioner tendered a \$500.00 check for the petition fee in this matter to the Department.⁴

4. On March 24, 2020, the Department received Respondent's ANSWER whereby it denied all of the complaint items in the underlying petition.⁵

5. On April 01, 2020, the Department referred this matter to the Office of Administrative Hearings ("OAH"), an independent state agency, for an evidentiary hearing on July 14, 2020. Per the NOTICE OF HEARING the issue to be determined is as follows:

Whether the Association violated CC&Rs 14.8.⁶

THE PARTIES AND GOVERNING DOCUMENTS

6. Respondent is a condominium association whose members own properties in the Rancho Del Oro residential real estate development located in Yuma, Arizona. Membership for the Association is comprised of the Rancho Del Oro condominium owners.

7. Petitioner is a Rancho Del Oro condominium owner and a member of the Association.

8. The Association is governed by its CC&Rs and overseen by a Board of Directors ("the Board"). The CC&Rs empower the Association to control certain aspects of property use within the development. When a party buys a residential unit in the development, the party receives a copy of the CC&Rs and agrees to be bound by their terms. Thus, the CC&Rs form an enforceable contract between the Association and each property owner.

³ *Id.*

⁴ See Department's electronic file at HO20-20049_Payment.pdf.

⁵ See Department's electronic file at HO20-20049_Answer Cover Sheet.pdf.

⁶ See NOTICE OF HEARING. Notably, at the time Petitioner submitting his petition to the Department he was given notice of the Department's jurisdictional limitations. Specifically, Petitioner was advised that the HOA Dispute Process does not have jurisdiction to hear disputes arising from Title 10 of the ARIZ. REV. STAT. Hence, why Petitioner was only assessed a \$500.00 petition filing fee.

9. The Association's CC&Rs were recorded with the Yuma County Recorder's Office on August 30, 1985.⁷ On April 07, 1986, the Association recorded its first Amendment with the Yuma County Recorder's Office. Section 14.8 was not amended. On August 11, 1986, the Association recorded its second Amendment with the Yuma County Recorder's Office. Section 14.8 was not amended. On January 31, 1992, the Association revoked pages 853 through 858 of the CC&Rs with the Yuma County Recorder's Office. Section 14.8 was not affected.

10. Bylaws Article XIV – Miscellaneous, Section 14.8, Notices, states, “Any notice permitted or required by this Declaration or the Bylaws may be delivered either personally or by mail. If delivery is by mail, it shall be deemed to have been delivered seventy-two (72) hours after a copy of the same has been deposited in the United States mail, postage prepaid, addressed to each person at the current address given by such person to the secretary of the Board or addressed to the Unit of such person if no address has been given to the secretary. Notices shall also be deemed received twenty-four (24) hours after being sent by telegram or upon personal delivery to any occupant of a Unit over the age of twelve (12) years.”⁸

HEARING EVIDENCE

11. Petitioner testified on his own behalf and submitted Exhibits A-I and L-N. Respondent declined to call any witnesses. The Department's electronic file, including the NOTICE OF HEARING, were also admitted into the record. The substantive facts are as follows:

- a. The Association assesses its Members monthly dues, payable on the first of each month.
- b. On January 04, 2016, Petitioner was advised that he was to send payment for his monthly assessments to the Association as PO Box 4333 Yuma, Arizona 85366.⁹ Correspondence reads, in pertinent parts, “[The Association’s attorney] advised this PO Box is the HOA’s primary address

⁷ See Department's electronic file at HO20-20049 CCRs.pdf.

⁸ *Id.*

⁹ See Petitioner Exhibit N.

1 for receiving all correspondence and all assessment payments from its
2 members” and “[p]lease send your payments to the above address.”

3 c. Petitioner mailed his monthly assessment payments to PO Box 4333
4 Yuma, Arizona 85366. However, as of November 2019, Petitioner began to
5 send his monthly assessment payments via restricted delivery by the United
6 States Postal Service (“USPS”), for board member Rhea Carlisle’s pickup
7 only.¹⁰

8 d. Petitioner was aware that the Association employed a property
9 management company to pick up their mail, and also knew that Ms. Carlisle
10 was not an employee of said property management company. Petitioner
11 was also aware that Diana Crites was listed as the Association’s Statutory
12 Agent for years 2019 and 2020.¹¹ Petitioner, who believed that an agent of
13 the Association’s property management company had thrown away one of
14 his mailed assessment payments, unilaterally chose to mail his monthly
15 assessment payments to Ms. Carlisle’s attention, despite instructions
16 otherwise and her status as an unpaid volunteer board member.

17 i. In December 2019, Petitioner’s mailed assessment payment was
18 picked up from USPS.¹²

19 ii. On January 25, 2020, Petitioner’s mailed assessment payment was
20 returned to him by USPS.¹³

21 iii. On January 30, 2020, Petitioner’s mailed assessment payment was
22 picked up from USPS.¹⁴

23 iv. On February 26, 2020, Petitioner’s mailed assessment payment was
24 picked up from USPS.¹⁵

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27 ¹⁰ See Department’s electronic file at HO20-20049_Exhibits.pdf; see also Petitioner Exhibit A.

28 ¹¹ See Petitioner Exhibits L-M.

29 ¹² See Petitioner Exhibit C.

30 ¹³ See Petitioner Exhibit D.

¹⁴ See Petitioner Exhibit E.

¹⁵ See Petitioner Exhibit F.

1 v. On April 17, 2020, Petitioner's mailed assessment payment was
2 picked up from USPS.¹⁶

3 vi. On June 08, 2020, Petitioner's mailed assessment payment was
4 returned to him by USPS.¹⁷

5 e. Each time Petitioner's monthly assessment was received as untimely by the
6 Association, he was assessed a late fee.¹⁸ Additionally, at each late
7 payment occurrence, his residence became in danger of foreclosure by the
8 Association.

9 12. In closing, Petitioner argued that because he was worried about incurring
10 unnecessary late fees and potentially losing his home, he filed his petition with the
11 Department because he did not know what else to do. Petitioner further argued that he
12 had always technically mailed his monthly assessment payments timely to the
13 Association.

14 13. In closing, Respondent argued that, notwithstanding Petitioner's
15 assessment mailing concerns, Section 14.8 of the CC&Rs were inapplicable to the facts
16 as presented and therefore Respondent could not be found in violation thereof.

17 **CONCLUSIONS OF LAW**

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

24 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
25 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested
26 case at bar. OAH has the authority to interpret the contract between the parties.¹⁹

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28 ¹⁶ See Petitioner Exhibit G.

29 ¹⁷ See Petitioner Exhibit H.

30 ¹⁸ See Department's electronic file at HO20-20049_Exhibits.pdf; see also Petitioner Exhibit A.

¹⁹ See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

3. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1243.²⁰

4. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."²¹ A preponderance of the evidence is "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."²²

5. Here, the material facts are clear.

6. It is clear that Section 14.8 of the CC&Rs is inapplicable to this case. The language of Section 14.8 speaks specifically to the Association's notice obligation to its members when mailing them information. Section 14.8 has no binding authority or control over homeowners sending mail to the Association.

7. By restricting the delivery of his monthly assessment payments, Petitioner inadvertently caused delay in their ability to be picked up by the Association. Regardless, there is no credible evidence in the record to suggest that the action(s) Petitioner volitionally took are Respondent's responsibility, least of all amounting to a violation of Section 14.8 of the CC&Rs.

8. No violation of Section 14.8 occurred in this matter.

9. Therefore, the undersigned Administrative Law Judge must conclude that because Petitioner failed to sustain his burden of proof that the Association Section 14.8 of the CC&Rs, his petition must be denied.

ORDER

Based on the foregoing,

IT IS ORDERED that Petitioner's petition be denied.

²⁰ See ARIZ. ADMIN. CODE R2-19-119.

²¹ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

²² BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

In the event of certification of the Administrative Law Judge Decision by the Director of the Office of Administrative Hearings, the effective date of the Order will be five days from the date of that certification.

NOTICE

Pursuant to ARIZ. REV. STAT. §32-2199.02(B), this Order is binding on the parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. § 32-2199.04. Pursuant to ARIZ. REV. STAT. § 41-1092.09, a request for rehearing in this matter must be filed with the Commissioner of the Arizona Department of Real Estate within 30 days of the service of this Order upon the parties.

Done this day, August 03, 2020.

/s/ Jenna Clark
Administrative Law Judge

Transmitted electronically to:

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