

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Nancy L. Babington,
4 Petitioner,
5 vs.
6 Park Scottsdale II Townhouse Corporation,
 Respondent.

No. 20F-H2020064-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

7 **HEARING:** August 28, 2020

8 **APPEARANCES:** Petitioner Nancy L. Babington appeared on her own behalf.
9 Respondent Park Scottsdale II Townhouse Corporation was represented by Lydia
10 Linsmeier.

11 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer

12
13 **FINDINGS OF FACT**

14 1. Park Scottsdale II Townhouse Corporation (Respondent) is an association
15 of condominium owners located in Scottsdale, Arizona.

16 2. On or about May 28, 2020, Nancy L. Babington (Petitioner) filed a petition
17 with the Arizona Department of Real Estate (Department), alleging that Respondent had
18 violated the provisions of A.R.S. Title 33, Chapter 16, Section 33-1258. Petitioner
19 specifically alleged, in relevant part, as follows:

20 After repeated attempts since the beginning of this year to get information,
21 on April 29, 2020 I emailed Associa Arizona and the Board of Directors of
22 Park Scottsdale II formally requesting records per ARS 33-1258 and to date,
 May 25, 2020, I have not received anything.

23 3. On or about June 1, 2020, the Department issued a notice to Respondent
24 regarding the petition.

25 4. On or about June 25, 2020, Respondent filed an answer to the petition
26 denying all allegations.

27 5. On or about July 1, 2020, the Department issued a Notice of Hearing to the
28 parties notifying them that a hearing on the petition would be conducted by the Office of
29 Administrative Hearings.

1 6. On August 28, 2020, a hearing was held on the petition and the parties
2 presented evidence and argument regarding the violation alleged in the petition.

3 7. Based on the evidence presented at the hearing, the following events
4 occurred.

- 5 a. By letter dated June 28, 2019, Community Management & Consulting,
6 LLC (CMC) provided notice to Respondent that it intended to terminate
7 the Management Agreement at the end of August 2019.
- 8 b. By letter dated July 16, 2019, CMC notified Respondent that it was
9 "immediately terminating" the Management Agreement.
- 10 c. Respondent hired Associa Arizona (Associa) as its new management
11 company. Associa attempted to obtain Respondent's records, including
12 financial records, from CMC to enable it to engage in a smooth transition
13 of the management services.
- 14 d. Respondent retained counsel to assist in its efforts to obtain the records
15 CMC was withholding due to a financial disagreement.
- 16 e. On or about April 8, 2020, Petitioner sent an email to Associa with a list
17 of questions for the Board to address at its annual meeting.
- 18 f. On or about April 11, 2020, Petitioner sent an email to Associa indicating
19 she had asked a question in the prior email and until she received an
20 answer to the question, she would continue paying maintenance fees of
21 the prior amount.
- 22 g. On or about April 29, 2020, Petitioner sent an email to Associa stated
23 that Respondent and/or Associa had not responded to her request for
24 information sent by email. Petitioner wrote as follows:

25 I am formally requesting from the Board of Directors of Park
26 Scottsdale II, Debbie Schumacher, Marty Shuford, Joe
27 Silberschlag, Angelina Rajenovich, Dermot Brown, Lori Nusbaum
28 and Associa all Park Scottsdale II records as required per ARS
29 33-1258.

30 I know that Associa's contract with this Board started Sept 1,
2019. I am requesting records from September 1, 2019 through
April 28, 2020. I have requested answers to questions that are in

1 these documents numerous times since there is no answer.
2 Either the Board and/or Associa is refusing to answer my
3 requests for information.

- 4 h. On or about May 1, 2020, Linda Parker, Director of Client Services with
5 Associa, responded to the email and wrote as follows:

6 Thank you for reaching out to Associa Arizona with your records
7 request for Park Scottsdale II. Ms. Evelyn Shanley and Ms. Laura
8 Smith have previously been in communication with you directly
9 via email and telephone and attempted to answer any and all
10 questions possible.

11 Your email below does not indicate any specific record request.
12 Please identify what you are specifically requesting, and Associa
13 Arizona will be glad to respond and provide any and all records
14 within our possession on behalf of the association, as permitted
15 by law.

- 16 i. On May 1, 2020, Petitioner responded to Ms. Parkers email as follows:

17 This is the list of records I am requesting:

- 18 1. All bank statemetns with copies of cancelled checks since
19 Sept 1, 2019.
- 20 2. Any and all financial statements since Sept 1, 2019.
- 21 3. Any and all 1099s issued for 2019.
- 22 4. Any and all Executive Session meeting minutes conducted in
23 2020, excluding the exemptions listed in the statute.
- 24 5. Any and all contracts signed in 2020.
- 25 6. Any and all outstanding invoices that have a due date that is
26 over 45 days.
- 27 7. Any documentation regarding the legality of the \$204.75
28 maintenance fee.
- 29 8. Any proof of Stephen Silberschlag's liability insurance.
- 30 9. Any landscaping plans.

- 31 j. On May 4, 2020, Ms. Parker responded to Petitioner's email indicating
32 that she understood Petitioner's request, but that Associa could only
33 provide records within Associa's possession.

- 34 k. On or about May 14, 2020, Petitioner emailed Ms. Parker noting that she
35 had yet to receive any response to her document request.

- 36 l. On or about May 15, 2020, Ms. Parker emailed Petitioner and wrote as
37 follows:

1 Please know that we have scheduled a meeting with the board for
2 this coming Wednesday evening, May 20th to discuss further any
3 details or information that Associa Arizona still needs in order to
4 answer questions. I am hopeful that following the meeting we are
5 able to answer your questions more thoroughly.

6 8. Petitioner acknowledged that her formal request was made on May 1, 2020,
7 and no one with Respondent or Associa ever said they would not give her the requested
8 documents.

9 9. Joseph Silberschlag, Secretary of Respondent's Board of Directors,
10 testified that because of the issues with CMC, neither Respondent nor Associa had
11 possession of a number of documents. Mr. Silberschlag also indicated that because
12 Respondent did not have the previous financial documents, Respondent did not have the
13 starting balances necessary to create current financials.

14 10. Respondent argued that it was unable to provide documents not in its
15 possession and that it was under no statutory obligation to create documents to respond
16 to Petitioner's request.

17 **CONCLUSIONS OF LAW**

18 1. The Department has jurisdiction to hear disputes between a property owner
19 and a condominium owners association. A.R.S. § 32-2199 *et seq.*

20 2. In this proceeding, Petitioner bear the burden of proving by a
21 preponderance of the evidence that Respondent violated A.R.S. § 33-1258. A.A.C. R2-
22 19-119.

23 3. A preponderance of the evidence is "[e]vidence which is of greater weight or
24 more convincing than the evidence which is offered in opposition to it; that is, evidence which
25 as a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW
26 DICTIONARY 1182 (6th ed. 1990).

27 4. A.R.S. § 33-1258 provides, in relevant part, as follows:

28 A. Except as provided in subsection B of this section, all financial and other
29 records of the association shall be made reasonably available for
30 examination by any member or any person designated by the member in
writing as the member's representative. The association shall not charge a
member or any person designated by the member in writing for making

1 material available for review. The association shall have ten business days
2 to fulfill a request for examination. On request for purchase of copies of
3 records by any member or any person designated by the member in writing
4 as the member's representative, the association shall have ten business
days to provide copies of the requested records. An association may
charge a fee for making copies of not more than fifteen cents per page.

5 5. There was no dispute that Respondent did not provide the requested
6 documents within 10 days. However, Respondent did not have possession of any of the
7 documents requested at the time of Petitioner's request and Petitioner did not provide any
8 authority that Respondent was required to create a document responsive to her request.
9 Thus, Petitioner failed to establish by a preponderance of the evidence that Respondent
10 violated A.R.S. § 33-1258(A).

11 **ORDER**

12 **IT IS ORDERED** that Petitioner's petition is denied.

13
14 **NOTICE**

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

19 Done this day, September 17, 2020.

20
21 /s/ Tammy L. Eigenheer
22 Administrative Law Judge

23 Transmitted by either mail, e-mail, or facsimile September 17, 2020, to:

24
25 Judy Lowe, Commissioner
26 Arizona Department of Real Estate
27 100 N. 15th Avenue, Suite 201
28 Phoenix, Arizona 85007
29 Attn:
jlowe@azre.gov
LDettorre@azre.gov

AHansen@azre.gov
djones@azre.gov
DGardner@azre.gov
ncano@azre.gov

Nancy L. Babington
5751 N. Granite Reef
Scottsdale, AZ 85250

Lydia A. Peirce Linsmeier
CARPENTER, HAZLEWOOD, DELGADO & BOLEN LLP
1400 E. Southern Ave., Suite 400
Tempe, Arizona 85282
minuteentries@carpenterhazlewood.com
Lydia.Linsmeier@carpenterhazlewood.com

By c. serrano