IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of Deborah Mesear Petitioner, vs Paradise Park Condominiums Phase II Homeowners Association Respondent.	No. 22F-H2222057-REL **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: September 15, 2022

APPEARANCES: Petitioner Deborah Mesear appeared on behalf of herself. Ashley Moscarello, Esq. appeared on behalf of Respondent Paradise Park Condominiums Phase II Homeowners Association.

ADMINISTRATIVE LAW JUDGE: Velva Moses-Thompson

FINDINGS OF FACT

1. On June 28, 2022, the Arizona Department of Real Estate (Department) issued a Notice of Hearing setting the above-captioned matter for hearing at the Office of Administrative Hearings.

2. The Notice of Hearing provided that the issue set for determination was whether Respondent Paradise Park Condominiums Phase II Homeowners Association (the Association) violated Arizona Revised Statutes (A.R.S.) section 33-1810 by failing to share an annual audit for years 2017, 2018, 2019, 2020, and 2021.

3. A hearing was held on September 15, 2022.

4. At hearing, Petitioner Deborah Mesear testified on behalf of herself and submitted Exhibit A. The Association presented the testimony of Carl Westlund, an employee of the entity that manages the Association, and submitted Exhibits A through E.

5. The Association contracted with an accounting firm, Newman and Associations, to prepare financial compilations of the Association for the years 2017 through 2020. *See* Respondent's Exhibits A through E.

6. In 2021, the Association hired a new accountant. Although the Association signed a contract with a new accountant to prepare a financial compilation for 2021, as of the hearing date, the accountant has not prepared a compilation.

7. Ms. Mesear owns property in the Association.

8. On or about May 29, 2022, Ms. Mesear filed a single-issue petition with the Arizona Department of Real Estate.

9. Through the petition, Ms. Mesear alleged that the Association violated A.R.S. section 33-1810[1] because it failed to share an annual audit for the years 2017 and 2020, despite multiple requests. Ms. Mesear also wrote, "I cannot find any evidence that these audits have been completed."

10. After receiving Ms. Mesear's petition, the Association provided Ms. Mesear with the financial compilations of the Association for the years 2017 to 2020.

11. At hearing, Ms. Mesear asserted that compilations are incomplete financial reports. Ms. Mesear did not dispute that she received financial compilations for the years 2017 to 2020 after the petition was filed.

12. Ms. Mesear alleged that she submitted a request for the audits by e-mail in May of 2022. However, Ms. Mesear did not provide evidence of the e-mail stating that she believed Respondent would have brought the e-mail.

13. At hearing, Mr. Westlund explained that the Association did not prepare audits for the years 2017 through 2021, but only compilations. Mr. Westlund explained that in the accounting world, a compilation is much more limited than an audit. The end of the Association's fiscal year is December 31st. The reports prepared by the

[1] A.R.S. section 33-1810 applies to planned communities and does not apply to the Association. However, A.R.S. section 33-1243(J) applies to condominiums and requires that the same financial reports be produced and shared as those under A.R.S. section 33-1810. The Association did not object to proceeding on the issue of whether it violated A.R.S. section 33-1243(J).

Association's accountant explain the limited scope of a compilation. *See* Respondent's Exhibits A through E. Mr. Westlund did not recall receiving a request for audits from

14. Ms. Mesear. Mr. Westlund did not learn of Ms. Mesear's request until the Association received her petition. The Association provided their new accountant with the information necessary to prepare the 2021 compilation toward the end of January of 2022. However, the Association did not provide Ms. Mesear with the financial compilation for 2021 because it has not been prepared.

15. I find Mr. Westlund's testimony to be credible.

CONCLUSIONS OF LAW

1. A.R.S. section 32-2199(1) 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.

2. Petitioner bears the burden of proof to establish that Respondent violated the A.R.S. section 33-1243(J) by a preponderance of the evidence.[2] Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.[3]

3. A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."[4] 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."[5]

4. A.R.S. section 33-1243(J) provides:

> J. Unless any provision in the condominium documents requires an annual audit by a certified public accountant, the board of directors **shall provide for an annual financial**

[2] *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).
[3] *See* A.A.C. R2-19-119(B)(2).
[4] MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).
[5] BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

> **audit, review *or* compilation of the association**. The audit, review or compilation shall be completed no later than one hundred eighty days after the end of the association's fiscal year and shall be made available on request to the unit owners within thirty days after its completion.
>
> Emphasis Added.

5. The Association is not required to prepare annual audits under A.R.S. section 33-1243, however, the Association may choose to prepare annual financial compilations. *See* A.R.S. section 33-1243(J).

6. The preponderance of the evidence shows that the Association shared with Ms. Mesear annual financial compilations for the years 2017, 2018, 2018, and 2020. The preponderance of the evidence shows that the Association contracted to have a financial compilation prepared by its new accountant for the year 2021, but such compilation has not been prepared. Moreover, the issue of whether the Association complied with A.R.S. section 33-1243 for year 2021 was not yet ripe at the time that Ms. Mesear filed her May 29, 2022 petition, because a financial compilation was not yet due.[6]

7. Ms. Mesear failed to establish that the Association violated A.R.S. section 33-1243. Therefore, the petition should be dismissed.

ORDER

IT IS ORDERED, the petition is dismissed.

NOTICE

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

Done this day, October 5, 2022.

/s/ Velva Moses-Thompson

[6] *See* A.R.S. section 33-1243(J), annual compilations must be prepared no later than 180 days after the end of the fiscal year.

Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile October 5, 2022 to:

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