

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of

No. 23F-H007-REL

4 Donald F. Molley,
5 Petitioner,

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 vs.

7
8 Verde Meadows Crest Homeowners
9 Association,
Respondent.

10
11 **HEARING:** January 05, 2023 at 9:00 AM.

12 **APPEARANCES:** Donald Molley (“Petitioner”) appeared on his own behalf. Kari
13 Wickenheiser appeared on behalf of Verde Meadows Crest Homeowners Association
14 (“Association” and “Respondent”).

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

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

20 **FINDINGS OF FACT**

21 **BACKGROUND AND PROCEDURE**

22 1. The Department is authorized by statute to receive and to decide petitions
23 for hearings from members of homeowners’ associations and from homeowners’
24 associations in Arizona.

25 2. On or about August 03, 2022, Petitioner filed a 2-issue petition¹ with the
26 Department which alleged that (1) the Association “[used] Board funds to hire a contractor
27 to maintain the front yard of all units, including grounds, trees, bushes, fences [sic], and
28 lamp post lights” in violation of section 12.B of the Covenants, Conditions and Restrictions
29 (“CC&Rs”), and (2) for the Association’s alleged failure to “provide requested financial

30 ¹ See Department’s electronic file at HOA Petition – Submitted 8.3.22.pdf.

documents and meeting minutes” in violation of the Arizona Revised Statute (“ARIZ. REV. STAT.”) § 33-1805.

3. On August 04, 2022, the Department issued a HOA NOTICE OF PETITION to Respondent.²

4. On or about August 26, 2022, Respondent returned its ANSWER to the Department whereby it denied both of Petitioner’s claims.³

5. On August 29, 2022, the Department referred this matter to the Office of Administrative Hearings (“OAH”), an independent state agency, for an evidentiary hearing on October 28, 2022.⁴ Per the NOTICE OF HEARING the issue(s) to be determined at hearing are as follows:

Petitioner states the following within the petition: “It states in our CCR’s [sic]. The homeowners will take care of their own maintenance in front yard and back yard area. The Board is using the HOA funds to hire a contractor to maintain the front yard of all units” in violation of Section, 12.B of the Association CC&Rs. Petitioner additionally states that Respondents have failed to respond to Petitioner’s requests for financial documents and meeting minutes in violation of A.R.S. § 33-1805.
(All errors in original.)

THE PARTIES AND GOVERNING DOCUMENTS

6. Respondent is a homeowners’ association whose members own townhouses in the Verde Meadows Crest residential real estate development located in Tucson, Arizona. Membership for the Association is comprised of the Verde Meadows Crest subdivision.

7. Petitioner is a Verde Meadows Crest subdivision townhouse owner and a member of the Association.⁵

8. Respondent is recognized federally and by the State of Arizona as a nonprofit organization under Internal Revenue Code (“IRC”) section 501(c)(4).

² See Department’s electronic file at 23F-H007 – Notice of Petition – Response Due.pdf.

³ See Department’s electronic file at 2_File No [23F-H007] Molley v. Verde Meadows Crest.pdf.

⁴ On October 27, 2022, the matter was erroneously vacated and subsequently reopened on November 03, 2022, whereby it was reset for hearing on January 05, 2023.

⁵ See Department’s electronic file at 4_VMCHOA BYLAWS.word, Article 3.1.

1 9. Respondent's Articles of Incorporation were filed on January 05, 2021, in
2 the Pima County Recorder's Office.⁶

3 10. The Association is governed by its Declaration of Building and Use
4 Restrictions ("Declaration")⁷, and overseen by a Board of Directors ("the Board"). The
5 Declaration empowers the Association to regulate "restrictions upon the use and
6 enjoyment of the residential building lots and portions of residential lots."⁸ When a party
7 buys residential property in the development, the party receives a copy of the Declaration
8 and agrees to be bound by its terms. Thus, the Declaration forms an enforceable contract
9 between the Association and each property owner. Section 12.B of the Declaration
10 provides the following:

11 The occupant of any dwelling shall not make or permit any disturbing noises on the
12 properties by himself, his family or guest, nor do or permit anything to be done by
13 such persons that will interfere with the rights, comfort or convenience of other
14 occupants. If any owner of a Lot fails to maintain the Lot, or the residence located
15 on the Lot, in a manner satisfactory to the Association, the Association has the
16 right, after giving the owner ten (10) day notice to cure the deficiency, to enter on
17 the Lot and make any necessary repairs, maintenance, rehabilitation or restoration
18 of the premises and the exterior of any improvements. The cost of maintenance
19 performed by the Association shall be charged against the owner by invoice and
20 collected in the same manner as assessments.

21 **HEARING EVIDENCE**

22 11. Petitioner testified on his own behalf. Kari Wickenheiser testified on behalf
23 of Respondent. The Department's electronic file and NOTICE OF HEARING were admitted
24 into the record. The substantive evidence of record is as follows:

25 Issue #1 – Alleged violation of Declaration Section 12.B

- 26 a. Petitioner testified that Respondent used Association funds to maintain
27 other property owners' lawns. Petitioner, however, could not identify the
28 amount Respondent allegedly spent on said landscaping, by whom the
29 maintenance was performed, on which lots the maintenance was
30

⁶ See Department's electronic file at 1_Articles of Incorporation of Verde Meadows Crest HOA.pdf.

⁷ See Department's electronic file at Verde Meadows CC_R_s.pdf.

⁸ *Id.*

performed, or when and for what duration the alleged maintenance took place.

Issue #2 – Alleged violation of ARIZ. REV. STAT. § 33-1805

- b. Petitioner testified that he verbally requested “financials” and “meeting minutes” from Respondent, but could not provide the date(s) of the request(s) and/or name the person(s) to whom the request(s) were made. Petitioner testified that he could not recall if he followed-up on his verbal request(s).
- c. On or about July 06, 2022, Petitioner submitted a written request to the Association’s Board of Directors for “a copy of the monthly bank Statements [sic] and a financial report each month starting with January of 2022.”⁹ Petitioner further requested “a copy of the Association’s bank statements and the financial books for 2021.”¹⁰
 - i. On an unknown date, Respondent complied with Petitioner’s request regarding the Association’s 2021 financial statement.¹¹ Ms. Wickenheiser testified that Respondent was unable to comply with Petitioner’s request for the Association’s 2022 financial statement, as it had not been completed, in large part, because Petitioner had served as the Association’s Treasurer for that fiscal year and had failed to remit the Association’s financial documentation to Respondent after he was voted out of office.

ADDITIONAL EVIDENCE

12. The Association is townhome subdivision that does not own any common areas or real property. Townhome owners in the Association do not own undivided interests in any common elements.

13. The Association’s Covenants, Conditions and Restrictions (“CC&Rs”) are comprised of the Declaration, Articles of Incorporation, and its Bylaws.

⁹ See Department’s electronic file at HOA Petition – Submitted 8.3.22.pdf.

¹⁰ *Id.*

¹¹ *Id.*

CLOSING ARGUMENTS

14. In closing, Respondent argued that Petitioner lacked standing to bring his petition, and that the Department did not have any statutory jurisdiction over the Association.

15. In closing, Petitioner argued that regardless of whether Respondent was legally classified as a “planned community” or “condominium association,” the Department should nevertheless take disciplinary action against Respondent.

CONCLUSIONS OF LAW

1. In Arizona, when construing statutes, we look first to a statute's language as the best and most reliable index of its meaning. If the statute's language is clear and unambiguous, we give effect to that language and apply it without using other means of statutory construction, unless applying the literal language would lead to an absurd result. Words should be given “their natural, obvious, and ordinary meaning.”¹²

2. Statutes should be interpreted to provide a fair and sensible result.¹³

3. When the legislature uses a word or words in one section of a statute, but not another, the tribunal may not read those words into the section where the legislature did not include them.¹⁴ Unless defined by the legislature, words in statutes are given their ordinary meanings.¹⁵

4. Each word, phrase, clause, and sentence of a statute or rule must be given meaning so that no part will be void, inert, redundant, or trivial.¹⁶

5. Only in a dispute between an owner and a condominium association or between an owner and a planned community association does the owner have the right to petition the Department of Real Estate for a hearing concerning violations of condominium documents or planned community documents, or the statutes regulating either type of association.¹⁷

¹² *Arpaio v. Steinle*, 201 Ariz. 353, 355 ¶ 5, 35 P.3d 114, 116 (App. 2001) (footnotes and citations omitted).

¹³ See *Gutierrez v. Industrial Commission of Arizona*; see also *State v. McFall*, 103 Ariz. 234, 238, 439 P.2d 805, 809 (1968) (“Courts will not place an absurd and unreasonable construction on statutes.”).

¹⁴ See *U.S. Parking v. City of Phoenix*, 160 Ariz. 210, 772 P.2d 33 (App. 1989).

¹⁵ *Id.*

¹⁶ See *Deer Valley, v. Houser*, 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007).

¹⁷ See ARIZ. REV. STAT. §§ 32-2199; 32-2199.01.

1 6. A “condominium” is “real estate, portions of which are designated for
2 separate ownership and the remainder of which is designated for common ownership
3 solely by the owners of the separate portions. Real estate is not a condominium unless the
4 undivided interests in the common elements are vested in the unit owners.”¹⁸

5 7. A condominium association is a “unit owners' association” organized under
6 ARIZ. REV. STAT 33-1241.¹⁹

7 8. A planned community is “a real estate development that includes real estate
8 owned and operated by or real estate on which an easement to maintain roadways or a
9 covenant to maintain roadways is held by a nonprofit corporation or unincorporated
10 association of owners, that is created for the purpose of managing, maintaining or
11 improving the property and in which the declaration expressly states both that the owners
12 of separately owned lots, parcels or units are mandatory members and that the owners
13 are required to pay assessments to the association for these purposes.”²⁰

14 9. A planned community association is “a nonprofit corporation or
15 unincorporated association of owners that is created pursuant to a declaration to own and
16 operate portions of a planned community and that has the power under the declaration to
17 assess association members to pay the costs and expenses incurred in the performance
18 of the association's obligations under the declaration...”²¹

19 10. The material facts in the case at bar are clear.

20 11. Here, the record reflects that the Association is not a condominium
21 association because it is not a unit owners' association organized pursuant to ARIZ. REV.
22 STAT. § 33-1241. The record also reflects that the Association is also not a planned
23 community association because it does not own any real property. As a result, neither the
24 Condominium Act nor the Planned Communities Act governs the Association and neither
25 Act can be enforced against it. Thus, the Department does not have the jurisdiction
26 pursuant to ARIZ. REV. STAT. §§ 32-2102 and 32-2199 et seq., regarding the underlying
27 dispute(s). As a result, OAH does not have the authority to hear or decide the contested

28 ¹⁸ See ARIZ. REV. STAT. § 33-1202(10).

29 ¹⁹ See ARIZ. REV. STAT. § 33-1202(4).

30 ²⁰ See ARIZ. REV. STAT. § 33-1802(4).

²¹ See ARIZ. REV. STAT. § 33- 1802(1).

case at bar under ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D), 32-2199.02, and 41-1092 et seq.²²

12. As an aside, while an analysis of whether Petitioner sustained his burden of proof under ARIZ. ADMIN. CODE R2-19-119²³ is unnecessary, it is noted that the record is devoid of evidence to support a finding that, notwithstanding the jurisdictional disconnect, Respondent is in violation of either Declaration Section 12.B or ARIZ. REV. STAT. § 33-1805.

13. Based upon a review of the credible and relevant evidence in the record, the undersigned Administrative Law Judge has no choice but to conclude that the underlying petition must be denied because Petitioner is not an owner in a condominium or a planned community and does not have the right to petition the Department for a hearing regarding his dispute with the Association.

ORDER

Based on the foregoing,

IT IS ORDERED that Petitioner's petition be denied.

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, January 20, 2023.

²² See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

²³ "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not." 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." See BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

Office of Administrative Hearings

/s/ Jenna Clark
Administrative Law Judge

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