

1                                   **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2  
3 In the Matter of

**No. 23F-H021-REL**

4 Victoria J Whitaker,  
5                   Petitioner,

**ADMINISTRATIVE LAW JUDGE  
DECISION**

6                   vs.

7  
8 Villas at Sunland Condominium  
9 Association,  
Respondent.

10  
11 **HEARING:** February 03, 2023 at 9:00 AM.

12 **APPEARANCES:** Victoria Whitaker ("Petitioner") appeared on her own behalf.  
13 Austin Baillio, Esq. appeared on behalf of Villas at Sunland Condominium Association  
14 ("Respondent" and "Association") with Joseph Milan and Steven Cheff as witnesses.  
Kimball Whitaker observed.

15 **ADMINISTRATIVE LAW JUDGE:** Jenna Clark.  
16

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

21                                   **FINDINGS OF FACT**

22                                   **BACKGROUND AND PROCEDURE**

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

25           2.       On November 18, 2022, Petitioner filed a single-issue petition with the  
26 Department which alleged that "On [July 18, 2022,] I received a notice of violation from  
27 Heywood Community Management for damages to a semi-common element, originally  
28 observed and inadequately resolved on [May 27, 2022,] before my purchase of the unit,  
29 for which management has proceeded to enforce the community documents, without  
30

1 following due process,” in violation of Condominium Statutes ARIZ. REV. STAT. §§ 33-  
2 1803.<sup>1</sup>

3 a. In the petition, Petitioner indicated that she desired the following relief: an  
4 Order for Respondent to abide by the referenced statute.

5 3. On November 22, 2022, Petitioner tendered \$500.00 to the Department as  
6 payment for the underlying petition.<sup>2</sup>

7 4. On November 22, 2022, the Department issued notice of the underlying  
8 petition to Respondent.<sup>3</sup>

9 5. On December 01, 2022, Respondent returned its ANSWER to the  
10 Department whereby it denied the merits of Petitioner’s allegation(s).<sup>4</sup> Respondent also  
11 submitted a REQUEST FOR DISMISSAL to the Department, along with Exhibit A - the Sunland  
12 Condominium Declaration (“Declaration”), Exhibit B - a July 18, 2022, COURTESY NOTICE  
13 issued to Petitioner, Exhibit C - an undated response purportedly issued by Petitioner,  
14 Exhibit D – Heywood Community Management email log from August 06-26, 2022, and  
15 Exhibit E – an August 31, 2022, letter to Petitioner from Respondent’s attorney.<sup>5</sup>

16 6. On December 07, 2022, the Department referred this matter to the Office of  
17 Administrative Hearings (“OAH”), an independent state agency, for an evidentiary hearing  
18 on February 03, 2023, regarding the following issue:

19 The Petitioner states “On 7/18/22, I received a notice of violation from  
20 [Respondent] for damages to a semi-common element, originally observed  
21 and inadequately resolved on 5/27/22, before my purchase of the unit, for  
22 which management has proceeded to enforce the community documents,  
23 **without following due process** outlined in ARIZ. REV. STAT. § 33-1803.<sup>6</sup>

24 (Emphasis added.)

25  
26 <sup>1</sup> See Department’s electronic file at HOA Petition.pdf.

27 <sup>2</sup> See Department’s electronic file at Receipt.pdf.

28 <sup>3</sup> See Department’s electronic file at 23F-H021 Notice of Petition.pdf.

29 <sup>4</sup> See Department’s electronic file at H022-21021\_Respondent\_Petition.pdf. For an unknown reason the  
30 document is dated December 06, 2021.

<sup>5</sup> *Id.*

<sup>6</sup> See Department’s electronic file at 23F-H021-REL Notice of Hearing.pdf.

## THE PARTIES AND GOVERNING DOCUMENTS

7. Respondent is a condominium community association whose members own properties in the Sunland Condominium residential real estate development located in Mesa, Arizona.<sup>7</sup> Membership for the Association is comprised of Sunland Condominium owners.

8. Petitioner is a Sunland Condominium owner and a member of the Association.

9. The Association is governed by its Declaration and overseen by a Board of Directors ("the Board"). The Declaration empowers the Association to control certain aspects of property use within the development, and outlines how the Association is permitted to operate. When a party buys a residential unit in the development, the party receives copies of the Declaration and agrees to be bound by its terms. Thus, the Declaration forms an enforceable contract between the Association and each property owner.

a. Heywood Community Management ("HMC") is the Association's agent and property management company.

10. Article 2.8.4, Allocation of Limited Common Elements, states, in pertinent part, "[T]he Board of Directors shall have the right to allocate as a Limited Common Element any portion of the Common Elements not previously allocated as a Limited Common Element."<sup>8</sup>

11. Article 5.1, Duties of the Association, states, in pertinent part, "The Association shall maintain, repair and replace all Common Elements, except for the Limited Common Elements which the Unit Owners are obligated to maintain, repair and replace."<sup>9</sup>

12. Article 5.2, Duties of Unit Owners, states, in pertinent part, "[E]ach Owner shall be responsible for the maintenance, repair and replacement of the Limited Common Elements allocated to [their] unit."<sup>10</sup>

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<sup>7</sup> See Department's electronic file at Arizona Corporations Commission.pdf.

<sup>8</sup> See Respondent Exhibit 1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

13. Article 5.3, Repair or Restoration Necessitated by Owner, states, in pertinent part, "Each Owner shall be liable to the Association for any damage to the Common Elements which results from the negligence or willful misconduct of the Owner or of the Owner's Lessees, Occupants or Invitees. The cost to the Association of any such repair, maintenance or replacements required by such act of an Owner or of the Owner's Lessees, Occupants or Invitees shall be assessed against the Owner."<sup>11</sup>

14. Article 5.4, Owner's Failure to Maintain, states, in pertinent part, "If an Owner fails to maintain in good condition and repair ... any Limited Common Element which [they] are obligated to maintain under this Declaration and the required maintenance, repair or replacement is not performed within fifteen (15) days after written notice has been given to the Owner by the Association, the Association shall have the right, but not the obligation, to perform the required maintenance, repair or replacement. The cost of any such maintenance, repair or replacement shall be assessed against the nonperforming unit Owner."<sup>12</sup>

#### HEARING EVIDENCE

15. On February 03, 2023, at the commencement of hearing, both parties agreed to amend the NOTICE OF HEARING to reflect the correct the listed Condominium Statute provision as ARIZ. REV. STAT. § 33-1242(D). Petitioner testified on her own behalf and submitted Exhibits A-L. Respondent called Joseph Milan and Steven Cheff as witnesses and submitted Exhibits 1-6. The Department's electronic file, including the NOTICE OF HEARING, was also admitted into the record. The substantive evidence of record is as follows:

- a. On May 27, 2022, the Association issued a COURTESY NOTICE to Chad and Ida Carpenter, owners of Unit 16 at 1050 S. Stapley Dr. Mesa, AZ 85204 who leased the property, regarding observed damage to the unit's carport.<sup>13</sup> The Carpenters were advised that "Damage was done to the carport by someone in your unit. The HOA will repair it and charge the cost

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See Respondent Exhibit 2.

1 to your account.”<sup>14</sup> The Carpenters were further advised as follows, in  
2 pertinent parts:

3 This is a Courtesy letter, but **failure to correct the above violation may**  
4 **result in fines being issued to your account. If you lease your property,**  
5 **please contact your tenant to correct the above violation.** No notice will  
6 be sent to your tenant regarding this matter.<sup>15</sup>  
(Emphasis added.)

- 7 b. On May 31, 2022, the Carpenters responded to HMC as follows:

8 The carport was damaged when I went by the condo while in Mesa. The unit  
9 has been vacant for a few weeks now and I could see the carport leaning. I  
10 saw no vehicle damage on the poles by our unit #16. I did see on the unit  
11 next to ours that it looks like the roof part was partially caved in like someone  
12 was on the top of it but it was by the unit next to ours that is the shared  
13 parking, not our side. It looks like someone may have jumped off of the roof  
14 next door?? I don't know but I saw no damage to poles or the roof on our  
15 side of the parking. We could take pictures next week when we go back  
16 there if you would like. Thanks.<sup>16</sup>

- 17 i. In response, between June 02-03, 2022, HMC advised the  
18 Carpenters that they could dispute the violation at a Board meeting  
19 scheduled July 05, 2022, and that no violation would progress,  
20 including the assessment of fine(s), pending a decision by the  
21 Board.<sup>17</sup>

- 22 c. On June 06, 2022, the Carpenters issued the following correspondence to  
23 the Association:

24 I need to get this resolved before the next board meeting. We are under  
25 contract to sell the condo and close on the 14th of June. We need to get a  
26 bill or something and how much we need to pay or whatever to get this  
27 resolved before the 14th even though we damaged nothing. Please send  
28 some sort of paperwork/bill/explanation or something so it can be taken care  
29 of before the sell. Thank you.<sup>18</sup>

30  
<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See Department's electronic file at Emails between HOA&Sellers.pdf.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

1 d. On or about June 07, 2022, a RESALE DISCLOSURE STATEMENT was created  
2 for 1050 S. Stapley Dr., Unit 16, Mesa, AZ 85204, with June 14, 2022, as an  
3 estimated close of escrow.<sup>19</sup>

4 i. The document does not generally reference any Common Elements,  
5 or specifically reference Unit 16's carport.

6 e. In email exchanges on June 10, 2022, the Carpenters inquired with HMC  
7 regarding the appeal of the carport violation and was advised that the  
8 Board's decision was still pending.<sup>20</sup> The Carpenters shared that they  
9 "[Need] to have answers by the end of the day or the contract on our home  
10 will fall through," and opined that the damage at issue was in front of Unit 15,  
11 not Unit 16.<sup>21</sup>

12 f. During a compliance inspection on June 10, 2022, a HMC noted that Unit  
13 16's carport was damaged, and that the Carpenters bore responsibility until  
14 the Board determined otherwise.<sup>22</sup>

15 g. On June 13, 2022, Petitioner's realtor advised the following:

16 I have some pretty awesome news. At least I think it is awesome news. I've  
17 been in contact with the listing agent quite a bit regarding the carport and  
18 saying that I didn't want to close until I had a better idea of what the cost is  
19 going to be or if [Unit 15] would share the responsibility. [Respondent] has  
20 been unable so far to provide that information. The [Carpenters] really want  
21 to get it closed though so the agent asked if \$10,000 would be enough  
22 instead of the \$8,000. I said I would at least want to see it [doubled]. We  
23 went back and forth a bit and she just got back to me and said that they  
24 would drop the price 20k total. So the new price would be \$285,000. What  
25 do you think?<sup>23</sup>

26 h. Later that same date, on June 13, 2022, Petitioner closed escrow on a  
27 residential condominium property located at 1050 S. Stapley Dr., Unit 16,  
28 Mesa, AZ 85204 for \$285,000.

29 <sup>19</sup> See Department's electronic file at Resale Disclosure Statement.pdf (SECURED).

30 <sup>20</sup> See Department's electronic file at Emails between HOA&Sellers.pdf.

<sup>21</sup> *Id.*

<sup>22</sup> See Respondent Exhibit 5.

<sup>23</sup> See Respondent Exhibit 6.

1 i. On June 14, 2022, HMC provided a \$5,500.00 repair estimate<sup>24</sup> to the  
2 Carpenters and advised, “[T]hat amount will need to be held back in  
3 escrow.”<sup>25</sup> To which the Carpenters replied, “We closed yesterday. We gave  
4 [Petitioner] a \$20,000 credit. You lost us \$15,000.”<sup>26</sup>

5 j. On July 18, 2022, the Association issued a COURTESY NOTICE to Petitioner  
6 regarding Unit 16’s carport.<sup>27</sup> Petitioner was advised “You need to repair the  
7 damage to the carport ceiling. Please let us know when you expect to have  
8 it corrected.”<sup>28</sup> Petitioner was further advised as follows, in pertinent parts:

9 **Thank you for taking the necessary action to resolve this violation**  
10 **within (21) days of the date of this letter.** This is a Courtesy letter, but  
11 failure to correct the above violation may result in fines being issued to your  
12 account. If you feel this violation is in error, you have the right to contest the  
13 matter and be heard by your Board. You will need to contest this violation in  
14 writing **within (21) days** from the date of this letter. Should no notice be  
15 received, your right to a hearing will be waived.<sup>29</sup>  
16 (*Emphasis in original.*)

17 i. On August 06, 2022, Petitioner timely contested the violation.<sup>30</sup>

18 k. On August 31, 2022, the Association, through its attorney, advised  
19 Petitioner, in pertinent parts, as follows:

20 Although you were not the one to cause the damage to the carport, you are  
21 the purchaser of a unit that had a violation on it which was disclosed to the  
22 seller and to the title company prior to the sale. Under A.R.S. § 33-1260(A)  
23 (3)(e), the seller is still obligated to disclose violations despite the  
24 Association disclosing them. Likewise, the Association is not precluded  
25 from taking action against the purchaser of a unit for violations that are  
26 apparent at the time of purchase. It appears from your letter that you were  
27 aware of the damage to the carport because it was disclosed in the  
28 inspection report, regardless of whether the buyer or title company  
29 disclosed the violation identified by the Association. Because you  
30 purchased the Unit with either actual knowledge or constructive knowledge

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24 See Petitioner Exhibit F.

25 See Department’s electronic file at Emails between HOA&Sellers.pdf.

26 *Id.*

27 See Respondent Exhibit 3.

28 *Id.*

29 *Id.*

30 See Petitioner Exhibits G-H.

1 of the violation (i.e. the need to repair the carport), the Association is  
2 pursuing the correction of that violation against you as the new owner.

3 The Association learned that the previous owners of Unit 16 (or their  
4 tenants) were responsible for damaging the carport. The Association made  
5 the prior owners aware of the violation and of their responsibility to pay to  
6 repair the carport prior to the close of escrow. While they appealed the  
7 violation to the Board, ultimately the Board found them responsible for the  
8 cost of repairs.

9 However, instead of resolving the violation, they sold the property to you. In  
10 their explanation to the Association as to why they sold without resolving the  
11 violation, the prior owners stated they discounted the price of the property to  
12 accommodate you for the cost of repairing the carport. Given this  
13 information and the statutes and governing documents mentioned above,  
14 the Association is requesting that you fix the violation that you inherited by  
15 purchasing the property.

16 The Association is in the process of assessing the cost of repairing the  
17 carport to Unit 16. Should you prefer to make the repairs yourself without  
18 having the assessment charged, the Association is allowing you to do  
19 that.<sup>31</sup>

- 20 I. On October 05, 2022, the 3-member Board of Directors held a hearing  
21 during an executive session of their meeting, per Petitioner's request,  
22 whereby they heard the testimony of Petitioner, a neighbor, and reviewed  
23 correspondence from the Carpenters. Ultimately, the Board decided that the  
24 violation at issue had been properly assessed against Petitioner.
- 25 m. On an unknown date Petitioner was assessed \$50.00 by the Association for  
26 "violation non-compliance."<sup>32</sup>
- 27 n. On December 01, 2022, Petitioner issued correspondence to counsel for  
28 Respondent, which, in relevant parts, expressed her dissatisfaction with the  
29 Association's handling of the damage sustained to Unit 16's carport, as well  
30 as her queries, "[W]hat exactly on the carport is expected to be repaired?"

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<sup>31</sup> See Respondent Exhibit 4

<sup>32</sup> See Petitioner Exhibit K.

And, “[H]ow the violation has been fully attributed to the Carpenters?”<sup>33</sup>

Petitioner wrote, in pertinent part, as follows:

I contested the violation, within the allotted time, and requested my right to be heard by the board. Though, at that point it wasn’t a “hearing” at all, as they had only been given one side of the story for weeks, and from that, made their decision. They would not “hear” what I had to say, because in their minds, the decision had already been made. How is that a fair due process?<sup>34</sup>

- o. In a response issued the same date, Petitioner was advised, in pertinent parts, as follows:

The Board received testimony of a neighbor who said the damage was done by the [Carpenter’s] tenants. The Association is entitled to rely on that witness testimony, which by all accounts appears truthful. In addition, the actions of the [Carpenters] support the presumption that the tenants caused the damage. Instead of contesting the damage, they agreed to pay for it. Their method of paying for it was to discount the purchase price of [Unit 16] so that you could resolve the damage and not hold up the sale. There is a lot of evidence to support the fact that you understood the carport damage was an issue holding up the sale and that the [Carpenters] dropped the price to resolve that issue. [Y]ou have been afforded all the due process required under A.R.S. section 33-1242(C) and (D). You have appealed the violation and had a hearing with the Board of Directors. You have had notice and opportunity to be heard 0 that is due process. The fact that you do not agree with the Board’s decision does not mean you have been deprived of due process. The violation will stand and the Association will continue to take appropriate actions until the carport is repaired.<sup>35</sup>

### CLOSING ARGUMENTS

16. In closing, Respondent argued that, per Petitioner’s admission, she had been afforded a hearing by the Board of Directors, at her request, prior to the Association taking any action on the underlying violation. Respondent argued that Petitioner’s dissatisfaction with the outcome of the hearing failed to invalidate the proceedings, or the information the Board relied on when coming to its final determination.

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

17. In closing, Petitioner argued that she had not been afforded an unbiased opportunity to be heard by the Board, and further argued that the underlying violation should not have been assessed against her as she had not “inherited” the problems with Unit 16’s carport when she purchased the residential property.

### **CONCLUSIONS OF LAW**

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

2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D), 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested case at bar. OAH has the authority to interpret the contract between the parties.<sup>36</sup>

3. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1243.<sup>37</sup>

4. “A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not.”<sup>38</sup> 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.”<sup>39</sup>

5. “In applying a statute . . . its words are to be given their ordinary meaning unless the legislature has offered its own definition of the words or it appears from the

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<sup>36</sup> See *Tierra Ranchos Homeowners Ass’n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

<sup>37</sup> See ARIZ. ADMIN. CODE R2-19-119.

<sup>38</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

<sup>39</sup> BLACK’S LAW DICTIONARY 1220 (8<sup>th</sup> ed. 1999).

context that a special meaning was intended.”<sup>40</sup> Each word, phrase, clause, and sentence must be given meaning so that no part of the legislation will be void, inert, or trivial.<sup>41</sup>

6. Legislation must also be given a sensible construction that avoids absurd results.<sup>42</sup> If the words do not disclose the legislative intent, the court will scrutinize the statute as a whole and give it a fair and sensible meaning.<sup>43</sup>

7. Condominium Associations are regulated by ARIZ. REV. STAT. Title 33, Chapter 9, Article 3.

8. ARIZ. REV. STAT. § 33-1242(B) provides, in pertinent part, that a unit owner who receives a written notice that the condition of [their] property is in violation of a requirement of the condominium documents, without regard to whether a monetary penalty is imposed by the notice, may provide the association with a written response by sending the response by certified mail within twenty-one calendar days after the date of the notice. The response shall be sent to the address identified in the notice.

9. ARIZ. REV. STAT. § 33-1242(C) provides, in pertinent part, that within ten (10) business days after receipt of the certified mail containing the response from the unit owner, the association shall respond to the unit owner with a written explanation regarding the notice that shall provide the following information:

- The provision of the condominium documents that has allegedly been violated.
- The date of the violation or the date the violation was observed.
- The first and last name of the person or persons who observed the violation.
- The process the unit owner must follow to contest the notice.

10. ARIZ. REV. STAT. § 33-1242(D) provides, in pertinent part, that the association shall not proceed with any action to enforce the condominium documents, and shall give the unit owner written notice of the unit owner's option to petition for an administrative hearing on the matter in the state real estate department.

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<sup>40</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

<sup>41</sup> See *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 204, ¶ 17 (App. 2007).

<sup>42</sup> See *State v. Gonzales*, 206 Ariz. 469, 471, ¶ 12 (App. 2003).

<sup>43</sup> See *Luchanski v. Congrove*, 193 Ariz. 176, 178, ¶ 9.

11. Based on the presentation of Petitioner's evidence, the record is clear that Petitioner was under the erroneous belief that the Tribunal had jurisdiction to determine who, if anyone, was responsible for causing the damage to Unit 16's carport and was therefore liable for the repairs required.

12. In all actuality, the crux of the matter for hearing is whether Respondent violated ARIZ. REV. STAT. § 33-1242. The relevant and credible evidence of record establishes that no violation occurred.

13. Here, none of the material facts are in dispute.

14. The record reflects that Petitioner did not follow the statutory requirements of ARIZ. REV. STAT. § 33-1242 necessary to “trigger” any protected due process rights. That fact notwithstanding, though neither party argued waiver, the facts establish that Respondent nonetheless apprised her of her rights and options, and afforded her an opportunity to be heard before the Board prior to levying penalties/fines over the violation at issue.

15. Specifically, the record establishes that Petitioner was afforded due process after she contested Respondent's violation assessment of July 18, 2022, as she filed an appeal on August 06, 2022, and the Association's Board convened a hearing on October 05, 2022, to address her concerns. The fact that Petitioner is dissatisfied with the outcome, or takes grievance with any portion of the Association's proceedings falls far outside the scope of this Tribunal's limited jurisdiction.

16. While it is unclear from the record if, or when, the Association levied one or more \$50.00 fine(s) against Petitioner after October 05, 2022, that query is immaterial.

17. Because a violation of ARIZ. REV. STAT. § 33-1242 has not been established by a preponderance of the evidence, the undersigned Administrative Law Judge concludes that the underlying petition must be denied.

18. Petitioner is not barred from seeking further legal recourse outside the administrative jurisdiction of the Department.

## ORDER

Based on the foregoing,



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