IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of Jill P. Eden-Burns Petitioner v. Tonto Forest Estates Homeowners Association Respondent	**No. 23F-H015-REL** **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: February 13, 2023, and April 4, 2023

APPEARANCES: Petitioner Jill P. Eden-Burns appeared on her own behalf. Respondent Tonto Forest Estates Homeowners Association was represented by Daniel S. Francom and Ashley N. Moscarello.

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

FINDINGS OF FACT

BACKGROUND AND PROCEDURE

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

2. On or about October 13, 2022, Petitioner filed a two issue petition with the Arizona Department of Real Estate (Department) which alleged that the Tonto Forest Estates Homeowners Association (Association) held a secret, closed meeting and that the Board unequally applied section 4.32 of the Association's Conditions Covenants and Restrictions (CCRs).

3. On or about October 27, 2022, Respondent returned its ANSWER to the Department whereby it denied Petitioner's claims.

4. On or about November 7, 2022, the Department referred this matter to the Office of Administrative Hearings (OAH), an independent state agency, for an evidentiary hearing to address the issues set forth as follows:

The Petitioner within her petition states, "A quorum of the Board held a secret, closed meeting and removed me from that meeting," in violation of A.R.S. § 33-1804(A), (C) and (E). Petitioner also states that "The Board has applied CC[R] 4.32 in an unequal manner; they tried to fundamentally change community wide policy without a proper vote" in violation of Tonto Forest Estates Homeowners Association's CC&Rs sections 10.4 and 4.32.

THE PARTIES AND GOVERNING DOCUMENTS

5. Respondent is a homeowners' association whose members own properties in the Tonto Forest Estates residential real estate development located in Maricopa County, Arizona.

6. Petitioner is a Tonto Forest Estates property owner and a member of the Association.

7. Article I of the CC&Rs defines Assessment as follows:

> "Assessment" shall mean the charges levied and assessed each year against each Membership pursuant to Article 8 hereof.

8. Section 4.32 of the CC&Rs provides as follows:

> **4.32 Required Sewage Treatment System.** Each Owner who purchases a Lot within the Property acknowledges that it· shall be required to construct and install, at such Owner's sole cost and expense, an AdvanTex sewage treatment system manufactured by Orenco Systems (or an alternative sewage treatment system if the AdvanTex sewage treatment system is no longer available and so long as the alternative sewage treatment system has been approved by the Board and Maricopa County) as part of the construction of any Dwelling Unit on such Owner's Lot (the "Required Sewage Treatment System"). After installation of the Required Sewage Treatment System, the Association shall assume responsibility for the monitoring, maintenance and repair of the Required Sewage Treatment System, *with the costs thereof to be included as part of the Assessments payable by such Owner*. If the Required Sewage Treatment System requires any capital improvements or replacements, such capital improvements or replacements shall be the responsibility of the Owner.

Emphasis added.

9. Section 8.1 of the CC&Rs provides, in pertinent part, as follows:

> **8.1 Creation of Assessment Right; Covenant to Pay.** In order to provide funds to enable the Association to meet its obligations, there is hereby created a right of assessment exercisable on behalf of the Association by

the Board. Assessments shall be imposed for the purpose of paying Common Expenses and to establish reserve funds as hereinafter provided and *shall be allocated equally among all Lots*. . . .

Emphasis added.

10. Section 8.2 of the CC&Rs provides, in pertinent part, as follows:

8.2 Purpose of Assessments: Common Expenses. The Association shall have the right to impose Assessments for the purpose of paying all Common Expenses of the Association, which shall include, without limitation, all costs incurred in connection with the acquisition, construction, alteration, maintenance, provision and operation of all land, properties, improvements, facilities, services, projects, programs, studies and systems desirable or beneficial to the general common interests of the Property, its Members and Residents, such as . . . other services for the protection of the health and safety of the Members and Residents of the Association.

11. Section 11.2 of the CC&Rs provides, in pertinent part, as follows:

11.2 Assessment of Certain Costs of Maintenance and Repair of Common Areas and Public Areas. In the event that the need for maintenance or repair of Common Areas and other areas maintained by the Association is caused through the act of any Member, his family, guests, tenants or invitees, the cost of such maintenance or repairs shall be due within thirty (30) days of notice and shall be added to, and become a part of, the Assessment to which such Member and the Member's Lot is subject, and shall be secured by the Assessment Lien, provided, that prior to submitting a bill for such costs, the Board shall cause a notice to be sent to Owner specifying the maintenance or repairs and Owner shall have the right to object to his responsibility. Following the Board's consideration of such objection, the Board may absolve Owner or demand that Owner pay the bill within the thirty (30) day period provided above. The decision of the Board shall be final and binding. Any charges or fees to be paid by the Owner of a Lot in connection with a contract entered into by the Association with an Owner for the performance of an Owner's maintenance responsibilities shall also become a part of such Assessment and shall be secured by the Assessment Lien. Nothing contained herein, however, shall be deemed to impose absolute liability on any Owner for damage to any Common Areas.

12. Section 15.1 of the CC&Rs provides as follows:

15.1 Interpretation of the Covenants. Except for judicial construction, the Association, by its Board, shall have the exclusive right to construe and interpret the provisions of this Declaration. In the absence of

any adjudication to the contrary by a court of competent jurisdiction, the Association's construction or interpretation of the provisions hereof shall be final, conclusive and binding as to all Persons and property benefited or bound by the Covenants and provisions hereof.

HEARING EVIDENCE

13. Petitioner testified on her own behalf, presented the testimony of Kathryn Kendall, John Krahn, and Michael Holland, and presented exhibits 1 through 6 related to complaint 1 and exhibits 1 through 17 related to complaint 2. Respondent presented the testimony of Melissa Jordan, Kerry Chou, Charles Kiehl, Jeanne Ackerley, and Kurt Meister, and presented exhibits A through P. Administrative notice was taken was the Department's electronic file and NOTICE OF HEARING. The substantive evidence of record is as follows:

a. The Association maintained a contract with Premier Environmental Products (Premier) to monitor and maintain all the septic systems in the Association. Premier conducted inspections of each system twice a year at a cost of $200.00 per inspection.
b. In November 2021, Petitioner's septic system was inspected as part of its regular maintenance. Petitioner had a leak that cost $325.00 to repair. Petitioner also had a pumpout that cost $1425.00.
c. The Association paid the $1750.00 for the work done on Petitioner's septic system.
d. Later, Petitioner was back assessed $1750.00 for the work performed on her septic system.
e. A virtual Board meeting was scheduled to begin at 4:00 p.m. on January 31, 2022, via Zoom.
f. A few minutes before 4:00 p.m., Petitioner joined the Board meeting via Zoom.
g. During the time she was in the virtual meeting, Petitioner heard and recorded a discussion between Rich Orcutt, Community Manager; Kurt

Meister, Board President; Jeremy Sikes, Secretary; and Board members Jeanne Ackerley, Kerry Chou, and Steve Gauer.

h. In the conversation, the following exchange occurred:

> Mr Orcutt: For clarification, you know, um, I think that, I think you can just you know, look, you're not approving really, you're just maybe explaining it. If you were to put it in a formal resolution, then you would have to vote on it, you know, approve it, and then sign it.
>
> Mr. Meister: What's, what's, what's the least, what's the lowest level requirement? Do we have to vote on this?
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> Mr. Orcutt: Well, I think, uhm, I think it's, I think it's more of just a board's interpretation of [CC&R] 4/32, and we, we just want to get this out to the owners, explain that in simple terms once and for all and lead with that.
>
> Mr. Meister: So, so then we, we would go through the septic discussion, come back to this page, and Rich, if you, if you just say, "this will be, this will be the septic policy posting." And then if Kerry says, "Is everybody on the board in agreement with that?" We just nod our heads. That's an acceptable.
>
> Mr. Orcutt: Yeah, I think you know if, I guess if it's a policy, you know and it's, and you know, it wouldn't be. Uh, to protect yourself, let's just go and just say that, I, uh, somebody nominates to adopt a septic policy. And then somebody seconds it and we vote on it and it becomes part of the community documents.

i. Shortly thereafter, the Board members realized Petitioner was on the Zoom meeting and removed her until the meeting officially started at 4:00 p.m.

j. At the meeting, the Board announced that the Association would not be paying for pumpouts of members' septic system. No vote was held.

ARGUMENTS

Petitioner's argument

14. Petitioner argued that pumpouts are a part of regular maintenance of a septic system and that, pursuant to the CC&Rs, the Association was responsible for maintenance.

15. Petitioner also argued that the discussion that occurred prior to the meeting on January 31, 2022, constituted a meeting of a quorum of the members of the Board, and therefore should have been open to the members.

16. Ultimately, Petitioner asked the Tribunal to issue an order granting her petition, including requiring the Association to comply with applicable laws and the governing documents. Petitioner also asked her filing fee be reimbursed.

Respondent's argument

17. Respondent asserted that all of the costs associated with the septic system were the responsibility of the owners. Respondent argued that, while Respondent had a "responsibility" for the monitoring, maintenance, and repair of the septic systems, Respondent was authorized to back charge owners the costs of that pursuant to the provision in Section 4.32 of the CC&Rs that stated that "the costs thereof to be included as part of the Assessments payable by such Owner." Respondent also noted that the provisions of Section 11.2 allow the Association to assess individual owners for charges associated with their property.

18. Respondent conceded that it paid for the twice yearly inspections because each home in the Association had two inspections a year and the cost was the same for every home. Respondent asserted that the frequency of pumpouts varied from home to home depending on the number of people living there and the time the home was occupied during the year. Respondent argued it would be unfair to expect some owners who did not live in their home full time or who had a small family to, essentially, pay for the more frequent pumpouts of other owners through their assessments.

19. Respondent also asserted that the discussion that occurred prior to the January 31, 2022 meeting was not a Board meeting as no substantive issues were discussed or decided. Rather, Respondent argued that the questions asked of the community manager were simply regarding the process necessary to address the matter during the meeting.

20. Ultimately, Respondent requested that the Tribunal deny Petitioner's appeal.

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 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 planned 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.[1]

3. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-33-1804(A), (C) and (E) and the CC&Rs.[2]

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

5. 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."[5]

6. Statutes should be interpreted to provide a fair and sensible result. *Gutierrez v. Industrial Commission of Arizona*; *see also State v. McFall*, 103 Ariz. 234,

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[1] *See Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).
[2] *See* ARIZ. ADMIN. CODE R2-19-119.
[3] MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).
[4] BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).
[5] *Arpaio v. Steinle*, 201 Ariz. 353, 355 ¶ 5, 35 P.3d 114, 116 (App. 2001) (footnotes and citations omitted).

238, 439 P.2d 805, 809 (1968) ("Courts will not place an absurd and unreasonable construction on statutes.").

7. 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.[6] Unless defined by the legislature, words in statutes are given their ordinary meanings.[7]

8. 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.[8]

OPEN MEETING CLAIM

9. ARIZ. REV. STAT. § 33-33-1804(A), (C) and (E) provides, in pertinent part, as follows:

> A. Notwithstanding any provision in the declaration, bylaws or other documents to the contrary, all meetings of the members' association and the board of directors, and any regularly scheduled committee meetings, are open to all members of the association . . . . Any portion of a meeting may be closed only if that closed portion of the meeting is limited to consideration of one or more of the following:
>
> 1. Legal advice from an attorney for the board or the association. . . .
> 2. Pending or contemplated litigation.
> 3. Personal, health or financial information about an individual member of the association, an individual employee of the association or an individual employee of a contractor for the association, including records of the association directly related to the personal, health or financial information about an individual member of the association, an individual employee of the association or an individual employee of a contractor for the association.
> 4. Matters relating to the job performance of, compensation of, health records of or specific complaints against an individual employee of the association or an individual employee of a contractor of the association who works under the direction of the association.
> 5. Discussion of a member's appeal of any violation cited or penalty imposed by the association except on request of the affected member that the meeting be held in an open session.
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> . . . .

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[6] *See U.S. Parking v. City of Phoenix*, 160 Ariz. 210, 772 P.2d 33 (App. 1989).
[7] *Id*.
[8] *See Deer Valley v. Houser*, 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007).

> C. Before entering into any closed portion of a meeting of the board of directors, or on notice of a meeting under subsection D of this section that will be closed, the board shall identify the paragraph under subsection A of this section that authorizes the board to close the meeting.
> . . . .
> E. Notwithstanding any provision in the declaration, bylaws or other community documents, for meetings of the board of directors that are held after the termination of declarant control of the association, all of the following apply:
>
> 1. The agenda shall be available to all members attending.
> 2. An emergency meeting of the board of directors may be called to discuss business or take action that cannot be delayed for the forty-eight hours required for notice. . . .
> 3. A quorum of the board of directors may meet by means of a telephone conference if a speakerphone is available in the meeting room that allows board members and association members to hear all parties who are speaking during the meeting.
> 4. Any quorum of the board of directors that meets informally to discuss association business, including workshops, shall comply with the open meeting and notice provisions of this section without regard to whether the board votes or takes any action on any matter at that informal meeting.

10. The plain language of the statute provides that when a quorum of a board of directors meets, even informally, to discuss association business, the meeting must be open to the members of the association, even if they do not vote or take any action during the informal meeting.

11. Here, the transcript of the meeting that Petitioner inadvertently attended, and was removed from upon her discovery, demonstrated that the Board members in attendance, constituting a quorum, were discussing the issue of septic system maintenance. Specifically, Mr. Meister stated that, during the open meeting, "we would just go through the septic discussion, come back to this page, and Rich, if you just say, 'This will be the septic policy posting.' And then if Kerry says, 'Is everybody on the board in agreement with that?' We just nod our heads. That's an acceptance."

12. The comments by Mr. Meister indicate that, at some point prior to the open meeting, the members of the Board discussed the matter and agreed on a new septic

policy that would be presented at the open meeting with the Board members then signifying their agreement.

13. Accordingly, Petitioner established that Respondent acted in violation of ARIZ. REV. STAT. § 33-33-1804(A), (C) and (E).

SECTION 4.32 OF THE CC&RS CLAIM

14. As set forth previously, Section 4.32 of the CC&Rs establishes the responsibilities of the owners and Respondent with respect to the maintenance of the septic system.

15. Specifically, Section 4.32 of the CC&Rs requires that the Association "shall assume responsibility for the monitoring, maintenance and repair" of the septic systems "with the costs thereof to be included as part of the Assessments payable by such Owner."

16. "Assessments" is a defined term in the CC&Rs. It is defined to mean "the charges levied and assessed *each year* against each Membership pursuant to Article 8 hereof." Emphasis added.

17. Section 8.1 of the CC&Rs sets for the creation of annual assessments and requires that the assessments "shall be allocated equally among all Lots." Nothing in Article 8 provides a mechanism by which a single owner may be charged for fees associated with their lot. Rather, that type of charge is located in Section 11 of the CC&Rs, which is not referenced in the definition of "Assessments."

18. Further, Section 8.2 of the CC&Rs details that the purpose of annual assessments includes "other services for the protection of the health and safety of the Members and Residents of the Association."

19. Accordingly, the terms of the CC&Rs requires that Respondent is responsible for the maintenance of the septic systems in the Association and that the maintenance is to be paid for from the annual assessments collected by Respondent.

20. Accordingly, Petitioner established that Respondent improperly charged Petitioner $1750.00 for the repair and pumpout to her septic system.

21. The undersigned Administrative Law Judge concludes that, because Petitioner sustained her burden of proof that Respondent committed the alleged violations, her petition must be granted.

ORDER

Based on the foregoing,

IT IS ORDERED that Petitioner's petition be granted.

IT IS FURTHER ORDERED that Respondent reimburse Petitioner's filing fee of $1,000.00 in certified funds.

IT IS FURTHER ORDERED that Respondent shall henceforth comply with ARIZ. REV. STAT. § 33-33-1804 and Section 4.32 of the CC&Rs.

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, May 18, 2023.

/s/ Tammy L. Eigenheer
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile May 18, 2023 to:

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