

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of
4 Deanna Smith

5 Petitioner
6 VS

7 Moondance Townhomes Homeowners
8 Association

9 Respondent

No. 23F-H049-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARING: May 17, 2023

APPEARANCES: Petitioner Deanna Smith appeared on her own behalf. Christina Morgan, Esq. appeared on behalf of Respondent Moondance Townhomes Homeowners Association with George Minter as a witness.

ADMINISTRATIVE LAW JUDGE: Brian Del Vecchio

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

FINDINGS OF FACT

THE PARTIES AND GOVERNING DOCUMENTS

1. Respondent is a Planned Community Association whose members own properties in the Moondance Townhomes Homeowners Association ("Respondent") located in Mesa, Arizona. Membership for the Association is comprised of Moondance Townhomes homeowners.

2. Petitioner Deanna Smith ("Petitioner") is a property owner, member of the Association, and Moondance Townhomes Homeowners Association board member.

3. The Association is governed by its Covenants, Conditions, and Restrictions ("CC&Rs"), and overseen by a Board of Directors ("the Board"). The Association is also regulated by Title 33, Chapter 16, Article 1 of the ARIZ. REV. STAT.

BACKGROUND AND PROCEDURE

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

5. On or about March 6, 2023, Petitioner filed a single issue petition with the Department which alleged that the Association failed to comply with a December 15, 2022, request for financial records of the Association pursuant to Arizona Revised Statutes (“ARIZ. REV. STAT.”) § 33-1805.¹

6. On or about March 30, 2023, Respondent returned its ANSWER to the Department whereby it denied Petitioner's claim(s).²

7. On March 31, 2023, the Department referred this matter to the Office of Administrative Hearings (“OAH”), an independent state agency, for an evidentiary hearing on May 17, 2023, to determine whether a violation of ARIZ. REV. STAT. § 33-1805 occurred.

HEARING EVIDENCE

8. Petitioner testified that sometime in November of 2022 at a regular HOA town hall meeting Petitioner verbally requested financial statements from the HOA President George Minter (“President”).³

9. On November 21, 2022, Linda Dieball, Treasurer (“Treasurer”) for Respondent emailed Petitioner informing her of an attempt to physically mail statements to Petitioner, however they were returned to Respondent as return to sender.⁴

10. On November 22, 2022 Petitioner emailed Treasurer with her corrected address.⁵

11. On December 15, 2022 Petitioner sent an email to Respondent requesting financial statements for September, October, and November 2022. ⁶

¹ See Department's electronic file at 23F-H049-REL OAH Request for Hearing – sent 3.31.pdf.

² See Department's electronic file at 23F-H049-REL ADRE Response 3-30-23.pdf.

³ See Petitioner's Exhibit 2.

⁴ See Respondent's Exhibit A.

⁵ See Respondent's Exhibit A.

⁶ See Petitioner's Exhibit 2.

1 12. On January 5, 2023, Petitioner emailed Treasurer reminding her of the 10
2 day response period as required by ARIZ. REV. STAT. § 33-1805.⁷

3 13. On January 5, 2023, President emailed Petitioner claiming, because she
4 was a current board member she had access to the shared Google Drive which allegedly
5 contained all of Respondent's financial statements.⁸

6 14. On January 11, 2023, Petitioner emailed President informing him she
7 searched the Google Drive, however, she was unsuccessful in finding any financial
8 information regarding Respondent.⁹

9 15. On January 12, 2023, Respondent emailed the Moondance Townhomes
10 HOA Profit & Loss statements for September 2022 and October through December
11 2022.¹⁰

12 16. Petitioner testified she had an accounting background and understood
13 financial statements include not only the Profit and Loss statement, but also statements of
14 cash flows, balance sheets, statements of income, and other reports which were not
15 included in Treasurer's January 12, 2023 email.

16 17. On January 18, 2023, Petitioner emailed President she still had not received
17 the financial statements she had requested and warned him Respondent was once again
18 out of compliance with the 10 day response requirement set forth in ARIZ. REV. STAT. § 33-
19 1805.¹¹

20 18. On January 23, 2023, Treasurer replied to Petitioner's January 20, 2023
21 email informing her the financial reports had never been available on the Google Drive.¹²

22 19. On April 11, 2023, President emailed Petitioner Respondent's Chase Bank
23 statements for the months of August 2022 through February 2023 and USB Savings
24 statements for the months of August 2022 through January 2023.¹³

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26 ⁷ See Petitioner's Exhibit 1.

27 ⁸ See Petitioner's Exhibit 1.

28 ⁹ See Petitioner's Exhibit 1.

29 ¹⁰ See Respondent's Exhibit A.

30 ¹¹ See Petitioner's Exhibit 2.

¹² See Petitioner's Exhibit 1.

¹³ See Respondent's Exhibit A.

CONCLUSIONS OF LAW

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

7 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
8 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested
9 case at bar. OAH has the authority to interpret the contract between the parties.¹⁴

10 3. In this proceeding, Petitioner bears the burden of proving by a
11 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1805.¹⁵
12 Respondent bears the burden of establishing any affirmative defenses by the same
13 evidentiary burden.¹⁶

14 4. A preponderance of the evidence is "[t]he greater weight of the evidence, not
15 necessarily established by the greater number of witnesses testifying to a fact but by
16 evidence that has the most convincing force."¹⁷

17 5. In Arizona, when construing statutes, we look first to a statute's language as
18 the best and most reliable index of its meaning. If the statute's language is clear and
19 unambiguous, we give effect to that language and apply it without using other means of
20 statutory construction, unless applying the literal language would lead to an absurd result.
21 Words should be given "their natural, obvious, and ordinary meaning."¹⁸

22 6. Statutes should be interpreted to provide a fair and sensible result.
23 *Gutierrez v. Industrial Commission of Arizona*; see also *State v. McFall*, 103 Ariz. 234,
24 238, 439 P.2d 805, 809 (1968) ("Courts will not place an absurd and unreasonable
25 construction on statutes.").

26
27 ¹⁴ See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

28 ¹⁵ See Arizona Administrative Code ("ARIZ. ADMIN. CODE") R2-19-119.

29 ¹⁶ *Id.*

30 ¹⁷ BLACK'S LAW DICTIONARY (11th ed. 2019).

¹⁸ *Arpaio v. Steinle*, 201 Ariz. 353, 355 ¶ 5, 35 P.3d 114, 116 (App. 2001) (footnotes and citations omitted).

1 7. When the legislature uses a word or words in one section of a statute, but
2 not another, the tribunal may not read those words into the section where the legislature
3 did not include them.¹⁹ Unless defined by the legislature, words in statutes are given their
4 ordinary meanings.²⁰

5 8. Each word, phrase, clause, and sentence of a statute or rule must be given
6 meaning so that no part will be void, inert, redundant, or trivial.²¹

7 9. ARIZ. REV. STAT. § 33-1805 provides, in relevant parts, as follows:

8 A. Except as provided in subsection B of this section, ***all financial and***
9 ***other records of the association shall be made reasonably available***
10 ***for examination by any member*** or any person designated by the member
11 in writing as the member's representative. The association shall not charge
12 a member or any person designated by the member in writing for making
13 material available for review. ***The association shall have ten business***
14 ***days to fulfill a request for examination. On request for purchase of***
15 ***copies of records by any member*** or any person designated by the
16 member in writing as the member's representative, ***the association shall***
17 ***have ten business days to provide copies of the requested records.***
18 ***An association may charge a fee for making copies of not more than***
19 ***fifteen cents per page.***

20 Emphasis added.

21 10. In Arizona, "Financial Statement (a) Means statements and footnotes
22 related to statements that purport to show a financial position or changes in a financial
23 position in conformity with generally accepted accounting principles or other
24 comprehensive basis of accounting. (b) Includes balance sheets, statements of income,
25 statements of retained earnings, statements of cash flows, statements of changes in
26 equity and other commonly used or recognized summaries of financial information."²²

27 11. "The administrative law judge may order any party to abide by the statute,
28 condominium documents, community documents or contract provision at issue and may
29 levy a civil penalty on the basis of each violation.... If the petitioner prevails, the
30

¹⁹ See *U.S. Parking v. City of Phoenix*, 160 Ariz. 210, 772 P.2d 33 (App. 1989).

²⁰ *Id.*

²¹ See *Deer Valley v. Houser*, 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007).

²² ARIZ. REV. STAT. § 32-701.

1 administrative law judge shall order the respondent to pay to the petitioner the filing fee
2 required by section 32-2199.01.”²³

3 12. Here, sometime in November, Petitioner verbally requested financial
4 statements from Respondent. On November 21, 2022, Treasurer attempted to comply
5 with the request with what she believed to be the financial statements per Petitioner’s
6 request. Due to an error in Petitioner’s contact info within Respondent’s system the
7 allegedly compliant documents were sent to the incorrect address. On January 12, 2023,
8 Respondent emailed the Profit and Loss statements for the period requested by
9 Petitioner. On January 18, 2023, Petitioner again requested Respondent’s financial
10 statements via email. Because Petitioner requested financial statements for the same
11 period after receiving the Profit and Loss statements, implicit in her request was the
12 understanding merely providing the Profit and Loss statement was insufficient to satisfy
13 her request for financial statements.

14 13. Even if the January 12, 2023, email by Treasurer were sufficient to satisfy
15 Respondent’s compliance obligation, the January 18, 2023, request was never fulfilled.
16 While it may be true in April of 2023 Respondent supplied bank statements, at no point did
17 Respondent supply any of the requisite documents such as balance sheets, statements of
18 income, statements of retained earnings, statements of cash flows, statements of
19 changes in equity, or any other commonly used or recognized summaries of financial
20 information. Furthermore, although President directed Petitioner to search the Google
21 Drive for the documents, Treasurer admitted on January 23, 2023, that the documents
22 Petitioner was seeking were never on the drive. Thus, Petitioner was neither supplied nor
23 had access to obtain the requisite financial statements.

24 14. Based upon a review of the credible and relevant evidence in the record,
25 Petitioner sustained her burden of proof.

26 15. Therefore, the Administrative Law Judge concludes that Respondent’s
27 conduct, as outlined above, was in violation of the charged provision of ARIZ. REV. STAT. §
28 33-1805.

29 ²³ ARIZ. REV. STAT. § 32-2199.02(A).

ORDER

IT IS ORDERED that Petitioner's petition in this matter be affirmed.

IT IS FURTHER ORDERED that Petitioner's request to levy a civil penalty against Respondent is denied.

IT IS FURTHER ORDERED Respondent shall reimburse Petitioner's filing fee of \$500.00 pursuant to ARIZ. REV. STAT. § 32-2199.02(A).

IT IS FURTHER ORDERED Respondent shall provide financial statements as defined by ARIZ. REV. STAT. § 32-701 for the months of August 2022 through December of 2022 pursuant to ARIZ. REV. STAT. § 33-1805.

Done this day, June 6, 2023.

/s/ Brian Del Vecchio
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile June 6, 2023 to:

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