

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Warren R. Brown,

4 Petitioner,

5 vs.

6 Mogollon Airpark, Inc.,

7 Respondent.

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10 Brad W. Stevens,

11 Petitioner,

12 vs.

13 Mogollon Airpark, Inc.

14 Respondent.

No. 18F-H1818029-REL-RHG

No. 18F-H1818045-REL

No. 18F-H1818054-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

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17 **HEARING:** September 28, 2018

18 **APPEARANCES:** Warren R. Brown on his own behalf; Brad W. Stevens on his own
19 behalf; Gregory A. Stein, Esq. and Mark K. Sahl, Esq. for Respondent

20 **ADMINISTRATIVE LAW JUDGE:** Thomas Shedden

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22 **FINDINGS OF FACT**

23 1. This is a consolidated matter addressing two petitions filed by Warren R.
24 Brown and one filed by Brad W. Stevens, with the Respondent in all three matters
25 being Mogollon Airpark, Inc.

26 2. The hearing was conducted on September 28, 2018 at the Office of
27 Administrative Hearings in Phoenix, Arizona.

28 3. Mr. Brown is the petitioner in docket Nos. 18F-H1818029-REL-RHG (the
29 "029" matter) and 18F-H1818045-REL (the "045" matter), and Mr. Stevens in docket
30 No. 18F-H1818054-REL (the "054" matter). Each matter was separately noticed and
they were consolidated while pending at the Office of Administrative Hearings.

1 4. Mogollon raised its 2018 assessment by \$325, it instituted a \$25 fee for
2 late payments, and it began charging 18% interest for past due accounts.

3 5. The \$325 increase was assessed in two parts: a \$116 increase in what
4 Mogollon classifies as the regular assessment, and \$209 that it classifies as a special
5 assessment. The previous year's assessment was \$825.

6 6. Mr. Brown alleges that as a matter of law Mogollon's actions violate ARIZ.
7 REV. STAT. section 33-1803(A). Mogollon agrees that the issues can be resolved as a
8 matter of law, but denies any violations.

9 7. Mr. Stevens alleges that the decision to raise the 2018 assessment by
10 \$325 violates section 33-1803(A), but he did not agree that the matter could be
11 resolved as a matter of law and he presented evidence in support of his position.

12 8. As pertinent to the facts of this matter, section 33-1803(A) provides that
13 an HOA cannot "impose a regular assessment that is more than [20%] greater than the
14 immediately preceding fiscal year's assessment" and "Charges for the late payment
15 of assessments are limited to the greater of fifteen dollars or ten percent of the amount
16 of the unpaid assessment"

17 9. Because an increase of \$325 over \$825 is 39.4%, Messrs. Brown and
18 Stevens assert Mogollon violated section 33-1803(A).

19 10. Mogollon argues that section 33-1803(A) applies only to "regular
20 assessments" and that the regular assessment was increased by only 14.1%, which is
21 what an increase of \$116 over \$825 is.

22 11. Messrs. Brown and Stevens argue that "regular assessment" refers to the
23 process by which assessments are created, not the type of assessment, and that
24 Mogollon has no authority to impose a special assessment.

25 12. But whether Mogollon has authority to impose special assessments is not
26 directly at issue because Mr. Brown's petition in the 029 matter and Mr. Stevens's
27 petition in the 054 matter are "single-issue petitions," limiting the hearing to their
28 respective allegations that Mogollon violated section 33-1803(A).
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1 13. In the 045 matter, Mr. Brown alleged that Mogollon violated section 33-
2 1803 by charging a late fee of \$25 and interest of 18% on late payments, whereas he
3 asserts that the statute limits the late charges to "\$15.00 or 10%."

4 14. Although the scope of the hearing was limited to the issues set out above,
5 underlying Mr. Brown's and Mr. Stevens's petitions are allegations that Mogollon's
6 treasurer and others have committed numerous accounting improprieties to create the
7 appearance that Mogollon required the income that the increased assessment was
8 intended to produce, whereas in their view, that income is not required, which means
9 that Mogollon lacks authority to impose the increased assessment.¹

10 The 029 Matter

11 15. On May 22, 2018, the Arizona Department of Real Estate issued an Order
12 Granting Rehearing and Notice of Rehearing setting the 029 matter for a rehearing on
13 July 11, 2018.

14 16. The Notice of Rehearing in the 029 matter does not provide an issue
15 statement per se, but rather states that the rehearing is granted for the reasons set out
16 in Mr. Brown's Request for Rehearing. The Notice of Hearing in the "original" 029
17 matter shows the issue in that matter as Mr. Brown allegation that Mogollon "is violating
18 the governing documents of the association by taking action not authorized by the
19 governing documents."

20 17. The petition in original 029 matter was filed on January 29, 2018.

21 18. In the original 029 petition, Mr. Brown alleged that Mogollon's "accounting
22 procedure was altered, ostensibly to show that the 2016 board of directors left office
23 showing a loss of funds," whereas they left the treasury about \$200,000 better off than
24 when they took office. He then listed numerous alleged improprieties in how Mogollon
25 was keeping its books and states that "it is believed that the accounting was
26 deliberately misleading and was intended to present an inaccurate picture of the HOA
27 finances."

28
29 ¹ Considering the nature of Messrs. Brown and Stevens's allegations, the civil courts may be better
30 suited than an administrative tribunal to address the issues they raise. Regardless, the substance of their
allegations was not addressed in this hearing.

1 19. According to Mr. Brown, the purpose of the alleged deception was to allow
2 the Board members to claim that there was a shortage in the treasury in order to justify
3 increasing the assessment by the \$325, even though there was no need for that
4 increased assessment and no authority for the Board to impose it.

5 20. In the original 029 matter, Mr. Brown requested a ruling that the special
6 assessment was unenforceable and that Mogollon be ordered to return any money it
7 had collected.

8 21. In the original 029 matter, Mogollon filed a Motion to Dismiss, asserting as
9 that Mr. Brown did not allege a violation of any specific Bylaw, CC&R, or statute, but
10 rather he only alleged that the bylaws/CC&Rs did not authorize Mogollon's accounting
11 practices and imposition of a special assessment for paving, which according to
12 Mogollon left the Office of Administrative Hearings without jurisdiction over the matter.

13 22. Mr. Brown responded to the Motion to Dismiss asserting that he had no
14 other means of redress and that Mogollon had violated ARIZ. REV. STAT. section 33-
15 1803 by imposing the special assessment (because that assessment plus the increase
16 in the regular assessment was an increase of greater than 20% over the prior year's
17 assessment).

18 23. The Administrative Law Judge in the original 029 matter issued an Order
19 Granting Motion to Dismiss dated March 15, 2018. That ALJ found that Mr. Brown's
20 petition was defective because he did not name a specific CC&R or Bylaw as having
21 been violated and because by its terms, section 33-1803 deals only with regular
22 assessments, not special assessments.

23 24. The ALJ advised Mr. Brown that he could amend his petition at the
24 Department to allege that a specific CC&R, Bylaw, or statute had been violated.² In
25 effect this is what Mr. Brown has done through the rehearing where he alleges that
26 section 33-1803(A) has been violated because the \$325 dues increase is greater than
27 the allowable limit of 20%.

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29 ² As the ALJ noted in her Order in the original 029 matter, Mr. Brown was asserting two issues: that
30 Mogollon's accounting practices were in violation and that imposing the special assessment was a
violation.

1 25. In his request for rehearing, Mr. Brown argued that the “additional
2 assessment” (i.e., the special assessment) violated the statute or was imposed by
3 Mogollon without the authority to do so, and that either way, there would be no remedy
4 for Mogollon’s members if the ALJ’s ruling stands.

5 26. At the rehearing in the 029 matter, Mr. Brown raised the single allegation
6 (issue) that Mogollon violated ARIZ. REV. STAT. section 33-1803 because it raised its
7 assessment by more than 20% in one year.

8 27. Mr. Brown’s position is that as used in 33-1803(A), “regular assessment”
9 means an assessment instituted following “regular” procedures, by which he means by
10 motion, second, and vote.

11 28. In the 054 matter, Mr. Stevens adopts this argument.

12 29. Mogollon asserts that a “regular assessment” is a type of assessment and
13 that “special assessment” is a term of art in the industry. Messrs. Brown and Stevens
14 respond that Mogollon presents no evidence or legal authority to support its position.

15 The 045 Matter

16 30. On May 23, 2018, the Arizona Department of Real Estate issued a Notice
17 of Hearing setting the 045 matter for hearing on July 19, 2018.

18 31. The Notice of Hearing in the 045 matter shows that the issue for hearing is
19 Mr. Brown’s allegation that Mogollon violated section 33-1803 as outlined in his
20 petition.

21 32. The petition in the 045 matter was filed with the Department by Mr. Brown
22 on April 19, 2018.

23 33. In that petition, Mr. Brown alleged that Mogollon had violated section 33-
24 1803 by charging a late fee of \$25 and interest of 18% on late payments, whereas he
25 asserts that the statute limits the late charges to “\$15.00 or 10%.”

26 34. In the original 029 matter, Mr. Brown asserts that he was charged what he
27 says “appears” to be late fees and interest of \$26.57. Attached to his petition was an
28 invoice showing \$25 in late fees and \$1.57 in interest.

29 35. In the 045 petition, Mr. Brown requests that the “unlawful penalties and
30 interest charges” be voided.

The 054 Matter

36. On July 16, 2018, the Arizona Department of Real Estate issued a Notice of Hearing setting the 054 matter for hearing on August 24, 2018.

37. The Notice of Hearing in the 054 matter shows that the issue for hearing is Mr. Stevens's allegation that Mogollon violated section 33-1803, Bylaws Article VI at Section 6, and CC&Rs Paragraph 34.

38. The petition in the 054 matter was filed with the Department by Mr. Stevens on June 7, 2018.

39. Mr. Stevens filed his petition as a "single issue" matter paying the filing fee of \$500, whereas arguably, he raised three issues in the petition.

40. At the hearing, Mr. Stevens acknowledged that he had filed a single-issue petition and he explained that in essence, he was only raising one issue, which was whether Mogollon violated section 33-1803, and that the other two other issues were actually information in support of this one.

41. Mr. Stevens's petition in the 054 matter is 45 pages long, with over 600 pages of exhibits.

42. In an "overview" of his petition, he alleges that Mogollon's treasurer used deceptive and nonstandard accounting methods, including keeping two sets of books, as part of a "plan [to] execute a deceptive and false need to raise the annual assessments by 39.4%."

43. Mr. Stevens also alleged that the Bylaws and CC&Rs support dues only as necessary for operating expenses and for approved Reserve funds, and he concluded that there was no need for a dues increase. At the hearing, Mr. Stevens testified as to his opinion that Mogollon has in excess of \$1 million, which he believes shows that it did not require an increase in its assessment.

44. In the remainder of the petition, Mr. Stevens alleges that there is no provision in the Bylaws or CC&Rs allowing a special assessment; that the \$325 assessment is far in excess of the monies required for reserves and to operate the facilities; and that the "fabricated shortfall" was used to convince the Board that a

1 39.4% increase in dues was required. He then lays out the purported deceptive and
2 false accounting practices, with references to his 630 pages of exhibits.

3 45. Mr. Stevens includes a long prayer for relief, much of which is beyond the
4 scope of the Office of Administrative Hearings' authority to grant.

5 Consolidation of the Matters

6 46. Mr. Brown and Mogollon agreed that the 029 and 045 matters should be
7 consolidated, and their request to do so was granted.

8 47. Mogollon moved to consolidate the 054 matter with the 029 and 045
9 matters.

10 48. Mr. Brown objected to consolidation, but that objection was overruled
11 because the three petitions all alleged that Mogollon had engaged in deceptive
12 accounting practices.

13 49. Mr. Stevens also objected, but his objection was filed after the deadline for
14 filing responses to the motion had passed and after the Order consolidating the matters
15 had been issued.

16 The Hearing

17 50. The hearing on the consolidated matters was conducted on September
18 28, 2018 at the Office of Administrative Hearings in Phoenix, Arizona.

19 51. Mr. Brown and Mogollon agreed that the matter could be resolved solely as
20 an issue of law. Consequently although they both appeared, neither presented any
21 witnesses. Mr. Stevens appeared and presented his own testimony.

22 52. As set out above, Messrs. Brown and Stevens assert that the \$325 or
23 39.4% increase violates section 33-1803(A), whereas Mogollon asserts that the statute
24 has not been violated because it applies only to regular assessments, not special
25 assessments, and that the \$116 increase in the regular assessment represents an
26 increase of only 14.1%.

27 53. Petitioners argue that as used in section 33-1803, "regular" does not
28 define a type of assessment, but rather refers to how the assessment comes into being.
29 That is to say, these are assessments for which a motion is made, the motion is
30 seconded, and then a vote is taken.

1 238, 439 P.2d 805, 809 (1968) ("Courts will not place an absurd and unreasonable
2 construction on statutes.").

3 5. Each word, phrase, clause, and sentence of a statute or rule must be
4 given meaning so that no part will be void, inert, redundant, or trivial. See *Deer Valley,*
5 *v. Houser*, 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007).

6 6. When a term is used in one provision of a statute and omitted from
7 another, that term should not be read into the section where it is omitted. *U.S. Parking*
8 *Sys v. City of Phoenix*, 160 Ariz. 210, 211, 772 P.2d 33, 34 (App. 1989) (citation
9 omitted).

10 7. The CC&Rs and Bylaws are a contract between the parties and the
11 parties are required to comply with its terms. See *McNally v. Sun Lakes Homeowners*
12 *Ass'n #1, Inc.*, 241 Ariz. 1, 382 P.3d 1216 (2016 App.).

13 8. ARIZ. REV. STAT. section 33-1803(A) provides in pertinent part:

14 Unless limitations in the community documents would result in
15 a lower limit for the assessment, the association shall not
16 impose a regular assessment that is more than twenty
17 percent greater than the immediately preceding fiscal year's
18 assessment without the approval of the majority of the
19 members of the association. ... Charges for the late payment
20 of assessments are limited to the greater of fifteen dollars or
21 ten percent of the amount of the unpaid assessment
(Underscoring added.)

22 9. Regarding the \$325 increased assessment, Messrs. Brown and Stevens
23 have not shown by a preponderance of the evidence that Mogollon violated section 33-
24 1803(A) because their definition of "regular assessment" is not supported by principles
25 of statutory construction. The reasonable assumption is that all assessments must be
26 passed following the "regular" process (i.e. motion, second, and vote), whereas under
27 Messrs. Brown and Stevens's argument, the statute would allow an HOA to pass an
28 assessment without following that process. Alternatively, if their position is that all
29 assessments must follow the regular process, the word "regular" is rendered trivial or
30 void in the statute.

10. Mogollon argues to the effect that a \$25 late fee charged on a special assessment does not violate section 33-1803(A) because that section applies only to regular assessments. This argument fails because the statute's limit on late charges applies to "assessments," not "regular assessments." Under Mogollon's interpretation, it is necessary to add the word "regular" where the legislature chose not to use it. This violates principles of statutory construction.

The 029 Matter and the 054 Matter

11. Mr. Brown's petition in the 029 matter should be dismissed because he has not shown by a preponderance of the evidence that Mogollon's decision to raise its assessment by \$325 violated section 33-1803(A)

12. Mr. Stevens's petition in the 054 matter should be dismissed because he has not shown by a preponderance of the evidence that Mogollon's decision to raise its assessment by \$325 violated section 33-1803(A).

13. Mogollon is deemed to be the prevailing party in the 029 and 054 matters.

The 045 Matter

14. Mr. Brown has shown by a preponderance of the evidence that Mogollon's \$25 late charge is in violation of section 33-1803(A).

15. Mr. Brown is deemed to be the prevailing party in the 045 matter.

ORDER FOR DOCKET NO. 18F-H1818029-REL-RHG

IT IS ORDERED that Petitioner Warren R. Brown's petition in Docket No. 18F-H1818029-REL-RHG is dismissed.

Notice Regarding Docket No. 18F-H1818029-REL-RHG

This administrative law judge order, having been issued as a result of a rehearing, is binding on the parties. ARIZ. REV. STAT. section 32-2199.02(B). A party wishing to appeal this order must seek judicial review as prescribed by ARIZ. REV. STAT. section and title 12, chapter 7, article 6. Any such appeal must be filed with the superior court within thirty-five days from the date when a copy of this order was served upon the parties. ARIZ. REV. STAT. section 12-904(A).

ORDER FOR DOCKET NO. 18F-H1818045-REL

IT IS ORDERED that Petitioner Warren R. Brown is deemed the prevailing party in Docket No. 18F-H1818045-REL;

IT IS FURTHER ORDERED that Mogollon Airpark Inc. must rescind the \$25 late fee it assess against Mr. Brown;

IT IS FURTHER ORDERED that Mogollon Airpark Inc. must pay to Mr. Brown his filing fee of \$500.00 within thirty days of this Order.

Notice Regarding Docket No. 18F-H1818045-REL

Pursuant to ARIZ. REV. STAT. section 32-2199.02(B), this Order is binding on the parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. section 32-2199.04.

Pursuant to ARIZ. REV. STAT. section 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.

ORDER FOR DOCKET NO. 18F-H1818054-REL

IT IS ORDERED that Petitioner Brad W. Stevens's petition in Docket No. 18F-H1818054-REL is dismissed.

Notice Regarding Docket No. 18F-H1818045-REL

Pursuant to ARIZ. REV. STAT. section 32-2199.02(B), this Order is binding on the parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. section 32-2199.04.

Pursuant to ARIZ. REV. STAT. section 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 18, 2018.

/s/ Thomas Shedden
Thomas Shedden
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile September 4, 2018 to:

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