

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Tom Barrs,
4 Petitioner,

5 vs.

6 Desert Ranch Homeowners Association,
7 Respondent.

No. 19F-H1918037-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

8 **HEARING:** March 21, 2019 at 1:30 PM.

9 **APPEARANCES:** Tom Barrs ("Petitioner") appeared on his own behalf. Brian
10 Schoeffler appeared on behalf of Desert Ranch Homeowners Association
11 ("Respondent" and "Association"). G. Mangiero, Peter Ashkin, Stephen Banks, and
12 Noah Banks observed.

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

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

18 **FINDINGS OF FACT**

19 **BACKGROUND AND PROCEDURE**

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

23 2. On or about December 17, 2018, Petitioner filed a single-issue petition
24 against the Association with the Department.¹ Petitioner tendered \$500.00 to the
25 Department with his petition.²

26 3. On or about January 12, 2019, the Association filed its ANSWER with the
27 Department whereby it denied all complaint items in the petition.³

28
29 ¹ See HO19-18037_Petition_Form_dec_2018.pdf.

30 ² *Id.*

³ *Id.*

1 4. Per the NOTICE OF HEARING, the Department referred this matter to the
2 Office of Administrative Hearings ("OAH"), an independent state agency, for an
3 evidentiary hearing on March 21, 2019, regarding the following issues based on
4 Petitioner's petition:

5 **Whether Desert Ranch Homeowners Association (Respondent)**
6 **violated A.R.S. § 33-1805 by failing to fulfill a records request.**

7 **THE PARTIES AND GOVERNING DOCUMENTS**

8 5. Respondent is a homeowners' association whose members own
9 properties in a residential real estate development located in Scottsdale, Arizona.
10 Membership for the Association is comprised of the Desert Ranch subdivision.

11 6. Petitioner is a Desert Ranch subdivision property owner and a member of
12 the Association.

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

17 **HEARING EVIDENCE**

18 8. Petitioner testified on his own behalf and submitted nine exhibits.
19 Respondent called Brian Schoeffler as a witness and submitted eight exhibits. The
20 Agency Record from the Department and NOTICE OF HEARING were also admitted into
21 the evidentiary record.

22 *Petitioner's testimony*

23 9. Petitioner testified that on November 01, 2018, he submitted a records
24 request for Environmental Design Committee ("EDC") submissions, requests, and
25 approval letters to Catherine Overby, Brian Schoeffler, and Lori Loch-Lee as follows:

26 "Pursuant to ARS 33-1805, I am requesting a copy of all EDC actions,
27 written requests, and written approvals from October 2017 through
28 October 2018. Soft copies via return email are preferable; otherwise,
29 please let me know when hard copies are available for pickup."⁴

30

 ⁴ See Petitioner Exhibit 2.

Petitioner testified that he submitted his request electronically to the Association's management company accounting manager, and copied the President and Vice President of the Board, as well as the Chairman of the EDC.

10. Petitioner alleged that the Association did not completely fulfill his request. Per Petitioner, on November 18, 2018, he received a summary table listing of some, not all, EDC actions which did not include the totality of the communications he requested including all EDC actions, written requests, and written approvals for the specified timeframe.⁵

11. Petitioner accused the Association of willfully failing to fulfill his request. Specifically, Petitioner alleged that the Association was familiar with his request as he had made a similar request on October 07, 2017, which the Association failed to fulfill, and he had had to have the same dispute adjudicated at OAH as a result.⁶

12. Petitioner testified that he followed-up with his request to the Board on March 06, 2019, in pertinent part, as follows:

"I still as of yet, have not been offered a time to stop by and pick up/make copies of the records as requested November 1, 2018 pursuant to ARS 33-1805. If it would be easier you can forward me copies via return email. Or if you would prefer, I will gladly sort through all of the records to find the ones I need. Again, as specified in my request, I am looking for not just the list of actions, but also copies of the communications (letters, emails, and application forms) relating to Environmental Design Review (EDC) submissions, requests, complaints and approvals (or denials) pertaining to the specific time period. Specifically, I am looking at items 3 & 5-10 on your "EDC Decisions" List:

(3) Copy of correspondence sent to individual property owners notifying of violation and any follow-up correspondence notifying each violator of "Full Compliance"

(5) Copy of Complaint correspondence from homeowner regarding shrubs. Any and all citations, letters, emails and follow-up correspondence relating to this line item.

⁵ See Petitioner Exhibits 7-8.

⁶ See Petitioner Exhibit 3 and Respondent Exhibits A-C. Respondent Exhibit A is a December 27, 2017, ALJ Decision for Docket No. 18F-H1817008-REL. Respondent Exhibit B is a summary table the Association provided to Petitioner in response to Petitioner's underlying records request in that case. There, Petitioner submitted a records request to the Board but did not include the EDC Chairman Mr. Schoeffler. Respondent Exhibit C is an August 23, 2018, ALJ Decision for Docket No. 18F-H1817008-REL-RHG. The facts in that case are no different from those in Docket No. 18F-H1817008-REL.

- (6) Copy of submittal correspondence outlining scope of project from homeowner (Mr. Schoeffler), approval correspondence from all three EDC members, and final approval letter/email sent to homeowner
- (7) Copy of original submittal correspondence for garage remodel and septic install. Copy of correspondence granting approval for garage remodel and septic install
- (8) Copy of Complaint correspondence from homeowner, and "notification" letters/emails sent by EDC to homeowners
- (9) Copy of trellis addition request by homeowner and approval email/letter sent to homeowner
- (10) Copy of request, approval and change order correspondence"⁷

(All errors in original.)

13. On March 11, 2018, Mr. Schoeffler replied to Petitioner's March 06, 2019, correspondence.⁸ In his email Mr. Schoeffler argued that Petitioner's request had been complied with on November 18, 2018, and directed Petitioner to submit a new request if Petitioner desired the bulleted information he identified in his March 06, 2019, email.⁹ Petitioner replied to Mr. Schoeffler's email that same day and accused him of intentionally withholding the records Petitioner requested.¹⁰

14. In a March 17, 2019, email Mr. Schoeffler explained that Petitioner's original November 01, 2018, request was only submitted to two of four Board members, and that Ms. Loch-Lee had informed Petitioner in a November 02, 2018, email that he had only emailed his request to two Board members.¹¹ Mr. Schoeffler further explained that providing Petitioner with additional documentation after his March 06, 2019, email could be interpreted as an admission of guilt, as the Association believed it had complied with Petitioner's request, which is why he asked Petitioner to submit a new request.¹²

15. At the close of his testimony Petitioner clarified that his dispute was regarding the Association's response to his request, or lack thereof, and not with the timeliness of it. Petitioner argued that the Association acted in bad faith, as the Association did not offer to make the documents he requested available in one hundred

⁷ See Petitioner Exhibit 8.

⁸ See Petitioner Exhibit 10.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Petitioner Exhibit 9.

¹² *Id.*

1 forty days. Petitioner prayed for an ORDER to be issued in his favor which required the
2 Association to abide by ARIZ. REV. STAT. § 33-1805, a reimbursement of his filing fee,
3 and impose a civil penalty against the Association.

4 *Brian Schoeffler's testimony*

5 16. Mr. Schoeffler testified that at all times relevant to the matter at bar he was
6 the Chairman of the Association's EDC.

7 17. Mr. Schoeffler testified that the Association fully yet untimely complied with
8 Petitioner's EDC request. Per Mr. Schoeffler, Petitioner submitted his request to the
9 EDC after business hours on November 01, 2018, as it was transmitted at 9:40 p.m.¹³
10 Thus, per Mr. Schoeffler, the deadline for the Association to respond to Petitioner was
11 on November 16, 2018,¹⁴ and the Association did not respond to Petitioner until
12 November 18, 2018.¹⁵ Mr. Schoeffler testified that he sent Petitioner a summary table of
13 EDC actions taken between October 2017 and October 2018, and reminded Petitioner
14 that he needed to copy all Board members on records requests.

15 18. Mr. Schoeffler argued that a similar dispute had previously been
16 adjudicated at OAH which had been returned in the Association's favor, and reasoned
17 that the Association addressed Petitioner's request the way it did as a result of that prior
18 decision.¹⁶

19 **CONCLUSIONS OF LAW**

20 1. This matter lies within the Department's jurisdiction. Pursuant to ARIZ. REV.
21 STAT. §§ 32-2102 and 32-2199 et al., regarding a dispute between an owner and a
22 planned community association, the owner or association may petition the department
23 for a hearing concerning violations of community documents or violations of the statutes
24 that regulate planned communities as long as the petitioner has filed a petition with the
25 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

26

¹³ See Petitioner Exhibit 1.

27 ¹⁴ See Respondent Exhibit F. Administrative Notice is taken that Monday, November 12, 2018, was a
28 Federal holiday.

29 ¹⁵ Administrative Notice is taken that November 18, 2018, was a Saturday. Thus, the Association's
30 response, for the purpose of compliance with ARIZ. REV. STAT. § 33-1805, is acknowledged as received by
Petitioner on Monday, November 19, 2018; the eleventh business day after Petitioner submitted his
request.

¹⁶ See Respondent Exhibits A-C.

2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(D), 32-2199.02, and 41-1092, OAH has the authority to hear and decide the contested case at bar.

3. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1805.¹⁷

4. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."¹⁸ 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."¹⁹

5. ARIZ. REV. STAT. § 1-243 provides, in relevant part, that "[T]he time in which an act is required to be done shall be computed by excluding the first day and including the last day, unless the last day is a holiday, and then it is also excluded."

6. ARIZ. REV. STAT. § 33-1805 provides, in relevant part, as follows:

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

B. Books and records kept by or on behalf of the association and the board may be withheld from disclosure to the extent that the portion withheld relates to any of the following:

1. Privileged communication between an attorney for the association and the association.

¹⁷ See ARIZ. ADMIN. CODE R2-19-119.

¹⁸ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

¹⁹ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

1 2. Pending litigation.

2 3. Meeting minutes or other records of a session of a board
3 meeting that is not required to be open to all members pursuant to
4 section 33-1804.

5 4. Personal, health or financial records of an individual member of
6 the association, an individual employee of the association or an
7 individual employee of a contractor for the association, including
8 records of the association directly related to the personal, health or
9 financial information about an individual member of the association,
10 an individual employee of the association or an individual employee
11 of a contractor for the association.

12 5. Records relating to the job performance of, compensation of,
13 health records of or specific complaints against an individual
14 employee of the association or an individual employee of a
15 contractor of the association who works under the direction of the
16 association.

17 C. The association shall not be required to disclose financial and other
18 records of the association if disclosure would violate any state or federal
19 law.

20 (Emphasis added.)

21 7. "In applying a statute . . . its words are to be given their ordinary meaning
22 unless the legislature has offered its own definition of the words or it appears from the
23 context that a special meaning was intended."²⁰ Each word, phrase, clause, and
24 sentence must be given meaning so that no part of the legislation will be void, inert, or
25 trivial. *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 204, ¶ 17 (App. 2007). Legislation must
26 also be given a sensible construction that avoids absurd results. *State v. Gonzales*, 206
27 Ariz. 469, 471, ¶12 (App. 2003). If the words do not disclose the legislative intent, the
28 court will scrutinize the statute as a whole and give it a fair and sensible meaning.
29 *Luchanski v. Congrove*, 193 Ariz. 176, 178, ¶ 9.

30 8. The material facts in this matter are not in dispute.

9. Petitioner's November 01, 2018, records request was required to be sent
to all members of the Association's Board, including its Chairman Mr. Schoeffler.

²⁰

[?] MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 Petitioner only sent his request to two Board members, including Mr. Schoeffler. Even
2 though Petitioner was informed the following day of his error, Petitioner did not forward
3 his request to the Board members he originally omitted. The Association's response to
4 Petitioner would have been required on or by November 16, 2018, had Petitioner
5 appropriately submitted his request as required. Because the credible evidence of
6 record reflects that Petitioner failed to properly submit his records request to the Board,
7 Petitioner has failed established by a preponderance of the evidence that the
8 Association was in violation of ARIZ. REV. STAT. § 33-1805 for providing him with a
9 summary table on November 18, 2018.

10 10. Per Petitioner's records request submission in Docket No. 18F-H1817008-
11 REL-RHG, the evidence establishes that Petitioner knew or should have known the
12 requirements regarding submitting a records request to the Association's EDC as he
13 had successfully completed one in that instance.

14 11. Notably, ARIZ. REV. STAT. § 33-1805 does not require a Homeowner's
15 Association to email copies of records upon request of a homeowner. Rather, the
16 statute requires only that the association reasonably permit a homeowner to examine
17 records and purchase copies. Here, the Association was not under a legal obligation to
18 email any records to Petitioner. While Petitioner is correct that the Association did not
19 fully comply with his specific request, he has not shown by a preponderance of the
20 evidence that the summary table provided by the Association was a violation of ARIZ.
21 REV. STAT. § 33-1805.

22 12. Therefore, the Administrative Law Judge concludes that the Association's
23 conduct, as outlined above, did not violate the charged provisions of ARIZ. REV. STAT. §
24 33-1805.

25 **ORDER**

26 **IT IS ORDERED** that Petitioner's petition in this matter be denied.

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

29 **IT IS FURTHER ORDERED** pursuant to ARIZ. REV. STAT. § 32-2199.02(A),
30 Respondent shall not reimburse Petitioner's filing fee as required by ARIZ. REV. STAT. §
32-2199.01.

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 Department of Real Estate within thirty (30) days of the service of this ORDER upon the parties.

Done this day, April 10, 2019.

/s/ Jenna Clark
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate

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