IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Aaron Ricks (Somerstone Properties, LLC), Petitioner, vs. Montelena Master Community Association, Respondent	**No. 21F-H2120024-REL** **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: January 27, 2021

APPEARANCES: Petitioner Aaron Ricks appeared on his own behalf. Respondent Montelena Master Community Association was represented by Troy Stratman.

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

FINDINGS OF FACT

1. On or about October 27, 2020, Petitioner Aaron Ricks filed a Homeowners Association (HOA) Dispute Process Petition (Petition) with the Arizona Department of Real Estate (Department) alleging a violation of community documents and statute by Respondent Montelena Master Community Association. Petitioner indicated a single issue would be presented, paid the appropriate $500.00 filing fee, and asserted a violation of A.R.S. § 33-1806, A.R.S. § 33-442, Article 6.9.2 of the Declaration of Covenants, Conditions, and Restrictions (CC&Rs), and Article 6.9.2.9 of the CC&Rs.

2. On or about December 7, 2020, the Department issued a Notice of Hearing in which it set forth the issue for hearing as follows:

> The dispute between Petitioner and Respondent arises from alleged violations of A.R.S. § 33-1806 and the Covenants, Conditions and Restrictions (CCRs) Article 6 Section 6.9.3/6.9.2.9 [sic] of the Association. Petitioners states in the petition, "The purpose of this communication is to seek relief from unlawful fees ($5,000 in total) that I am being forced to pay by the community HOA, in order to see my home."

3. On or about January 19, 2021, Respondent filed a Motion for Summary Judgment (Motion) in which Respondent argued that the Petition should be dismissed as a matter of law because the CC&Rs authorized a transfer fee, the transfer fee touched

and concerned the land, and venue was improper because Petitioner was not the current owner and Petitioner's requested relief was unavailable.

4. Petitioner did not file a response to the Motion prior to the scheduled hearing date. Accordingly, the Motion was taken up at the time of the hearing.

5. During argument on the Motion, Petitioner asserted that the $2500.00 transfer fee charged to the purchaser by Respondent each time a parcel was sold was in violation of A.R.S. § 33-442, A.R.S. § 33-1806, and the CC&Rs. Specifically, Petitioner argued that A.R.S. § 33-442, entitled "Prohibition on transfer fees", generally provides that transfer fees are not allowed. Petitioner acknowledged that A.R.S. § 33-442(C) set out exceptions to the general prohibitions as follows:

> 3. Any provision of a document that requires payment of a fee or charge to an association to be used exclusively for the purpose authorized in the document if both of the following apply:
> (a) The fee being charged touches and concerns the land.
> (b) No portion of the charge or fee is required to be passed through to a third party or declarant designated or identifiable by description in the document or in another document that is referenced in the document unless the third party is authorized in the document to manage real property within the association or was part of an approved development plan.

However, Petitioner asserted that the statutory requirement that "the purpose authorized in the document" for which the transfer fee must exclusively be used had to be a very specific limited purpose such as a swimming pool or a landscaping project rather than a general purpose such as the association's operating expenses or reserves. Petitioner also argued that Section 6.9.2 and Section 6.9.2.9 of the CC&Rs specifically precluded the transfer fee he was charged when he purchased the property out of bankruptcy. Petitioner did not provide any argument as to how the transfer fee constituted a violation of A.R.S. § 33-1806.

6. Counsel for Respondent represented that he was counsel for approximately 750 associations in the state and at least 85 percent of them had transfer fees similar to the one at issue in this matter, and many associations charge transfer fees that are greatly in excess of the one at issue in this matter. Counsel asserted that A.R.S. § 32-442(C) was implemented to prevent transfer fees being paid to developers after the property had first

been sold. Counsel argued that the provision that the transfer fee be used to “fund the Master Association’s operating expenses and/or the Master Association’s reserves” was sufficient to meet the requirements of A.R.S. § 33-442(C) because it touched and concerned the land and was for a specific purpose. Counsel also pointed out that the provisions in Section 6.9.2 and 6.9.2.9 of the CC&Rs referenced by Petitioner were not addressing a transfer fee, but were addressing a Contribution to Reserves. Therefore, Respondent was able to charge Petitioner the transfer fee pursuant to his purchase of the property out of bankruptcy. Counsel further argued that Petitioner was not obligated to pay the transfer fee when he sold the property as the fee is charged to the purchaser, and therefore the fact that Petitioner contracted with the purchaser to pay the transfer fee on their behalf should not be held against Respondent in the event the Administrative Law Judge concluded it was a violation of the statutes or CC&Rs.

CONCLUSIONS OF LAW

1. Arizona statute permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of planned community documents or violations of statutes that regulate planned communities. A.R.S. § 32-2199. That statute provides that such petitions will be heard before the Office of Administrative Hearings.

2. Petitioner bears the burden of proof to establish that Respondent committed the alleged violations by a preponderance of the evidence. *See* ARIZ. REV. STAT. section 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); *see also Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952). Respondent bears the burden to establish affirmative defenses by the same evidentiary standard. *See* A.A.C. R2-19-119(B)(2).

3. “A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not.” MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960). 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." BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

4. Section 7.15 of the CC&Rs provides, in pertinent part, as follows:

> Transfer Fee. Each person or entity who purchases a Lot or Parcel (other than a Developer) shall pay to the Master Association and/or any management company employed by the Master Association immediately upon becoming the Owner of the Lot or Parcel a transfer fee in such amount as is established from time to time by the Board and/or such management company. Such transfer fee shall be payable at the closing of the transfer, and shall be secured by the Assessment Lien.

5. Section 6.6 of the CC&Rs provides, in pertinent part, as follows:

> The Master Association may require the new Owner of a Lot or Parcel to pay to the Master Association, or its designated representative, a transfer fee in an amount to be set by the Board . . . .

6. On or about July 23, 2010, Respondent recorded a Board Resolution with the Maricopa County Recorder's office, which provided, in pertinent part, as follows:

> The Master Association shall charge a Transfer Fee on all new Owners of a Lot or Parcel to be used exclusively to fund the Master Association's operating expenses and/or the Master Association's reserves. . . .
> This Transfer Fee shall be in addition to any other fees and assessments due and payable in relation to the transfer of the property, including, but not limited to, a Reserve Contribution pursuant to Article 6, Section 6.9 of the Declaration.

7. Petitioner offered no authority to support his interpretation that A.R.S. § 33-442 required that the transfer fee had to be for a more specific purpose than those identified in the governing documents.

8. Accordingly, Petitioner failed to establish Respondent acted in violation of the community documents and A.R.S. § 33-442.

ORDER

IT IS ORDERED that Petitioner's petition is dismissed.

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, February 16, 2021.

/s/ Tammy L. Eigenheer
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile February 16, 2021, to:

Judy Lowe, Commissioner
Arizona Department of Real Estate

Troy B. Stratman, Esq.
Stratman Law Firm, PLC
20860 N. Tatum Blvd., Ste. 380
Phoenix, AZ 85050-4286
docket@stratmanlawfirm.com

Aaron Ricks
18507 E Sunnydale Dr.
Queen Creek, AZ 85142
aaronricks@gmail.com

By: