

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Michael J Stoltenberg,
4 Petitioner,

No. 20F-H2020049-REL-RHG

5 vs.

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 Rancho Del Oro Homeowners Association,
7 Respondent.

8 **HEARING:** February 16, 2021 at 1:30 PM.

9 **APPEARANCES:** Michael J. Stoltenberg ("Petitioner") appeared in-person on his
10 own behalf. Nicole Payne, Esq. appeared telephonically on behalf of Rancho Del Oro
11 Homeowners Association ("Respondent" and "Association").

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

13
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 this
16 ORDER to the Commissioner of the Arizona Department of Real Estate ("Department").

17 **FINDINGS OF FACT**

18 **BACKGROUND AND PROCEDURE**

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

22 2. On or about March 02, 2020, the Department received a single-issue
23 petition from Petitioner which alleged that the Association was in violation of Arizona
24 Revised Statutes ("ARIZ. REV. STAT.") §§ 10-3842 and 10-801, and section 14.8 of the
25 Association's Declaration of Covenants, Conditions and Restrictions ("CC&Rs").¹
26 Specifically, Petitioner alleged that the Association "fail to do their job, and are acting in
27 bad faith."² Petitioner prayed for an Order compelling the Association to abide by statutes
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29 ¹ See Department's electronic file at HO20-20049_Petition.pdf.

30 ² *Id.*

and section(s) of the CC&Rs specified in the complaint, and also sought the issuance of a civil penalty against the Association.³

3. On March 03, 2020, Petitioner tendered a \$500.00 check for the petition fee in this matter to the Department.⁴

4. On March 24, 2020, the Department received Respondent's ANSWER whereby it denied all of the complaint items in the underlying petition.⁵

5. On April 01, 2020, the Department referred this matter to the Office of Administrative Hearings ("OAH"), an independent state agency, for an evidentiary hearing on July 14, 2020. Per the NOTICE OF HEARING the issue to be determined is as follows:

Whether the Association violated CC&Rs 14.8.⁶

6. On August 03, 2020, the undersigned Administrative Law Judge issued an AMENDED ADMINISTRATIVE LAW JUDGE DECISION to the Commissioner of the Department.

7. On August 28, 2020, Petitioner submitted rehearing request to the Department on the grounds that there was an alleged "Error in the admission or rejection of evidence or other errors of law occurring during the proceeding" and because "[t]he findings of fact or decision is arbitrary, capricious, or an abuse of discretion."⁷

8. On September 09, 2020, Petitioner's rehearing request was granted.

9. On October 09, 2020, the Department issued a NOTICE OF REHEARING, and referred this matter back to OAH for an evidentiary hearing on November 13, 2020, regarding the same issue as the previous hearing.

THE PARTIES AND GOVERNING DOCUMENTS

10. Respondent is a condominium association whose members own properties in the Rancho Del Oro residential real estate development located in Yuma, Arizona. Membership for the Association is comprised of the Rancho Del Oro condominium owners.

³ *Id.*

⁴ See Department's electronic file at HO20-20049_Payment.pdf.

⁵ See Department's electronic file at HO20-20049_Answer Cover Sheet.pdf.

⁶ See NOTICE OF HEARING. Notably, at the time Petitioner submitting his petition to the Department he was given notice of the Department's jurisdictional limitations. Specifically, Petitioner was advised that the HOA Dispute Process does not have jurisdiction to hear disputes arising from Title 10 of the ARIZ. REV. STAT. Hence, why Petitioner was only assessed a \$500.00 petition filing fee.

⁷ See HO20_20049_RHG_Request.pdf.

1 11. Petitioner is a Rancho Del Oro homeowner and a member of the
2 Association.

3 12. The Association is governed by its CC&Rs and overseen by a Board of
4 Directors (“the Board”). The CC&Rs empower the Association to control certain aspects of
5 property use within the development. When a party buys a residential unit in the
6 development, the party receives a copy of the CC&Rs and agrees to be bound by their
7 terms. Thus, the CC&Rs form an enforceable contract between the Association and each
8 property owner.

9 13. The Association’s CC&Rs were recorded with the Yuma County Recorder’s
10 Office on August 30, 1985.⁸ On April 07, 1986, the Association recorded its first
11 Amendment with the Yuma County Recorder’s Office. Section 14.8 was not amended. On
12 August 11, 1986, the Association recorded its second Amendment with the Yuma County
13 Recorder’s Office. Section 14.8 was not amended. On January 31, 1992, the Association
14 revoked pages 853 through 858 of the CC&Rs with the Yuma County Recorder’s Office.
15 Section 14.8 was not affected.

16 14. Bylaws Article XIV – Miscellaneous, Section 14.8, Notices, states, “Any
17 notice permitted or required by this Declaration or the Bylaws may be delivered either
18 personally or by mail. If delivery is by mail, it shall be deemed to have been delivered
19 seventy-two (72) hours after a copy of the same has been deposited in the United States
20 mail, postage prepaid, addressed to each person at the current address given by such
21 person to the secretary of the Board or addressed to the Unit of such person if no address
22 has been given to the secretary. Notices shall also be deemed received twenty-four (24)
23 hours after being sent by telegram or upon personal delivery to any occupant of a Unit
24 over the age of twelve (12) years.⁹

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29 ⁸ See Department's electronic file at HO20-20049_CCRs.pdf.

30 ⁹ *Id.*

REHEARING EVIDENCE

15. Petitioner testified on his own behalf. Respondent declined to call any witnesses. The Department's electronic rehearing file, including the NOTICE OF REHEARING, and 20F-H2020049-REL hearing record were also admitted into the evidentiary record. The substantive facts are as follows:

- a. The Association assesses its Members monthly dues, payable on the first of each month.
- b. On January 04, 2016, Petitioner was advised that he was to send payment for his monthly assessments to the Association as PO Box 4333 Yuma, Arizona 85366.¹⁰ Correspondence reads, in pertinent parts, "[The Association's attorney] advised this PO Box is the HOA's primary address for receiving all correspondence and all assessment payments from its members" and "[p]lease send your payments to the above address."
- c. From that time on Petitioner mailed his monthly assessment payments to PO Box 4333 Yuma, Arizona 85366. However, as of November 2019, Petitioner began to send his monthly assessment payments via restricted delivery by the United States Postal Service ("USPS"), for board member Rhea Carlisle's pickup only.¹¹
- d. Petitioner was aware that the Association employed a property management company ("PMC") to pick up their mail, and also knew that Ms. Carlisle was not an employee of the Association's PMC. Petitioner was also aware that Diana Crites was listed as the Association's Statutory Agent for years 2019 and 2020.¹² Petitioner, who believed that an agent of the Association's property management company had thrown away one of his mailed assessment payments, unilaterally chose to mail his monthly assessment payments to Ms. Carlisle's attention, despite instructions otherwise and her status as an unpaid volunteer board member.

¹⁰ See Petitioner Exhibit N.

¹¹ See Department's electronic file at HO20-20049_Exhibits.pdf; see also Petitioner Exhibit A.

¹² See Petitioner Exhibits L-M.

- i. In December 2019, Petitioner's mailed assessment payment was picked up from USPS.¹³
- ii. On January 25, 2020, Petitioner's mailed assessment payment was returned to him by USPS.¹⁴
- iii. On January 30, 2020, Petitioner's mailed assessment payment was picked up from USPS.¹⁵
- iv. On February 26, 2020, Petitioner's mailed assessment payment was picked up from USPS.¹⁶
- v. On April 17, 2020, Petitioner's mailed assessment payment was picked up from USPS.¹⁷
- vi. On June 08, 2020, Petitioner's mailed assessment payment was returned to him by USPS.¹⁸
- e. Each time Petitioner's monthly assessment was received as untimely by the Association, he was assessed a late fee.¹⁹ Additionally, at each late payment occurrence, his residence became in danger of foreclosure by the Association.

CLOSING ARGUMENTS

16. At the hearing Petitioner argued that because he was worried about incurring unnecessary late fees and potentially losing his home, he filed his petition with the Department because he did not know what else to do. Petitioner further argued that he had always technically mailed his monthly assessment payments timely to the Association.

17. In closing at the rehearing, Petitioner argued that the previous administrative decision failed to interpret and define section 14.8 of the Association's CC&Rs, and should have applied ARIZ. REV. STAT. § 10-3842 as well.

¹³ See Petitioner Exhibit C.

¹⁴ See Petitioner Exhibit D.

¹⁵ See Petitioner Exhibit E.

¹⁶ See Petitioner Exhibit F.

¹⁷ See Petitioner Exhibit G.

¹⁸ See Petitioner Exhibit H.

¹⁹ See Department's electronic file at HO20-20049_Exhibits.pdf; see also Petitioner Exhibit A.

18. At the hearing Respondent argued that, notwithstanding Petitioner's assessment mailing concerns, Section 14.8 of the CC&Rs were inapplicable to the facts as presented and therefore Respondent could not be found in violation thereof.

19. In closing at the rehearing, Respondent argued that the prior administrative decision should be affirmed because section 14.8 of the Association's CC&Rs are inapplicable to this matter since the provision related to the Association's notice obligation not the homeowners send in mail to the Association, and that Petitioner's request for declaratory relief is not authorized by statute or binding precedent. Respondent also argued that the Department has no jurisdiction under Title 10 of the ARIZ. REV. STAT. Respondent opined that Petitioner failed to sustain his burden of proof, and therefore prayed that his request(s) for relief be denied as none could lawfully be given.

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.²⁰

3. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1243.²¹

4. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."²² 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

²⁰ See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

²¹ See ARIZ. ADMIN. CODE R2-19-119.

²² MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
2 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
3 the other.”²³

4 5. Here, the material facts are clear.

5 6. It is clear that Section 14.8 of the CC&Rs is inapplicable to this case. The
6 language of Section 14.8 speaks specifically to the Association’s notice obligation to its
7 members when mailing them information. Section 14.8 has no binding authority or control
8 over homeowners sending mail to the Association. No further explanation of this provision
9 is necessary as the language is neither vague nor ambiguous.

10 7. ARIZ. REV. STAT. § 10-3842²⁴ falls outside of the Department’s jurisdiction
11 and is therefore inapplicable to this matter.

12 8. By restricting the delivery of his monthly assessment payments, Petitioner
13 inadvertently caused delay in their ability to be picked up by the Association. Regardless,
14 there is no credible evidence in the record to suggest that the action(s) Petitioner
15 volitionally took are Respondent’s responsibility, least of all amounting to a violation of
16 Section 14.8 of the CC&Rs.

17 9. No violation of Section 14.8 occurred in this matter.

18 10. Additionally, Petitioner did not introduce any evidence tending to suggest
19 that there was an “error in the admission or rejection of evidence or other errors of law
20 occurring during the proceeding” in the prior hearing, or that “[t]he findings of fact or
21 decision is arbitrary, capricious, or an abuse of discretion.”

22 11. Therefore, the undersigned Administrative Law Judge must again conclude
23 that because Petitioner failed to sustain his burden of proof that the Association Section
24 14.8 of the CC&Rs, his petition shall be denied.

25 **FINAL ORDER**

26 Based on the foregoing,

27 **IT IS ORDERED** that Petitioner’s petition be denied.

28 ²³ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

29 ²⁴ ARIZ. REV. STAT. § 10-3842 concerns standards of conduct for officers of nonprofit corporations. The
30 statute provides, generally, that duties must be discharged in good faith.

NOTICE

This Administrative Law Judge ORDER, having been issued as a result of a rehearing, is binding on the parties.²⁵ A party wishing to appeal this order must seek judicial review as prescribed by ARIZ. REV. STAT. § 41-1092.08(H) 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.²⁶

Done this day, March 08, 2021.

Office of Administrative Hearings

/s/ Jenna Clark
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
c/o Dan Gardner, HOA Coordinator
Arizona Department of Real Estate

Transmitted electronically and/or via US Mail to:

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²⁵ See ARIZ. REV. STAT. § 32-2199.02(B).

²⁶ See ARIZ. REV. STAT. § 12-904(A).