

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Thomas A & Jade Bossert,

Petitioner,

VS.

Silverbell West Association, Inc.,

Respondent.

No. 21F-H2120011-REL

**AMENDED ADMINISTRATIVE LAW
JUDGE DECISION**

HEARING: March 18, 2021, with the record held open until April 2, 2021 for the submission of written closing arguments.

APPEARANCES: Anthony Tsontakis, Esq. appeared on behalf of Thomas A. and Jade Bossert (“Petitioner”). Timothy Butterfield, Esq. and Nicholas Nogami, Esq. appeared on behalf of Silverbell West Association, Inc. (“Association” and “Respondent”). Barbara Schoneck, Rex Warnix, III, and Linda Garner appeared as witnesses.

ADMINISTRATIVE LAW JUDGE: Adam D. Stone

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

BACKGROUND AND PROCEDURE

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

2. On or about August 17, 2020, Petitioner filed a two-issue petition¹ with the Department which alleged that the Association failed to disclose Association records in violation of ARIZ. REV. STAT. § 33-1258(A), and failed to complete annual financial audits.

¹ See Department's electronic file at HO21-20011 Notice Petition.pdf.

1 reviews or compilations with 180 days of the end of the Association's 2018 and 2019 fiscal
2 years in violation of ARIZ. REV. STAT. § 33-1243(J).

3 3. On September 14, 2020, Respondent returned its ANSWER to the
4 Department whereby it denied all of the complaint items.²

5 4. Per the NOTICE OF HEARING, the Department referred this matter to the
6 Office of Administrative Hearings ("OAH"), an independent state agency, for an
7 evidentiary hearing on November 4, 2020.³

8 **THE PARTIES AND GOVERNING DOCUMENTS**

9 5. Respondent is a condominium association whose members own properties
10 in the Silverbell West real estate development located in Tucson, Arizona. Membership
11 for the Association is comprised of the Silverbell West condominium owners.

12 6. Petitioner is a Silverbell West condominium owner and a member of the
13 Association.

14 7. The Association is governed by its Covenants, Conditions, and Restrictions
15 ("CC&Rs")⁴, and overseen by a Board of Directors ("the Board"). The CC&Rs empower
16 the Association to control certain aspects of property use within the development. When a
17 party buys a residential unit in the development, the party receives a copy of the CC&Rs
18 and agrees to be bound by their terms. Thus, the CC&Rs form an enforceable contract
19 between the Association and each property owner.

20 8. The Associations Bylaws were adopted by the Board on May 16, 2016.⁵

21 **HEARING EVIDENCE**

22 9. Petitioner testified on his own behalf and called Barbara Schoneck, Rex
23 Warnix III and Linda Garner as witnesses and submitted eleven exhibits into the record.
24 Respondent did not call any witnesses and submitted four exhibits into the record. The
25 Department's electronic file and NOTICE OF HEARING were also admitted into the record.

26 Petitioner's testimony

27
28 ² See Department's electronic file at HO21-20011_Response_Petition.pdf.

29 ³ The matter was continued twice, and reset for March 18, 2021, at 1:00 p.m.

30 ⁴ See Respondent Exhibit A.

⁵ See Respondent Exhibit B.

10. Petitioner testified that he had been elected to the Board in February 2019, and was immediately appointed Vice President. Petitioner testified that he became Board President in June 2019 and remained in that position until February 2020.

11. Petitioner testified that on June 2, 2020, he sent a letter to Linda Garner requesting all financial documents pertaining to fiscal years 2018, 2019 and 2020.⁶

12. Petitioner further testified that when he received the documents, they were out of order and even contained miscellaneous advertisements.

13. Petitioner testified that he brought the documents to Digit & Docs, LLC, a bookkeeping company.

14. Petitioner testified that after receiving a report from Digit & Docs, he sent another letter to Linda Garner on July 20, 2020, summarizing the documents which were missing and which ones he still requested be produced. Specifically, Petitioner requested all cash receipt journals, all monthly dues reports, all cash disbursement journals all credit and debit card statements, missing bank statements, check registers and financial statements.⁷ Petitioner testified that he never received the requested documents from his second request.

15. Petitioner testified that at the March 4, 2019 meeting, there was discussion about hiring an accountant to perform monthly accounting as well as the year-end compilation.⁸ At the April 1, 2019 meeting again there was a discussion about the year-end compilation needing to be completed.⁹ At the June 3, 2019 meeting, there was a mention that the financial compilation needed to be completed by the end of June.¹⁰

16. In addition, Petitioner testified that it was his utmost concern that a financial compilation be prepared timely.

17. Petitioner testified that a compilation was prepared by Lynda Meadows for fiscal year 2018, but it was past the 180 day deadline, and believed it was incomplete.¹¹

⁶ See Petitioner Exhibit 1.

⁷ See Petitioner Exhibit 8.

⁸ See Respondent Exhibit C

⁹ See Id.

¹⁰ See Id.

¹¹ See Petitioner Exhibit 11.

18. Petitioner testified that in September 2019, the Board voted to do an annual compilation starting in January 2020,¹² but never completed the same.

19. Petitioner testified that the Board Treasurer, Donald Molley, would not keep all of the financial records in the Board office where members could access and when he did, a key was required which was not always available.

Barbara Schoneck's testimony

20. Ms. Schoneck testified that she owned Digit & Docs LLC and reviewed the documents Petitioner presented.

21. Ms. Schoneck testified that the box of documents was not organized and statements were not even sorted correctly. Ms. Schoneck testified that after reviewing the documents, she believed that documents were missing,¹³ and that an accurate 2018 and 2019 report could not have been made based upon the documents she reviewed.

Rex Warnix III's testimony

22. Mr. Warnix testified that he is the current Board President. Mr. Warnix testified that he turned over the records request to Mr. Molley, and it was his belief that the Board complied with Petitioner's records request based upon the available records in Mr. Molley's possession.

23. Mr. Warnix testified that he became Board President in hopes that he could bring the two factions (Petitioner and Mr. Molley) together.

24. Mr. Warnix testified that he had no role in the compilation of the documents and that Mr. Molley told him that he had mixed up the documents, which he did not believe was the right thing to do.

25. As to the follow up request on July 20, 2020, Mr. Warnix testified that to the best of his knowledge those additional records were not sent and thought that Mr. Molley would do the right thing once the second request came.

26. Mr. Warnix testified that he went to the bank to get bank statements and provided the same to Mr. Molley.

¹² See Petitioner Exhibit 14.

¹³ See Petitioner Exhibit 4.

1 27. Mr. Warnix testified that after the Complaint was filed, he did not try to obtain
2 any other documents.

3 28. Finally, Mr. Warnix testified that since the Board has hired Adam, LLC as
4 property manager, all records are now being properly kept.

5 Linda Garner's testimony

6 29. Ms. Garner testified that she works for Adam LLC, and is the property
7 manager for the Association.

8 30. Ms. Garner testified that she complied with the Petitioner's records request
9 with the documents that she had been given. She further testified that she passed the rest
10 of the request off to the Board and they knew they had to comply.

11 **CONCLUSIONS OF LAW**

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

18 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
19 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested
20 case at bar. OAH has the authority to interpret the contract between the parties. See
21 *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App.
22 2007).

23 3. In this proceeding, Petitioner bears the burden of proving by a
24 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1243.¹⁴

25 4. "A preponderance of the evidence is such proof as convinces the trier of fact
26 that the contention is more probably true than not."¹⁵ A preponderance of the evidence is
27 "[t]he greater weight of the evidence, not necessarily established by the greater number of
28 witnesses testifying to a fact but by evidence that has the most convincing force; superior

29 ¹⁴ See ARIZ. ADMIN. CODE R2-19-119.

30 ¹⁵ 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.”¹⁶

4 5. ARIZ. REV. STAT. § 33-1258(A) provides, in pertinent part:

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

16 6. ARIZ. REV. STAT. § 33-1243(J) provides:

17 Unless any provision in the condominium documents requires an annual
18 audit by a certified public accountant, the board of directors shall provide for
19 an annual financial audit, review or compilation of the association. The
20 audit, review or compilation shall be completed no later than one hundred
21 eighty days after the end of the association's fiscal year and shall be made
22 available on request to the unit owners within thirty days after its completion.

23 7. Based upon a review of the credible and relevant evidence in the record,
24 Petitioner has sustained his burden of proof.

25 8. Here, the material facts are not at issue.

26 9. The records were not provided as per the statute. Mr. Warnix, as President
27 of the Board, should have taken a more active role in at least obtaining all bank account
28 records and copies of checks given his knowledge of Mr. Molley's actions. It is
29 understandable if he could not properly access the bank statements/check copies online,
30 but he could have requested copies of the same in person at the bank. The fact that these
records still have not been turned over is inexcusable.

10 10. With regards to the other records (check registers, cash receipt journals,
11 dues reports, etc.), it is unclear from Mr. Bossert's testimony, if those even existed as it

12 ¹⁶ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

1 appeared as if the Board's Treasurer may not have even kept the same. Thus, it is
2 impossible to know if they even exist, as there was no evidence from Mr. Bossert that they
3 do in fact exist.

4 11. That then leads to the financial compilations. Once Mr. Bossert was on the
5 Board, he knew that there had not been a financial compilation timely completed for 2018,
6 as it was discussed, without resolution, at several Board meetings leading up to the June
7 30, 2019 deadline. When the financial compilation was completed, the accountant hired
8 by the Board, admitted it was incomplete or inaccurate as she did not have enough
9 information to fully complete the same. The tribunal is conflicted on this issue because
10 Mr. Bossert, while acting as President, could have taken more aggressive measures with
11 Mr. Molley to get him to provide the same and if he was not going to do it, then perhaps Mr.
12 Bossert should have taken over that responsibility. Therefore, Petitioner has not met his
13 burden as to the 2018 financial report.

14 12. Further, while the Board voted to hire a CPA starting in January 2020, it is
15 clear from the facts that the 2019 financial compilation was not completed or else it would
16 have presumably been turned over. That is of course unless it is in the possession of Mr.
17 Molley, or the other Board members, which again would lead to a violation of the records
18 request.

19 13. Therefore, the tribunal finds that Respondent has violated ARIZ. REV. STAT.
20 § 33-1258(A), insofar as the bank account statements and check copies are concerned.
21 Further, the Tribunal finds that Respondent has violated ARIZ. REV. STAT. § 33-1243(J) for
22 failing to complete the 2019 financial compilation.

23 14. The final issue is the request by Petitioner for a civil penalty. ARIZ. REV.
24 STAT. § 32-2199.02(A) provides in pertinent part, "[t]he administrative law judge may order
25 any party to abide by the statute, condominium documents, community documents or
26 contract provision at issue and may levy a civil penalty on the basis of each violation..."
27 Petitioner argues that a civil penalty is appropriate as the Respondent has displayed
28 "execrable and pathetic behavior". Whereas Respondent argues that civil penalties are
29 awarded in only severe cases of deliberate and ongoing violations.
30

1 15. As discussed above, it appears that Mr. Molley is largely the one to blame in
2 this scenario. His behavior in preparing and presenting the documents was unacceptable
3 and the lack of proper record keeping was likewise unacceptable. Further, as mentioned
4 above, Mr. Warnix should have at least gone to Wells Fargo to retrieve the bank
5 statements as those would be easily obtainable, but he failed to do so. That being said,
6 the tribunal believes that Board took the appropriate steps to ensure better record keeping
7 in the future, and also presumes that the 2020 financial compilation will be timely
8 completed and these issues will not result in an ongoing violation. Thus, the
9 Administrative Law Judge declines to impose a civil penalty.

10 16. Therefore, the undersigned Administrative Law Judge concludes that
11 Petitioner sustained his burden of proof that the Association violated ARIZ. REV. STAT. §§
12 33-1258(A) and 33-1243(J), and is entitled to his filing fees.

13 **ORDER**

14 Based on the foregoing,

15 **IT IS ORDERED** that Petitioner is deemed the prevailing party and is entitled to his
16 filing fees of \$1,000.00, and Respondent must reimburse this within 30 days.

17 **NOTICE**

18 Pursuant to ARIZ. REV. STAT. §32-2199.02(B), this Order is binding on the parties
19 unless a rehearing is granted pursuant to ARIZ. REV. STAT. § 32-2199.04. Pursuant
20 to ARIZ. REV. STAT. § 41-1092.09, a request for rehearing in this matter must be filed
21 with the Commissioner of the Arizona Department of Real Estate within 30 days of
22 the service of this Order upon the parties.

23
24 Done this day, April 16, 2021.

25
26 /s/ Adam D. Stone
27 Administrative Law Judge

28 Transmitted electronically to:
29
30

1 Judy Lowe, Commissioner
2 Arizona Department of Real Estate

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