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Petitioner,

El Rio Community Association,

ADMINISTRATIVE LAW JUDGE DECISION

APPEARANCES: Petitioner Michael E. Palacios appeared via Google Meet. Respondent El Rio Community Association was represented by Quinten T. Cupps, Esq. appeared via Google Meet.

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").

BACKGROUND AND PROCEDURE

2. On or about May 10, 2021, Petitioner filed a single-issue petition against the Association with the Department. Petitioner tendered \$500.00 to the Department with his petition.

1

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 August 4, 2021, regarding the following issue based on Petitioner's
4 petition:

5 **Whether the Association violated A.R.S. § 33-1805 and the Association**
6 **Bylaws Article 11.3 by failing to fulfill a records request.**

7 **THE PARTIES AND GOVERNING DOCUMENTS**

8 5. Respondent is a homeowners' association whose members own properties
9 in a residential real estate development located in Mohave Valley, Arizona.

10 6. Petitioner is a property owner and a member of the Association.

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

15 **HEARING EVIDENCE**

16 8. Petitioner testified on his own behalf. Respondent called Denise Ferreira as
17 a witness and submitted three exhibits into evidence. The Agency Record from the
18 Department and NOTICE OF HEARING were also admitted into the evidentiary record.

19 Petitioner's testimony

20 9. Petitioner testified that he purchased a home in the community on or about
21 March 3, 2021. He testified further that on or about March 24, 2021, he was appointed to
22 the Board. On March 30, 2021, Petitioner requested the opportunity to inspect the
23 Association's books and records.

24 10. Petitioner alleged that the Association did not completely fulfill his request.
25 According to Petitioner, he received about 5% of what he requested. Petitioner testified
26 that he requested the remaining documents and while more documents were provided to
27 him, he did not receive the contract for the property management company (D & E
28 Management), copies of contracts with attorneys, landscaper contracts, Board minutes,
29 cancelled checks, and ledgers.
30

11. Petitioner also believed that some of the documents which were provided were false or forged as they contained the name, "El Rio Estates Homeowners Association", which is not the proper name of the Association.

12. Petitioner testified that Respondent and D & E had not submitted all of the documents and that the property management agreement was fraudulent because it contained the incorrect name, and is worried that because of this, it could hurt his property value.

Denise Ferreira's testimony

13. Ms. Ferreira testified that she owns D & E and at all times relevant to the matter at bar she was the manager for the Association since July 2014.

14. Ms. Ferreira testified that the Association fully yet untimely complied with Petitioner's request. Ms. Ferreira testified that she was untimely in presenting the copies of the checks but that was because of the bank needing time to prepare the large request.

15. In addition, Ms. Ferreira testified that there were no agreements with attorneys for ongoing representation, as attorneys were only used on an "as needed" basis. She stated that the proof of the payments would be in the checks and ledgers turned over to Petitioner.

16. As to the landscaping agreement, again Ms. Ferreira testified that there was no ongoing contract with a particular company, but all previous payments to landscapers were disclosed through the checks and ledgers now in Petitioner's possession.

17. As to Petitioner's confusion over the name of the Association, Ms. Ferreira testified that due to an ongoing controversy surrounding the entire development, some Board members wanted to change the name of the Association to "El Rio Estates Homeowners Association" which is why that name appears on some documents. She testified however, that she has instructed the Board to cease the use of that name until it is formally modified with the Arizona Corporation Commission. She testified though that there still maybe some documents which contain the incorrect name.

CONCLUSIONS OF LAW

1. This matter lies within the Department's jurisdiction. Pursuant to ARIZ. REV. STAT. §§ 32-2102 and 32-2199 et al., regarding a dispute between an owner and a

1 planned community association, the owner or association may petition the department for
2 a hearing concerning violations of community documents or violations of the statutes that
3 regulate planned communities as long as the petitioner has filed a petition with the
4 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

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

7 3. In this proceeding, Petitioner bears the burden of proving by a
8 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1805.¹

9 4. "A preponderance of the evidence is such proof as convinces the trier of fact
10 that the contention is more probably true than not."² A preponderance of the evidence is
11 "[t]he greater weight of the evidence, not necessarily established by the greater number of
12 witnesses testifying to a fact but by evidence that has the most convincing force; superior
13 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
14 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
15 the other."³

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

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

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

¹ See ARIZ. ADMIN. CODE R2-19-119.

² MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

³ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

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

2. Pending litigation.

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

4. Personal, health or financial records of an individual member of the association, an individual employee of the association or an individual employee of a contractor for the association, including records of the association directly related to the personal, health or financial information about an individual member of the association, an individual employee of the association or an individual employee of a contractor for the association.

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

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

6. Article 11.3 of the Association Bylaws states,

Every Director shall have the absolute right at any reasonable time to inspect all books, records, and documents of the Association and the physical properties owned or controlled by the Association. The right of inspection by a Director includes the right to make extra copies of documents at the reasonable expense of the Association.

7. The material facts in this matter are not in dispute.

8. Petitioner made a proper request for documents on March 30, 2021.

From the evidence presented, D & E Management timely responded to the request and informed Petitioner of any potential delays in obtaining the cancelled checks, for example. Petitioner presented no credible evidence that documents existed which were not disclosed. Petitioner did not meet his burden of proof in demonstrating that the

Association was in violation of ARIZ. REV. STAT. § 33-1805 or Article 11.3 of the Bylaws.

ORDER

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

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

IT IS FURTHER ORDERED pursuant to ARIZ. REV. STAT. § 32-2199.02(A), 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, August 13, 2021.

/s/ Adam D. Stone
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate

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