

1 **Final agency action regarding decision below:**

2

3 **ALJFIN ALJ Decision final by statute**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6

7 Nicole Armsby (NICDON 10663 LLC),
8 Petitioner,
9 vs.
10 Desert Mountain Master Association,
 Respondent.

No. 21F-H2121055-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

11

12 **HEARING:** August 30, 2021

13 **APPEARANCES:** Nicole Armsby (NICDON 10663 LLC) appeared on behalf of
14 herself. Mark Sahl, Esq. appeared on behalf of Respondent Desert Mountain Master
15 Association.

16 **ADMINISTRATIVE LAW JUDGE:** Velva Moses-Thompson

17

18 **FINDINGS OF FACT**

19 1. The Arizona Department of Real Estate (the Department) is authorized by
20 statute to receive and to decide Petitions for Hearings from members of homeowners'
21 associations and from homeowners' associations in Arizona.

22 2. Respondent Desert Mountain Master Association (Respondent or the
23 Association) is a homeowners' association whose members own houses on lots in the
24 Desert Mountain Community in Scottsdale, Arizona.

25 3. Petitioner Nicole Armsby (NICDON 10663 LLC or Armsby) owns a house
26 in and is a member of Respondent.

27 4. At all times relevant to this matter, Armsby was involved in litigation with
28 Respondent regarding an amendment to Respondent's Covenants, Code, &
29 Restrictions (CC&Rs) that prohibits short-term rentals.

1 5. Desert Mountain's Executive Director was Kevin C. Pollock.

2 6. On April 21, 2021, Armsby submitted an e-mail to Mr. Pollock that
3 included the following language:

4 Please see our attached correspondence in relation to the
5 DMMA's Community email sent out on 14 April, 2021 detailing
6 "Operation Quick and Secure Entry". We appreciate your
7 attention and consideration in respect to our request.

8 7. On May 14, 2021, Armsby sent an e-mail to Mr. Pollock that included the
9 language, "still interested in the documentation we requested regarding Operation Quick
10 and Secure Entry." Through the May 14, 2021 e-mail Armsby requested:

11 (1) Copies of Board meeting Minutes related to the initiative
12 (2) Emails, notes, or committee meeting minutes possessed
13 by DMMA employees or Board members that discuss why this
14 initiative is required.

15 8. On May 18, 2021, Mr. Pollock notified Armsby by e-mail that due to
16 ongoing litigation, all communications should be sent to Curtis Ekmark, Respondent's
17 attorney.

18 9. On May 21, 2021, Mr. Earmark sent an e-mail to Armsby's attorneys (Jon
19 Dessaulles and Hoxsie Matthew) that provided, as follows:

20 Your client is requesting to speak with me. The community
21 manager has told her that I cannot do so without your approval
22 but she is insisting. Do you approve me speaking to Nikki and
23 Jordan? God bless, Curtis Ekmark, Esq.

24 10. On May 21, 2021, Mr. Hoxie provided a response by e-mail to Mr.
25 Earmark that provided, in relevant part, as follows:

26 Good afternoon Curtis, Dom and I approve, presuming this is
27 related to the information request discussed this week. Please
28 continue to speak with Dom and I regarding Supreme Court
29 related questions. I hope you have a good weekend,
30 Sincerely, Matthew Hoxsie Associate Greenberg Traurig, LLP
 2375 E. Camelback Rd. Suite 700 Phoenix, AZ 85016.

 11. On May 21, 2021, Mr. Earmark responded by e-mail to Mr. Dessaulles and
 Mr. Hoxsie. The May 21, 2021 e-mail provided, in relevant part, as follows:

1 I appreciate your responses. However, it seems as if you are
2 both offering a conditional approval. In other words, you are
3 approving me talking to Nikki or Jordan as long as I do not
4 speak about this litigation. There are two problems with this.
5 First, I do not know exactly what your client wants to talk about
6 and do not know where the conversation will go. Second, I
7 have zero trust that your client will accurately describe the
8 conversation when done. For example, today she
9 misrepresented a conversation with the community manager.
10 I am willing to get involved and try to answer whatever
11 questions your client has. However, I am not willing to be
12 subjected to a bar complaint. To that end, I ask that either: (1)
13 one of you contact me; or (2) you both provide unconditional
14 approval to talk to Nikki and Jordan. I would much prefer to
15 speak with one of you. However, I will call Nikki if that is what
16 you want. Have a good weekend. God Bless.

17 12. Respondent did not provide the communication and records requested by
18 Armsby in Armsby's May 14, 2021 e-mail. On or about May 25, 2021, Armsby filed a
19 single-issue petition with the Department that alleged that Respondent had violated
20 Arizona Revised Statutes (A.R.S.) § 33-1805, Section 5.10 of the Association's CC&Rs,
21 and Article VIII, Section 1 of the Association's Bylaws, by failing to provide access to
22 Association records to Armsby.

23 13. Respondent filed a timely response to Armsby's petition denying that it
24 had violated any Bylaws, CC&Rs, and A.R.S. § 33-1805.

25 14. On June 28, 2021, the Department issued a Notice of Hearing setting the
26 petition for hearing on August 4, 2021.¹

27 15. A hearing was held on August 17, 2021.

28 16. At hearing, Armsby testified on behalf of herself and submitted exhibits 1
29 through 9. Respondent presented the testimony of Stephen Prall and submitted exhibits 1
30 and 2.

17. Armsby explained that Operation Quick and Secure Entry (the keyless
entry program) requires that members, renters, vendors, and guests are required to have
their identification cards scanned and stored before gaining access to Desert Mountain.

¹ The hearing was continued to August 17, 2021.

Armsby asserted that Respondent failed to provide access to or copies of documents and communications related to the keyless entry program. Armsby stated that there were no Board Meetings from 2020 and 2021 on Respondent's website. Armsby explained that there were security committee meeting minutes posted from 2019 regarding the keyless entry program. Armsby asserted that her request for documents and communications regarding the keyless entry program was unrelated to the pending litigation between Armsby and the Respondent. Armsby stated on cross-examination that her property is available for rental for one month up to six months. Armsby explained that she has rented the property in the past to other members within the Association.

18. Mr. Prall explained that Respondent did not believe that Armsby's April 14, 2021 request was a records request. Mr. Prall explained that Respondent did not provide documents and communication related to the keyless entry program because Armsby's request related to pending litigation and some of the information requested by Armsby was subject to attorney-client privilege. Mr. Prall explained Armsby's request related to pending litigation because renters must access Desert Mountain through the keyless entry program. The program controls renters' ability to access Desert Mountain. The issue of the pending litigation was the CC&Rs prohibition against short-term rentals. Mr. Prall explained that he was not sure whether Board Meeting Minutes from 2020 were posted on the website but he believed that such minutes were posted. Mr. Prall testified to the effect that the Board Meetings would need to be approved before minutes were posted to the website.

19. Section 5.10 of the Association's CC&Rs provide:

Records. In accordance with Arizona law and procedures established by the Board, but subject to the limitations set forth herein, the Master Association shall make the Governing Documents, books, records and financial statements of the Master Association available for inspection and copying by each Owner. The Master Association may withhold from Owners the books, records and financial statements that the Master Association is, by law, permitted or required to withhold. Developer shall be under no obligation to make its own books and records available for inspection by any Owner, Member or other Person.

1 20. Article VIII, Section 1 of the Association's Bylaws provide:

2 Miscellaneous Section

3 1. Books and Accounts.

4
5 All books and records of the Association may be inspected by
6 any Member, or his agent or attorney, at any reasonable time
7 upon ten (10) business days notice. The following are not
8 subject to inspection by any party other than the Board of
9 Directors and the management agent(s):

10 (a) Privileged communication between an attorney for the
11 Association and the Association, including, but not limited to,
12 legal advice from an attorney for the Board or the Association;

13 (b) Pending litigation;

14 (c) Meeting minutes or other records of a closed, executive
15 meeting of the Board held in accordance with Arizona law;

16 (d) Personal, health or financial information about an
17 individual Member of the Association, an individual employee
18 of the Association, or an individual employee of a contractor
19 for the Association;

20 (e) Records relating to job performance of, compensation of,
21 health records of, or specific complaints against an individual
22 employee of the Association or an individual employee of a
23 contractor of the Association who works under the direction of
24 the Association; and

25 (f) Financial and other records of the Association if disclosure
26 would violate any state or federal law.

27 **CONCLUSIONS OF LAW**

28 1. A.R.S. § 41-2198.01 permits an owner or a planned community
29 organization to file a petition with the Department for a hearing concerning violations of
30 planned community documents or violations of statutes that regulate planned
31 communities. That statute provides that such petitions will be heard before the Office of
32 Administrative Hearings.

33 2. Petitioner bears the burden of proof to establish that Respondent violated
34 Section 5.10 of the Association's CC&Rs, Article III, Section 1 of the Association's

1 Bylaws, and A.R.S. § 33-1805 by a preponderance of the evidence.² Respondent bears
2 the burden to establish affirmative defenses by the same evidentiary standard.³

3 3. A preponderance of the evidence is such proof as convinces the trier of fact
4 that the contention is more probably true than not.”⁴ A preponderance of the evidence is
5 “[t]he greater weight of the evidence, not necessarily established by the greater number of
6 witnesses testifying to a fact but by evidence that has the most convincing force; superior
7 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
8 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather
9 than the other.”⁵

10 A.R.S. § 33-1805 provides in pertinent part follows:

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

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

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

30 2. Pending litigation.

2 See A.R.S. § 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).

3 See A.A.C. R2-19-119(B)(2).

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

5 BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

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

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

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

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

20 4. "In applying a statute . . . its words are to be given their ordinary meaning
21 unless the legislature has offered its own definition of the words or it appears from the
22 context that a special meaning was intended."⁶ Each word, phrase, clause, and
23 sentence must be given meaning so that no part of the legislation will be void, inert, or
24 trivial. *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 204, ¶ 17 (App. 2007). Legislation must
25 also be given a sensible construction that avoids absurd results. *State v. Gonzales*, 206
26 Ariz. 469, 471, ¶12 (App. 2003). If the words do not disclose the legislative intent, the
27 court will scrutinize the statute as a whole and give it a fair and sensible meaning.
28 *Luchanski v. Congrove*, 193 Ariz. 176, 178, ¶ 9.

29 5. The preponderance of the evidence shows that at the time of Petitioner's
30 request for documents and communication regarding the keyless entry program,
Petitioner was involved in litigation with Respondent regarding an amendment to the
CC&Rs that prohibits short-term rentals. The evidence presented at hearing shows that

⁶ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 the keyless entry program controls renters' access to Desert Mountain. Therefore, the
2 Administrative Law Judge concludes that Respondent was permitted to withhold
3 documentation and communication related to the keyless entry program from Petitioner,
4 due to pending litigation regarding the CC&Rs amendment that prohibits short-term
5 rentals.

6 6. Petitioner has failed to establish that Respondent violated A.R.S. § 33-1805,
7 Article VIII, Section 1 of the Association's Bylaws, and Section 5.10 of the Association's
8 CC&Rs.

9 7. Accordingly, the petition should be dismissed and Respondent is deemed to
10 be the prevailing party in this matter.

11 **ORDER**

12 **IT IS ORDERED** that the petition of Nicole Armsby (NICDON 10663 LLC) is
13 dismissed.

14 **NOTICE**

15 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties**
16 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S.**
17 **§ 41-1092.09, a request for rehearing in this matter must be filed with the**
18 **Commissioner of the Department of Real Estate within 30 days of the service of**
19 **this Order upon the parties.**

20 Done this day, September 7, 2021.

21
22 /s/ Velva Moses-Thompson
23 Administrative Law Judge
24

25 Transmitted electronically to:

26
27 Judy Lowe
28 Commissioner
29 Arizona Department of Real Estate
30 100 N. 15th Avenue, Suite 201
Phoenix, Arizona 85007

Attn:

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DGardner@azre.gov

Transmitted by US mail and electronically this day September 7th, 2021 to:

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