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ADMINISTRATIVE LAW JUDGE DECISION

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

The dispute between Petitioner and Respondent arises from A.R.S. § 33-1804, 33-1805 and Community Document Conditions, Covenants, and Restrictions (CCRs) Section 15 sub c. The Petitioner states in the petition, "In violation of Arizona law 33-1805 paragraph A, the HOA has continually refused to release or to allow an on site inspection of all HOA documents... In violation of Arizona law 33-1804 paragraph A, the board has continually closed meetings to owners and unannounced as prescribed in paragraph B pf [sic] Arizona law 33-1804... Board is in violation of Section 15 subsection c of CCR's regarding removal and replacing board members"

1 4. At the outset of the hearing, Petitioner indicated that the issue regarding the
2 removal and replacement of board members was being addressed in a separate venue,
3 and therefore, would not be a subject of the instant matter. Further, Respondent raised
4 the issue that the statutes Complainant cited in the Petition were applicable to
5 homeowners' associations while Respondent was a condominium unit owners'
6 association. After discussion, the hearing proceeded with the understanding that the
7 statutes applicable to the instant matter were A.R.S. § 33-1248, instead of A.R.S. § 33-
8 1804, and A.R.S. § 33-1258, instead of A.R.S. § 33-1805.

9 5. Petitioner submitted a variety of emails they exchanged with Respondent's
10 staff and attorney to evidence their document requests. There was an abundance of
11 requests in the emails, but Petitioner specifically focused on their June 1, 2021, request
12 that provided, in pertinent part, as follows:

- 13 • ALL 1099's for board members. Musa's 2018 was never sent, no
14 record on Tim. Also all invoices for work performed by said board
15 members, I have received invoices on Musa for 2019 but none for
16 2018 and 2020 or the current year.
- 17 •
- 18 • ALL signed contracts with providers such as landscape and porters
19 with scope of work to be performed. To [sic] include copy of insurance
20 and license for providers.

21 6. On or about June 7, 2021, Respondent's counsel responded to Petitioner's
22 request as follows:

- 23 • You have already been provided with the 1099s for Lorinda and
24 Musa. Tim has not done any work on the property. You have already
25 been provided with the invoices for 2018-2020. There are no
26 invoices for 2021 to date.
- 27 •
- 28 • Vendor contracts are attached.

29 7. Petitioner presented a number of invoices from M. Sayegh and Lorinda
30 Brown dated in early 2021 that they purportedly received from another unit owner.
Petitioner also presented a copy of a landscaping contract that was provided to them from
Respondent that Petitioner alleged to have been altered.

1 8. Petitioner was unclear if they received the landscaping contract with the
2 June 7, 2021 response or were merely alleging that the contract was altered and,
3 therefore, Respondent did not comply with the document request.

4 9. Petitioner also argued that Respondent was required to give them access to
5 review all the association's documents in person at its office.

6 10. At hearing, Respondent's counsel agreed that the 2021 invoices were in
7 existence at the time of Petitioner's request and that the invoices were not provided to
8 Petitioner within 10 days.

9 11. At hearing, Respondent presented the testimony of Cathy Hacker,
10 Association Manager, who testified that allowing Petitioner to come into the office to
11 review all of the association's documents was not feasible because a number of
12 Respondent's documents were confidential and the time and effort necessary to go
13 through every file to remove those documents would be unduly burdensome on
14 Respondent. Ms. Hacker also indicated that during the time period in question, COVID-19
15 was an ongoing concern.

16 12. As to the executive session issue, Petitioner presented the March 25, 2021
17 Board Meeting agenda, which included three items to be considered during the executive
18 session: 1) Written appeals, 2) Accounts Receivable Status, and 3) Landscaping Bid
19 Review. Petitioner argued that items 2 and 3 were not appropriate to be conducted
20 outside the open portion of the meeting, but then presented no evidence or argument
21 regarding item 2.

22 13. Petitioner did not establish when the agenda for the March 25, 2021 Board
23 Meeting was issued to condominium unit owners.

24 14. Ms. Hacker testified that she recalled there was an employment issue with
25 the landscaping company. She believed the issue to be a job performance concern of or
26 specific complaints against an individual employee of the landscaping company but was
27 not certain that was the issue being addressed.

28 **CONCLUSIONS OF LAW**

29 1. The Department has jurisdiction to hear disputes between a property owner
30 and a condominium unit owners' association. A.R.S. § 32-2199 *et seq.*

1 2. In this proceeding, Petitioner bears the burden of proving by a
2 preponderance of the evidence that Respondent violated A.R.S. § 33-1248 and A.R.S. §
3 33-1258. A.A.C. R2-19-119.

4 3. A preponderance of the evidence is “[e]vidence which is of greater weight or
5 more convincing than the evidence which is offered in opposition to it; that is, evidence which
6 as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW
7 DICTIONARY 1182 (6th ed. 1990).

8 4. A.R.S. § 33-1248 provides, in relevant part, as follows:

9 A. Notwithstanding any provision in the declaration, bylaws or other
10 documents to the contrary, all meetings of the unit owners' association and
11 the board of directors, and any regularly scheduled committee meetings,
12 are open to all members of the association or any person designated by a
13 member in writing as the member's representative and all members or
14 designated representatives so desiring shall be permitted to attend and
speak at an appropriate time during the deliberations and proceedings. . . .
Any portion of a meeting may be closed only if that portion of the meeting is
limited to consideration of one or more of the following:

15

16 4. Matters relating to the job performance of, compensation of, health
17 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.

18 5. Discussion of a unit owner's appeal of any violation cited or penalty
19 imposed by the association except on request of the affected unit
owner that the meeting be held in an open session.

20

21 D. Notwithstanding any provision in the declaration, bylaws or other
22 condominium documents, for meetings of the board of directors that are
23 held after the termination of declarant control of the association, notice to
24 unit owners of meetings of the board of directors shall be given at least forty-
25 eight hours in advance of the meeting by newsletter, conspicuous posting or
any other reasonable means as determined by the board of directors. . . .
Any notice of a board meeting shall state the date, time and place of the
meeting.

26 5. A.R.S. § 33-1258 provides, in relevant part, as follows:

27 A. Except as provided in subsection B of this section, all financial and other
28 records of the association shall be made reasonably available for
29 examination by any member or any person designated by the member in
writing as the member's representative. The association shall not charge a
30

1 member or any person designated by the member in writing for making
2 material available for review. The association shall have ten business days
3 to fulfill a request for examination. On request for purchase of copies of
4 records by any member or any person designated by the member in writing
5 as the member's representative, the association shall have ten business
6 days to provide copies of the requested records. An association may
7 charge a fee for making copies of not more than fifteen cents per page.

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

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

13 2. Pending litigation.

14 3. Meeting minutes or other records of a session of a board meeting
15 that is not required to be open to all members pursuant to section 33-
16 1248.

17 4. Personal, health or financial records of an individual member of the
18 association, an individual employee of the association or an
19 individual employee of a contractor for the association, including
20 records of the association directly related to the personal, health or
21 financial information about an individual member of the association,
22 an individual employee of the association or an individual employee
23 of a contractor for the association.

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

28 6. When construing a statute, the primary goal is to ascertain the legislature's
29 intent. *State ex rel. Thomas v. Contes*, 216 Ariz. 525, 527, 169 P.3d 115, 117 (App.
30 2007). This is accomplished by first looking to the text of the statute. *Id.* If the language is
clear, its plain meaning is ascribed, unless it would lead to absurd results. *Id.*; *Marsoner*
v. Pima County, 166 Ariz. 486, 488, 803 P.2d 897, 899 (1991). If ambiguity exists,
secondary principles of statutory construction are used to determine the intent. *Contes*,
216 Ariz. at 527.

31 Non-privileged Association Business Conducted in Closed Session

32 7. A.R.S. § 33-1248 requires that all meetings of the board of directors of a
33 condominium unit owners' association must be open to the members unless the topic
34 being addressed is one of the identified exceptions and that appropriate notice of the

executive session must be provided at least 48 hours in advance.

8. In the instant matter, Petitioner did not provide any evidence as to when the March 25, 2021 Board Meeting agenda was issued, therefore, Petitioner failed to establish that the notice was not proper.

9. Further, Respondent's witness asserted that the issue regarding the landscaping bid review was a specific performance issue with an employee of the landscaping company. As that topic falls under the exception listed in A.R.S. § 33-1248(A)(4), Respondent properly considered the issue in an executive session closed to its members.

10. Accordingly, Petitioner failed to establish by a preponderance of the evidence that Respondent committed the alleged violation of A.R.S. § 33-1248.

Document Request

11. A.R.S. § 33-1258 requires that association documents, with certain identified exceptions, "shall be made reasonably available for examination by any member". Nothing in the statute however, grants a condominium unit owner the right to peruse all of the association's documents at will as some documents may properly be withheld.

12. Petitioner's assertion that the landscaping contract was altered in some way is completely without merit and cannot be the basis for a finding that Respondent violated A.R.S. § 33-1258.

13. Petitioner failed to establish that they have the right to examine all of Respondent's documents in person.

14. Respondent's witness acknowledged that certain invoices requested by Petitioner were in existence at the time of the request, but were not provided to Petitioner. Such a failure to provide the documents requested was a violation of A.R.S. § 33-1258.

15. Based on the facts presented, the Administrative Law Judge finds no civil penalty is appropriate in this matter.

ORDER

IT IS ORDERED that Petitioner's petition is affirmed in part and denied in part.

IT IS FURTHER ORDERED that Respondent reimburse Petitioner their \$500.00 filing fee for the issue on which they prevailed.

IT IS FURTHER ORDERED Respondent is directed to comply with the requirements of A.R.S. § 33-1258 going forward.

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, September 8, 2021.

/s/ Tammy L. Eigenheer
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile September 8, 2021 to:

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