

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Clifford Burnes,
4 Petitioner,
5 vs.
6 Saguaro Crest Homeowners Association,
7 Inc.,
8 Respondent.

No. 22F-H2221010-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

9
10 **HEARING:** November 19, 2021.

11 **APPEARANCES:** Petitioner Clifford (Norm) Burnes appeared on his own behalf.
12 Respondent Saguaro Crest Homeowners Association was represented by John T. Crotty.

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

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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 16, 2021, Petitioner filed a single issue petition with the Arizona Department of Real Estate (Department) which alleged that the Association failed to fulfill Petitioner's records request in violation of ARIZ. REV. STAT. § 33-1805.

3 On or about September 13, 2021, Respondent returned its ANSWER to the Department whereby it denied Petitioner's claim.

4 On or about September 22, 2021, the Department referred this matter to the Office of Administrative Hearings (OAH), an independent state agency, for an evidentiary hearing on November 19, 2021, to determine whether the alleged violation of A.R.S. § 33-1805 occurred.

THE PARTIES AND GOVERNING DOCUMENTS

5 Respondent is a homeowners' association whose members own properties in the Saguaro Crest residential real estate development located in Tucson, Arizona. Membership for the Association is compromised of the Saguaro Crest subdivision.

6. Petitioner is a Saguaro Crest subdivision property owner and a member of the Association.

HEARING EVIDENCE

7. Petitioner testified on his own behalf and submitted exhibits A through D. Respondent did not call any witnesses, but submitted exhibits A through L into the record. The Department's electronic file and NOTICE OF HEARING were also admitted into the record. The substantive evidence of record is as follows:

a. On or about December 31, 2020, Petitioner sent a certified letter to the Association requesting certain documents, as follows:

Dear Saguaro Crest HOA,

Attached, please find my document request. As you are aware, I do not agree with this statement below with regard to the time allowed by statute, however, I am signing it under protest in order to obtain the documents requested.

Per Section 33-1805 of the Arizona Statutes, I acknowledge that the association shall have ten business days to fulfill my request for review. I also acknowledge that upon the date of my request to purchase copies of records at the fee of fifteen cents per page, the association shall have ten business days to provide copies of the reviewed records.

I would like to have COPIES of all of these documents. I do agree that there will be a fee of fifteen cents (\$0.15) per page. Please let me know the total amount due, and I will pay that straight away.

In the event of duplicate copies, one copy of each document will be fine.

For all emails, please include all attachments, whether or not the attachments are relevant to the request.

Please feel free to call if you have any questions, comments or concerns.
520-250-8808.

Also, please do not place ANY ITEMS in my mailbox. Only postage paid items are to be placed in there by the US Postal Service.

Thanks.

1 Clifford (Norm) Burnes

- 2 b. Included in the request was a completed Saguaro Crest Homeowner's
3 Association Request for Review of the Association's Records Form
4 (Request Form). The prepopulated portion of the form included the
5 following statement:

6 Per Section 33-1805 of the Arizona Statutes, I acknowledge that the
7 association shall have ten business days to fulfill my request for review. I
8 also acknowledge that upon the date of my request to purchase copies of
9 records at the fee of fifteen cents per page (8.5"x11"), the association shall
10 have ten business days to provide copies of the reviewed records.

- 11 c. The Request Form identified Petitioner as "Clifford (Norm) Burnes" and
12 provided his address as "4138 W. Bent Saguaro Court" or Saguaro Crest
13 Lot #6.
14 d. Attached to the Request Form was a list of nine items of which Petitioner
15 was requesting copies.
16 e. On or about December 31, 2020, Petitioner also sent an email to the
17 Association including substantially the same request.
18 f. On or about January 5, 2021, the Association received Petitioner's
19 document request.
20 g. On or about January 7, 2021, the Association purportedly sent Petitioner a
21 letter indicating he could review the requested documents on January 12,
22 2021. The letter was sent by certified mail to "Norm Burnes" at the address
23 "4138 W. Moonlit Saguaro Ct." and therefore was not delivered to Petitioner.
24 h. On or about January 21, 2021, the Association's letter to "Norm Burnes"
25 was returned to the Association.
26 i. On or about January 26, 2021, the Association purportedly sent Petitioner a
27 letter indicating he could review the requested documents on "February 4,
28 2020, and February 11, 2020." The letter was sent by certified mail to "Norm
29 Burnes" at "4138 West Bent Saguaro Ct." indicating it was a "Resubmittal
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1 and Scheduling due to undelivered US Postal Letter.” The January 7, 2021
2 letter was included in the mailing as well.

3 j. On or about January 29, 2021, Petitioner received the letter from the
4 Association.

5 k. On or about February 4, 2021, Petitioner reviewed the documents at the
6 Association’s office and requested copies of the documents be provided to
7 him.

8 l. On or about February 8, 2021, the Association sent a package with the
9 copies of the requested records by Restricted Certified Mail to “Norm
10 Burnes.” Petitioner was unable to sign for the package because his legal
11 name was Clifford Burnes, not “Norm Burnes” as indicated on the package.

12 m. On or about February 24, 2021, Petitioner verbally notified Joseph Martinez
13 the he had been sent a package requiring a signature, but was unable to do
14 so because of the name issue. Petitioner indicated that, in the event the
15 package was from the Association, it would need to resend the package to
16 him.

17 n. On or about February 26, 2021, the Association resent the package with the
18 copies of the requested documents by Restricted Certified Mail to “Clifford
19 Burnes.”

20 o. On or about February 27, 2021, Petitioner signed for and received the
21 package with the requested documents.

22 **ARGUMENTS**

23 Petitioner’s argument

24 8. Petitioner argued that the Association wrongly required him to inspect the
25 documents he requested prior to providing him with a copy of the documents. Further,
26 Petitioner asserted that the Association failed to allow him to inspect the requested
27 documents or provide him with copies within ten days as required by Arizona statute.

28 9. Ultimately, Petitioner asked the Tribunal to issue an order granting his
29 appeal, including requiring the Association to comply with applicable laws. Petitioner also
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asked his filing fee be reimbursed and that a civil fine be imposed against Respondent if it was held in violation.

Respondent's argument

10. Respondent asserted that it interpreted ARIZ. REV. STAT. § 33-1805 to mean that it could require a homeowner to inspect documents before providing copies of the documents because it was more "efficient" to do so.

11. Respondent argued that it acted in good faith when it attempted to notify Petitioner of the date he could inspect the requested documents and when it attempted to provide Petitioner with the requested documents. Respondent asserted that its attempts to contact Petitioner established it had made the records "reasonably available" for review.

12. Respondent attempted to shift the blame for the erroneous mailings to Petitioner because Petitioner sometimes signed his emails as "Norm Burnes" or identified himself of "Clifford (Norm) Burnes". However, counsel for Respondent acknowledged that Respondent would have had a list of members including Petitioner's legal name and correct address before it sent any responses to him via certified mail.

13. Ultimately, Respondent requested that the Tribunal deny Petitioner's appeal.

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.¹

¹ See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

1 3. In this proceeding, Petitioner bears the burden of proving by a
2 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1805.²

3 4. “A preponderance of the evidence is such proof as convinces the trier of fact
4 that the contention is more probably true than not.”³ 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 than
9 the other.”⁴

10 5. In Arizona, when construing statutes, we look first to a statute's language as
11 the best and most reliable index of its meaning. If the statute's language is clear and
12 unambiguous, we give effect to that language and apply it without using other means of
13 statutory construction, unless applying the literal language would lead to an absurd result.
14 Words should be given “their natural, obvious, and ordinary meaning.”⁵

15 6. Statutes should be interpreted to provide a fair and sensible result.
16 *Gutierrez v. Industrial Commission of Arizona*; see also *State v. McFall*, 103 Ariz. 234,
17 238, 439 P.2d 805, 809 (1968) (“Courts will not place an absurd and unreasonable
18 construction on statutes.”).

19 7. When the legislature uses a word or words in one section of a statute, but
20 not another, the tribunal may not read those words into the section where the legislature
21 did not include them.⁶ Unless defined by the legislature, words in statutes are given their
22 ordinary meanings.⁷

23 8. Each word, phrase, clause, and sentence of a statute or rule must be given
24 meaning so that no part will be void, inert, redundant, or trivial.⁸

25 9. ARIZ. REV. STAT. § 33-1805 provides, in pertinent part, as follows:

26 ² See ARIZ. ADMIN. CODE R2-19-119.

27 ³ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

28 ⁴ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

29 ⁵ *Arpaio v. Steinle*, 201 Ariz. 353, 355 ¶ 5, 35 P.3d 114, 116 (App. 2001) (footnotes and citations omitted).

30 ⁶ See *U.S. Parking v. City of Phoenix*, 160 Ariz. 210, 772 P.2d 33 (App. 1989).

⁷ *Id.*

⁸ See *Deer Valley, v. Houser*, 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007).

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

12 10. On December 31, 2020, Petitioner submitted a records request to
13 Respondent that sought to obtain copies of certain items in the Association's records.
14 Petitioner specifically demanded that his requests be fulfilled within 10 days. The record
15 reflects that Respondent had until January 10, 2021, to comply with Petitioner's request.
16 Even assuming Respondent was not aware of Petitioner's request until January 5, 2021,
17 Respondent had until January 15, 2021, to comply with Petitioner's request.

18 11. Petitioner did not have an opportunity to inspect the records until February
19 4, 2021, and did not obtain a copy of the documents until February 27, 2021.

20 12. Nothing in ARIZ. REV. STAT. § 33-1805 can be read to permit an HOA to
21 require members to first inspect records before it provides copies of records requested by
22 members. Accordingly, Respondent cannot be said to have provided Petitioner with
23 copies of the records he requested within 10 days of his request.

24 13. A violation of ARIZ. REV. STAT. § 33-1805 was established. Therefore, the
25 undersigned Administrative Law Judge concludes that because Petitioner sustained his
26 burden of proof that Respondent violated ARIZ. REV. STAT. § 33-1805, his petition must be
27 granted.

28 **ORDER**

29 Based on the foregoing,

30 **IT IS ORDERED** that Petitioners' petition be granted.

IT IS FURTHER ORDERED that Respondent reimburse Petitioner's filing fee of
\$500.00 in certified funds.

IT IS FURTHER ORDERED that Respondent shall henceforth comply with ARIZ. REV. STAT. § 33-1805.

In the event of certification of the Administrative Law Judge Decision by the Director of the Office of Administrative Hearings, the effective date of the Order will be five days from the date of that certification.

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 Arizona Department of Real Estate within 30 days of the service of this Order upon the parties.

Done this day, December 9, 2021.

/s/ Tammy L. Eigenheer
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile December 9, 2021 to:

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