IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Brian Gordon and Rosalie Gordon, Petitioners, v. Tucson Estate No. Two Owner's Association, Respondent.	No. 24F-H043-REL **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: Convened and concluded on June 21, 2024.

APPEARANCES:

For Petitioners: Brian Gordon and Rosalie.

For Respondents: Jason Smith.

ADMINISTRATIVE LAW JUDGE: Samuel Fox

EXHIBITS ADMITTED INTO EVIDENCE: Notice of Hearing File, provided by the Department of Real Estate. Petitioners' Exhibits 1.1 through 4.3.

FINDINGS OF FACT

PETITIONERS' CLAIMS

1. Tucson Estates No. Two Owner's Association ("Respondent") is a planned community association in Tucson, Arizona.

2. Brian Gordon and Rosalie Gordon ("Petitioners") own a home located at [redacted] and are members of Respondent.

3. On or about March 22, 2024, Petitioners filed a four-issue Petition with the Arizona Department of Real Estate ("Department") alleging that Respondent had violated Planned Community Statutes, A.R.S. §§ 33-1804 and 1805; its Bylaws, Articles 2.21, 6.3.2, 7, and 10.4; and CC&Rs, Sections 6, 7, and 8. The four issues identified in the Petition, for which Petitioners paid the requisite $2,000.00 filing fee, are as follows:

i) Violation of Planned Communities Act 33-1805; Nonprofit Corp. Act 10-11601; & By-laws Article 10, by not recording

> and making available the minutes of all Finance Committee Meetings held in 2023: Feb 2; Apr 24; Oct 9; 16 & 23. The HOA opinion is they are not required.
>
> ii) Violation of Planned Communities Act 33-1805; Nonprofit Corporation Act 10-11601; & By-laws Article 10, by not keeping and making financial and other HOA business documentation available for review. In 2023, on Oct 22, Nov 15, & Nov 17; I requested copies of the Budget Working Papers which the BOD has refused to provide. They insisted they are destroyed immediately which also violates HOA retention policy.
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> iii) Violation of Planned Communities Act 33-1805; Nonprofit Corporation Act 10-11601; & By-laws Article 10, by not keeping and making financial and other HOA business documentation available for review. On May 25, 2022, June 1, 2022, Dec 12, 2022, & July 26, 2023; I requested copies of the Accounts Payable journal with GL detail. Instead all I received were random pages from the General Ledger without GL or other accounting detail. They have insisted they do not have any Accounts Payable reporting ability.
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> iv) Violation of Planned Communities Act 33-1805; Nonprofit Corporation Act 10-11601; & By-laws Article 10, by not keeping and making financial and other HOA business documentation available for review. In Oct 12, 2023, I requested to review in the office the IRS Tax filings. What I was given to review were photocopies of just pages 1 & 2 of the 1120-h forms without any other corporate tax forms or IRS schedules that would have been included with those filings. I also requested on Oct 25, 2023 to review all back-up documentation for the tax filings but was told nothing else existed other then the General Ledger report. This also violates the HOA retention policy.[1]

4. Respondent, through its Attorney, Jason Smith, filed a written answer to the Petition, denying that it had violated any Bylaws or statutory provisions.

5. The Department referred the Petition to the Office of Administrative Hearings, an independent state agency, for an evidentiary hearing.

6. A hearing was held on June 21, 2024. Administrative Notice was taken of the agency record. Petitioners testified on their own behalf; called James Tilley, a

[1] Not. of Hr'g. File, Homeowners Association (HOA) Dispute Process Petition. (All errors included in original.)

member of Respondent, to testify; and entered Exhibits into evidence. Mandi Bates, Community Manager, testified for Respondent.

REFERENCED BYLAWS[2]

7. Article 7 of the Bylaws provides in relevant part as follows:

> The Secretary (or his or her designee) shall ensure that all the proceedings of the Meetings of the Members, and the Board of Directors, are recorded in book(s) kept for that purpose. The Secretary (or his or her designee) is the custodian of all contracts, deeds, and documents, all other indicia of title to properties owned by the Association and of its corporate records (except accounting records). Upon request, the Secretary (or his or her designee) shall make the records of the Association which are not in the custody of the Treasurer, available for inspection pursuant to the provisions of Section 10.4 of these Bylaws, at all reasonable times to any Directors or Member of the Association. All such records of the Association shall be readily accessible from the Association's office.

8. Article 10.4 of the Bylaws provides in relevant part as follows:

> Books and Records. The Community Documents, together with the books and records of account and Members, and minutes of the Members Meetings, and open portions of Board of Directors meetings shall be available for inspection by any Member, or any person designated by a Member in writing as that Member's representative, during reasonable business hours at the principal office of the Association. Availability of such records for inspection may be withheld from disclosure pursuant to the provisions of A.R.S. §33-1805(B) and §33-1805(C). The Association may charge a reasonable fee for production and photocopying of Community Documents, books and records requested by a Member.

[2] The Complaint identifies Bylaw sections 2.21 and 6.3.2; however, the issues presented do not allege violations of these sections. Section 2.21 regards rules concerning the recreational vehicle storage facility. Section 6.3.2 regards upkeep of common areas and related budgetary issues.

REFERENCED STATUTES[3]

9. A.R.S. § 33-1805 provides as follows:

Association financial and other records

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

10. A.R.S. § 10-11601 provides as follows:

A corporation shall keep as permanent records minutes of all meetings of its members and board of directors, a record of all actions taken by the members or board of directors without a meeting and a record of all actions taken by a committee of the board of directors on behalf of the corporation.

REFERENCED COVENANTS, CONDITIONS AND RESTRICTIONS[4]

11. CC&R Section 8 provides as follows:

"Community Documents" means the "Articles of Incorporation", the "Declaration", the "Bylaws", the "Rules and Regulations", the "Architectural Guidelines", the "Rules Concerning The Recreational Vehicle Storage Facility", and any other regulatory document promulgated to enhance the safety, welfare and enjoyment of Lot Owners and Residents within the properties.

HEARING EVIDENCE

COMPLAINT NUMBER 1:

Violation of Planned Communities Act 33-1805; Nonprofit Corp. Act 10-11601; & By-laws Article 10, by not recording and making available the minutes of all Finance Committee Meetings held in 2023: Feb 2; Apr 24; Oct 9; 16 & 23. The HOA opinion is they are not required.

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[3] The Petitioners identified A.R.S. § 33-1804; however, the issues presented do not allege violations of this section.

[4] The Petitioners identified CC&R § 6 and 7; however, the issues presented do not allege violations of these sections.

12. On or around January 17, 2024, Petitioners requested copies of the Finance Committee Meeting minutes.[5]

13. On or around January 18, 2024, Ms. Bates, acting as the representative for Respondent, informed Petitioners "I do not believe she is going to provide minutes as they were budget meetings and would just state that the committee discussed the budget and not provide all changes. I can ask though."[6]

14. Petitioners did not receive copies of the Finance Committee Meeting minutes.

15. Respondent does not regularly keep meeting minutes for the Finance Committee.

16. Respondent's Board of Directors created a Finance Committee and established rules for its operation. In relevant part, "the Committee shall keep minutes of all its meetings as a permanent record of its actions."[7]

17. The Finance Committee rules also establish the Committee Responsibilities and Duties:

> 1) Advise and assist the Board of Directors in areas of finance, financial planning, and in monitoring budget and investment practices.
> 2) Review and analyze monthly financial statements.
> 3) Assist in the preparation, monitoring and analysis of the annual budget.
> 4) Make recommendations regarding financial controls, budget procedures, fiscal accountability and pertinent fiscal policies and procedures.
> 5) Review insurance provisions and make recommendations on adequacy of coverage, coverage options, costs etc.

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[5] Not. of Hr'g. File, Petition and Supporting Documents, at 37–43.

[6] *Id.*

[7] *Id.* at 25. During their respective examinations, the parties put forward their positions regarding what would trigger the requirement to keep meeting minutes under this rule. Respondent's position was that meeting minutes, if required, would only be required if an action was taken by the committee and that the Finance Committee is purely advisory, so it does not take any "actions." Petitioners' position is that no formal "action" is required, but that a vote of those present would suffice.

6) Review and make recommendations on the adequacy of and contributions to the reserve fund.
7) Review all budgeted and non-budgeted expenses and make recommendations regarding any impact on financial status.
8) Make recommendations regarding the selection of a tax preparer and the review/audit of the Association's books and records.
9) Review the annual review/audit and tax reports.
10) Perform other tasks as requested by the Board.[8]

18. There was no dispute that the Committee rules were approved by the Board of Directors, that the rules were in place during each of the Committee meetings at issue, that the rules provided to this Tribunal were accurate, or that votes occurred during the Finance Committee meetings.

19. Ms. Bates testified that Respondent provided all of the records in its position to the Petitioners.

20. Petitioners testified that Respondent was required to keep meeting minutes under A.R.S. § 10-1601. Petitioners offered recordings into evidence, but significant portions of those recordings were unintelligible. Instead, Petitioners testified to their contents: votes were made during the meeting, and at least once, a committee member stated that they were taking notes for meeting minutes.

COMPLAINT NUMBER 2:

Violation of Planned Communities Act 33-1805; Nonprofit Corporation Act 10-11601; & By-laws Article 10, by not keeping and making financial and other HOA business documentation available for review. In 2023, on Oct 22, Nov 15, & Nov 17; I requested copies of the Budget Working Papers which the BOD has refused to provide. They insisted they are destroyed immediately which also violates HOA retention policy.

21. On October 22, 2023, Petitioners requested copies of budget working papers of the Finance Committee.[9]

[8] *Id.* at 23.
[9] *Id.* at 45–53.

22. On or around November 17, 2023, Respondent provided documents to Petitioners. Petitioners inquired about why they received the documents they received, and Respondent stated: "You wanted what was used for the budget and that was what I provided. The GL and Indicated Actuals along with the 'unapproved budget', which was provided at the meeting. That's it."[10]

23. Ms. Bates explained the process of how the budget working papers are created. Respondent's management company, AAM, provided Respondent with a proprietary spreadsheet to use for budgeting. The Community Manager and the Treasurer created a draft of this spreadsheet, which they provided to the Finance Committee for discussion. Respondent only maintained one version of the spreadsheet, and when changes were made, the spreadsheet was updated.

24. Any notes, drafts, edits, or comments that committee members made on their personal versions were not records of Respondent, which did not collect, track, or record the committee members' individual notes.

25. Ms. Bates also testified that Respondent provided all of the responsive records in its possession to Petitioners.

26. Petitioners testified that they requested copies of the budget working papers several times verbally and in writing, and that in return Petitioners had only received copies of the general ledger. Petitioners testified that they did not receive working documents. They received documents without notes or markups and without versions of the documents to indicate changes. Petitioners testified that, at the finance committee meeting, the Treasurer discussed draft documents being sent to members for review.

27. Petitioners also testified that Respondent had a records retention policy that required budget working papers to be kept for three years.[11]

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[10] *Id.*

[11] *Id.* at 55. Respondent's position was that the retention policy was AAM's policy, not Respondent's policy.

COMPLAINT NUMBER 3:

Violation of Planned Communities Act 33-1805; Nonprofit Corporation Act 10-11601; & By-laws Article 10, by not keeping and making financial and other HOA business documentation available for review. On May 25, 2022, June 1, 2022, Dec 12, 2022, & July 26, 2023; I requested copies of the Accounts Payable journal with GL detail. Instead all I received were random pages from the General Ledger without GL or other accounting detail. They have insisted they do not have any Accounts Payable reporting ability.

28. In May, June, and December 2022, and in July 2023, Petitioners requested accounts payable journals from 2021, 2022, and 2023 and/or a check register with details.[12]

29. Respondent provided pages[13] from the general ledger that did not contain the details that Petitioners were seeking.

30. Respondent's Management Company, AAM, maintained Respondent's accounting information. AAM used a third party for accounts payable processing. The third party's digital output was integrated with AAM's records, and AAM provided basic reports to Respondent.[14] Respondent provided those basic reports to Petitioners.

31. Respondent later learned about a more detailed report that it could purchase from AAM and offered those details to Petitioners, but Petitioners refused those documents.

32. The contract between Respondent and AAM stated:

> Accounting Services: To keep full, detailed and adequate accounts and records of all funds received and disbursed with reference to the Agent's management of Association and said records shall be available for representatives of the Association to examine at any time during business hours upon reasonable notice.[15]

33. Ms. Bates testified that Respondent received account payable reports in the form of check receipts and the general ledger, which Respondent provided to Petitioners, but Petitioners were not satisfied with that information.

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[12] *Id.* at 61–67.
[13] Petitioners described these pages as random.
[14] Pet. Exh. 2.1, 2.3.
[15] Pet. Exh. 3.

COMPLAINT NUMBER 4:

Violation of Planned Communities Act 33-1805; Nonprofit Corporation Act 10-11601; & By-laws Article 10, by not keeping and making financial and other HOA business documentation available for review. In Oct 12, 2023, I requested to review in the office the IRS Tax filings. What I was given to review were photocopies of just pages 1 & 2 of the 1120-h forms without any other corporate tax forms or IRS schedules that would have been included with those filings. I also requested on Oct 25, 2023 to review all back-up documentation for the tax filings but was told nothing else existed other then the General Ledger report. This also violates the HOA retention policy

34. On October 12, 2023, Petitioners requested IRS tax filings for the past ten years.[16]

35. When the documents were ready, Petitioners went to the office to review the documents. Instead of complete or original tax documents, Petitioners received only photocopies of two pages of schedule 1120-h.[17] Petitioners asked about the other schedules and were told that Respondents did not have additional information.

36. Petitioners got a copy of the complete tax document at a later date, and it was fourteen pages long.[18]

37. On or around October 22, 2023, Petitioners requested the backup documentation for the tax filings.

38. Respondent believed that additional tax documents might be with the certified public accountant (CPA).[19] However, Respondent later told Petitioners that the CPA did not have the documents either. Respondent later found some backup documents for 2017, 2018, and 2019.

39. Petitioners' witness Mr. Tilley testified that when he requested supporting tax documents, that Respondent stated no supporting documents were available. He

[16] Not. of Hr'g. File, Petition and Supporting Documents at 91.
[17] Pet. Ex. 4.1, 4.2.
[18] Pet. Ex. 4.3.
[19] *See also* Not. of Hr'g. File, Petition and Supporting Documents at 95.

was also given the same information as Petitioners, two pages of the Form 1120-h and access to the General Leger. Mr. Tilley testified that after a supervisor at AAM became involved, an additional 7,000 documents became available for review pursuant to the request for supporting tax documents.

40. Ms. Bates testified that upon receiving the request for tax documents, she provided everything available in Respondent's custody. After providing the documents that Respondent had, Ms. Bates contacted the CPA and asked about what backup information was used to back up the taxes. The CPA said he used the general ledger and he did not have the tax documents. Ms. Bates testified that she did not know where additional tax documents were maintained.

CONCLUSIONS OF LAW

1. A.R.S. § 32-2199 authorizes the administrative law judge to "adjudicate complaints regarding and ensure compliance with . . . [t]itle 33, chapter 16 and planned community documents." This Tribunal is not authorized to adjudicate complaints arising from the Arizona Nonprofit Corporations Act, Internal Revenue Service regulations, or other laws or regulations.

2. A.R.S. § 32-2199.01 permits a member of a planned community to file a petition with the Department for a hearing concerning the planned community association's alleged violations as set forth in Title 33, Chapter 16. This matter lies within the Department's jurisdiction. That statute provides that such petitions will be heard before the Office of Administrative Hearings.

3. A.R.S. § 32-2199.02 authorizes the administrative law judge to "order any party to abide by the statute, condominium documents, community documents or contract provision at issue and may levy a civil penalty on the basis of each violation." This

Tribunal is not authorized to order other remediation or order civil penalties for other conduct.

4. A.R.S. § 33-1805 provides that "all financial and other records of the association shall be made reasonably available for examination by any member." It does not require Respondent to provide documents that it does not have nor does it require Respondent to create documents in response to a request.

5. Documents in the custody of AAM are in the custody of Respondent, and Respondent is obligated to provide them to members under A.R.S. § 33-1805.

6. A.R.S. § 33-1805 provides that "[t]he association shall have ten business days to fulfill a request for examination. On request for purchase of copies of records by any member or any person designated by the member in writing as the member's representative, the association shall have ten business days to provide copies of the requested records."

7. Respondent's Bylaws § 10.4 provides that "books and records of account . . . shall be available for inspection by any Member . . . ." It does not require Respondent to provide documents that it does not have nor does it require Respondent to create documents in response to a request.

8. Petitioners bear the burden of proof to establish that Respondent violated applicable statutes, CC&Rs, and/or Bylaws by a preponderance of the evidence.[20] Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.[21]

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[20] *See* A.A.C. R2-19-119(A) and (B)(1); *see also Vazzano v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952).

[21] *See* A.A.C. R2-19-119(B)(2).

9. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."[22] A preponderance of the evidence is "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."[23]

COMPLAINT NUMBER 1:

Violation of Planned Communities Act 33-1805; Nonprofit Corp. Act 10-11601; & By-laws Article 10, by not recording and making available the minutes of all Finance Committee Meetings held in 2023: Feb 2; Apr 24; Oct 9; 16 & 23. The HOA opinion is they are not required.

1. The CC&R define "Community Documents" to include the "Bylaws, the Rules and Regulations . . . and any other regulatory document promulgated to enhance the safety, welfare and enjoyment of Lot Owners and Residents within the properties."[24]

2. The Finance Committee is an advisory committee created by the Board of Directors pursuant to Article VIII of the Bylaws.[25] The Committee's creation was established by a Community Document, which set forth a list of Committee Responsibilities and Duties and stated that "the Committee shall keep minutes of all its meetings as a permanent record of its actions."[26]

3. The Responsibilities and Duties set the parameters of the "actions" that the Finance Committee was created to take. When the Committee advised, assisted, reviewed, analyzed, recommended, or otherwise took action within the parameters of its

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[22] MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).
[23] BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).
[24] Not. of Hr'g. File, Ex A, CC&Rs, at 2. (Internal quotations omitted).
[25] Not. of Hr'g. File, Ex B, Bylaws, at 17.
[26] Not. of Hr'g. File, Petition and Supporting Documents, at 25.

Responsibilities and Duties, that was an "action" by the Committee as established by the Board.

4. The preponderance of the evidence supports that Respondent failed to record meeting minutes at the Finance Committee meetings as required by its Community Documents. Accordingly, Petitioners met their burden to support that Respondent failed to abide by its Community Documents.

COMPLAINT NUMBER 2:

Violation of Planned Communities Act 33-1805; Nonprofit Corporation Act 10-11601; & By-laws Article 10, by not keeping and making financial and other HOA business documentation available for review. In 2023, on Oct 22, Nov 15, & Nov 17; I requested copies of the Budget Working Papers which the BOD has refused to provide. They insisted they are destroyed immediately which also violates HOA retention policy.

5. In response to Petitioners' request for budget working papers, Respondent provided all available copies of the budget working papers: a copy of the unapproved budget, a copy of the general ledger, and it had already provided, at the time of the Finance Committee meeting, the budget working papers draft.[27] Accordingly, Petitioners failed to meet their burden to support that Respondent did not make records available for review. Accordingly, Petitioners did not meet their burden to support a violation of A.R.S. § 33-1805 or to support that Respondent failed to abide by its Community Documents.

COMPLAINT NUMBER 3:

Violation of Planned Communities Act 33-1805; Nonprofit Corporation Act 10-11601; & By-laws Article 10, by not keeping and making financial and other HOA business documentation available for review. On May 25, 2022, June 1, 2022, Dec 12, 2022, & July 26, 2023; I requested copies of the Accounts Payable journal with GL detail. Instead all I received were random pages from the General Ledger without GL or other accounting detail. They have insisted they do not have any Accounts Payable reporting ability.

[27] While Petitioners contended that other versions were "destroyed", the evidence indicated that any amendments made between the two versions identified would be made during the Finance Committee meeting, the relevant records for which are addressed in Complaint Number 1, or on the personal versions, belonging to the individual members and which were not Respondent's records.

6. The preponderance of the evidence establishes that Respondent provided copies of the available accounts payable reports to Petitioners. When Respondent later identified an additional report, available for purchase through AAM, it offered to get that report for Petitioners. Petitioners refused. Accordingly, Petitioners failed to meet their burden that Respondent violated A.R.S. § 33-1805 or failed to abide by its Community Documents.

COMPLAINT NUMBER 4:

Violation of Planned Communities Act 33-1805; Nonprofit Corporation Act 10-11601; & By-laws Article 10, by not keeping and making financial and other HOA business documentation available for review. In Oct 12, 2023, I requested to review in the office the IRS Tax filings. What I was given to review were photocopies of just pages 1 & 2 of the 1120-h forms without any other corporate tax forms or IRS schedules that would have been included with those filings. I also requested on Oct 25, 2023 to review all back-up documentation for the tax filings but was told nothing else existed other then the General Ledger report. This also violates the HOA retention policy

7. The preponderance of the evidence establishes that Petitioners did not receive full copies of Respondent's tax returns or backup documentation for the tax returns within ten days of their respective October requests. However, Petitioners received compete tax form and backup documentation at a later date. The preponderance of the evidence supports that Respondent had the requested documents (or had access to them through Respondent's agents, such as AAM) but failed to provide those documents to the Petitioners in a timely manner.

8. Accordingly, Petitioners met their burden to support that Respondent violated A.R.S. § 33-1805.

ORDER

IT IS ORDERED that Petitioners be deemed the prevailing party in this matter regarding Petition Issues 1 and 4.

IT IS ORDERED that Respondent be deemed the prevailing party in this matter regarding Petition Issues 2 and 3.

IT IS ORDERED that Respondent pay Petitioners the filing fee of $1,000.00, to be paid directly to Petitioners within thirty (30) days of this Order.

IT IS ORDERED Respondent is directed to comply with the requirements of its Community Documents going forward.

IT IS ORDERED Respondent is directed to comply with the requirements of A.R.S. § 33-1805 going forward.

No Civil Penalty is found to be appropriate in this matter.

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, July 10, 2024.

/s/ Samuel Fox
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile July 10, 2024 to:

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