

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2023-000179-001 DT

04/04/2024

HONORABLE JOSEPH P. MIKITISH

CLERK OF THE COURT
S. Ortega
Deputy

TOM BARRS

TOM BARRS
PO BOX 14122
SCOTTSDALE AZ 85267

v.

DESERT RANCH HOMEOWNERS
ASSOCIATION (001)

DESERT RANCH HOMEOWNERS
ASSOCIATION
NO ADDRESS ON RECORD

JUDGE MIKITISH
OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

MINUTE ENTRY

Agency Case No. HO22-22050 & HO22-22054

Petitioner Tom Barrs (“Mr. Barrs”) appeals from the decision of the Arizona Department of Real Estate (“the Department”) dated May 23, 2023, denying his request to compel Respondent, Desert Ranch Homeowners Association (“Desert Ranch”, “Association” or “HOA”) to provide records containing the names and addresses of the members of the HOA within a reasonable time. For the reasons stated below, the decision of the department is reversed and remanded.

I. Background

Mr. Barrs is a property owner and member of Desert Ranch. ROA 105, 106. Desert Ranch is a planned community in Scottsdale and is governed by a board consisting of five

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owners. The Association is a registered nonprofit corporation. ROA 152-153, Exhibit 63. It consists of 28 homes and six vacant lots. ROA 140-141.

Mr. Barrs made various requests for information from Desert Ranch which he asserted he had a statutory right to obtain and were not provided. For purposes of this appeal, on October 21, 2021, Mr. Barrs sent a request for an updated 2021 membership list. ROA 152, Exhibit 20. The Association's management company responded to his request by stating "the Owner Directory is not made available to the residents." Record on Appeal (ROA) 146-147, Ex P 285.

On April 18, 2022, Mr. Barrs filed a petition with the Department alleging that the Association violated A.R.S. § 33-1805 by failing to provide the directory. On May 16, 2022, the Association filed its answer with the Department whereby it denied the allegations. On May 25, 2022, the Department referred the matter to the office of administrative hearings. The Petition was consolidated for hearing with the other petitions filed by Mr. Barr.

On July 11, 2022, the Association provided a copy of the 2022 roster dated 7/5/2022 that included names and account numbers, but excluding mailing addresses, email addresses, and phone numbers. ROA 140, exhibits P 19-22. The Association previously provided membership lists with names, addresses, and phone numbers. See ROA 144-145, 146-147, 150-151.

An assigned Administrative Law Judge (ALJ) conducted the evidentiary hearing on January 9-10, 2023, and issued a ruling on February 21, 2023 denying the petition. ROA #186.

Mr. Barrs filed a petition for rehearing with the Department, pursuant to A.R.S. § 32-2199.04. On April 7, 2023, the Association filed a response. On April 19, 2023, the Department denied the motion for rehearing. See A.R.S. § 32-2199.04 (C). ROA 113-123. Mr. Barrs filed a timely notice of appeal on May 23, 2023. On June 2, 2023, a notice of action was filed with the office of administrative hearings requesting the administrative record to be transferred. ROA 124-127.

On June 15, 2023, this Court granted a stipulation to stay the proceedings for settlement purposes. On September 12, 2023, the stay was lifted. This Court has jurisdiction pursuant to Ariz. Const. Art. VI § 16 and A.R.S. §§ 12-124 and -905(A).

II. STANDARD OF REVIEW

A final decision of an administrative agency must be affirmed unless it is "contrary to law, is not supported by substantial evidence, arbitrary and capricious, or is an abuse of discretion." A.R.S. § 12-910 (F); *Berenter v. Gallinger*, 173 Ariz. 75, 77 (App. 1992). A decision that is supported by substantial evidence may not be set aside as arbitrary, capricious, or an abuse of

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discretion. *Smith v. Ariz. Long Term Care Syst.*, 207 Ariz. 217, 220 ¶ 14 (App. 2004). An agency's decision will be found to be supported by substantial evidence as long as the "decision is supported by the record," even if the record could also support a different conclusion. *Gaveck v. Ariz. State Board of Podiatry Examiners*, 222 Ariz. 433, 436 ¶ 11 (App. 2009). The Appellate Court will review conclusions of law *de novo*. *Rail N Ranch Corp. v. Hassell*, 177 Ariz. 487 (App. 1994). A decision is an abuse of discretion if it is based on an error of law. *Grant v. Ariz. Public Service Company*, 133 Ariz. 434, 455-56 (1982).

III. DISCUSSION

1. Membership lists

Mr. Barrs first argues that the Association's membership list is a clearly defined record required to be maintained by a nonprofit corporation. "A corporation or its agent shall maintain a record of its members in a form that permits preparation of a list of the names and addresses of all members and in alphabetical order by class of membership showing the number of votes each member is entitled to cast and the class memberships held by each member." A.R.S. § 10-11601 (C). Mr. Barrs argues that the membership list, as a record of the Association, is subject to request pursuant to A.R.S. § 33-1805.

Mr. Barrs further argues that the membership list, including addresses, email addresses, and phone numbers, are not subject to the privilege for personal information provided in statute. He argues that the privilege allows an association to withhold records only "to the extent that the portion withheld relates to... personal, health or financial records of an individual member of the association... including records of the association directly related to the personal, health or financial information about an individual member of the association." A.R.S. § 33-1805(B)(4). He argues that the exemption permits nondisclosure of only limited portions of records and the Association must show why nondisclosure is justified. Here, Mr. Barrs argues that the Association withheld the entire membership list, instead of only purportedly privileged information.

Mr. Barrs argues that the exception for personal information in fact means private information, similar to health or financial information about an individual member. See A.R.S. § 33-1804. He argues that cases from other states demonstrate that an expectation of privacy in name and address information is not objectively reasonable. See *Com v. Duncan*, 572 Pa 438, 455 (2003); *International Union, United Plant Guard Workers of America v. Department of State Police*, 422 Mich. 432, 458 (1985); *Tobin v. Michigan Civil Service Commission*, 416 Mich. 661 (1982). He argues that in the context of the statute, "personal" means "private" or "secret," as opposed to "relating to a particular person."

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He argues that, as to the statute, “personal” is grouped with “health” and “financial.” He argues that health and financial records are typically recognized as being afforded significant privacy interests. See Health Insurance Portability And Accountability Act of 1996, 42 U.S.C. § 1320d-6; Right To Financial Privacy, 12 U.S.C. § 3402.

Mr. Barrs further argues that the statutes govern homeowners associations in which each unit is a voting member. See A.R.S. § 33-1802 (4). He argues that transparency and accountability support the need to make information on members, including contact information, available. He argues that the Association is required to maintain the information as a business record, and should be required to disclose it to members. He argues that in interpreting a statute courts must look at the “words, context, subject matter, effects and consequences, reason, and spirit of the law.” *State ex rel Flournoy v. Mangum*, 113 Ariz. 151, 152 (1976). He argues that the spirit of the HOA laws is to allow persons to speak on each side of an issue. See A.R.S. § 33-1804. He argues that Arizona law requires associations to divulge the names and addresses associated with election materials. A.R.S. § 33-1812 (A) (6).

Mr. Barrs argues that members must have the opportunity to speak before the board takes formal action or a vote of the board members. See A.R.S. § 33-1804 (A). He argues that there is no reasonable opportunity for members to express their support or dissent for any measure without reasonable access to a membership list containing the same contact information used by the board to give notice and transmit absentee ballots. See also A.R.S. § 33-1804 (F) (policy of the state “to ensure that members have the ability to speak after discussion of agenda items but before a vote of... members is taken.” Therefore, responsible individuals “shall take into account this declaration of policy and shall construe any provision of this section in favor of open meetings.”) Mr. Barrs further argues that members are granted the right to circulate petitions necessary for removal of board members, see A.R.S. § 33-1813, but some members may not be contacted if they live out of state. He argues that California courts concluded that a statute which requires corporations to disclose addresses of members is sufficiently broad to encompass email addresses. See *Worldmark v. Wyndham Resort Development Corp.*, NoC 061019, 3-4 (Cal. Ct. App. August 24, 2010).

Mr. Barrs concludes that because names and addresses are not personal, the ALJ erred in determining that the Association was not required to produce a membership list within 10 days.

Arizona law provides that, subject to certain exceptions, “all financial and other records of the association shall be made reasonably available for examination by any member or any person designated by the member in writing as the member's representative.” A.R.S. § 33-1805 (A).

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The law further provides that an association may withhold records from disclosure “to the extent that the portion withheld relates to any of the following:

...

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.”

A.R.S. § 33-1805 (B).

In this case, Desert Ridge has kept membership lists as a part of their records undoubtedly for a variety of reasons. Unless those records qualify for an exception, they must be made available to all members. While not clearly stated in the ALJ’s ruling, the ALJ appeared to conclude that membership lists are personal records. Those membership lists containing names and addresses, however, do not appear to fall within the exemption for personal records. While they relate to individuals named in the statute, they do not relate to information that individuals normally keep private. *See Com v. Duncan*, 572 Pa 438, 455 (2003); *International Union, United Plant Guard Workers of America v. Department of State Police*, 422 Mich. 432, 458 (1985); *Tobin v. Michigan Civil Service Commission*, 416 Mich. 661 (1982). In addition, in order to actively participate in HOA affairs, all members must have the ability to know who is in the Association and which home or land they own.

The desire for additional personal information, including email addresses and phone numbers and the like, while understandable, is not necessary for active participation in the affairs of the Association. A member may contact other members by knocking on doors, leaving pamphlets, or sending mail concerning their views. Email addresses and phone numbers, however, are more personal and less public in nature. In addition, this contact information more readily can be used for marketing purposes or harassment. While disclosure of names and property addresses, without some further showing of the potential for harm, may be essential to having a homeowners association, the disclosure of email addresses and phone numbers is not.

2. Error in finding of fact regarding 2021 list

Mr. Barrs argues that the ALJ erred in concluding that the 2020 membership list was withheld, when in fact it was the 2021 roster. He argues that the exhibits in the record show a pattern of having received membership lists through 2020. Based on the Court’s rulings, the Court holds that this purported error is inconsequential to the decision in the case.

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3. Injunctive relief

Mr. Barrs argues that the ALJ should have issued injunctive relief ordering that the list be disclosed. The Court's order will address the process moving forward.

4. Request for fees and costs

Mr. Barrs argues that he is incurred fees and costs on appeal. He argues that there is a statutory basis for fees and costs. The Court will allow Mr. Barrs to submit an affidavit for an award of fees and costs. The Court, however, notes that Mr. Barrs filed his opening brief pro per, without representation by a paid attorney. The Court notes that a party cannot receive attorney's fees for his or her own time and working on an appeal.

IV. CONCLUSION

IT IS ORDERED reversing, in part, the decision of the Department.

IT IS FURTHER ORDERED that Mr. Barrs is permitted to file an application and supporting affidavit to obtain fees and costs in this matter no later than **April 26, 2024**; and the Association shall have the opportunity to file a response thereto no later than **May 24, 2024**.

Upon ruling upon any request for fees and costs, the Court will enter a final appealable order, with a remand to the department.

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.