

Petitioner.

11. The CC&Rs indicate that motor homes may be parked “within a completely enclosed garage with closed doors.” See Exhibit 2, Section 9.

12. At some point, in April 2018, Respondent’s Board President, Bill Ferguson, called Petitioner about rental activity at the property.⁴ The participants have variant recollections of exactly what was said and in what tone; however, the phone call was intended to bring to Petitioner’s attention that the CC&Rs prohibited short-term rentals of less than 30 consecutive days.⁵ Petitioner acknowledged to Mr. Ferguson that there had been short-term rentals but also indicated that they would, from then on, comply with the CC&Rs.

13. At hearing, Mr. Ferguson indicated that the Board decided to contact an attorney and send a letter about compliance with the CC&Rs.⁶ Mr. Burolla echoed that action when he indicated, at hearing, that the Board had taken the advice of its attorney in sending the May 11, 2018 Cease & Desist Letter.

14. The May 11, 2018 Cease & Desist Letter states as follows, in pertinent part:

Since February of 1996, the CC&Rs have required under Section 1.1 that “all leasing or rental of a lot” must be in writing and shall not be for “transient or hotel purposes, which shall be defines as rental [of] any period of less than thirty (30) consecutive days.” Section 1.1 goes on to require that a lease must be for no less than the “owner’s entire lot.” You are in repeat violation of this Section of the CC&Rs as your son openly lists your Property as multiple units on www.vrbo.com as a vacation rental by the night (see enclosed VRBO print out from May 9, 2018).

...

⁴ By the time of the hearing, Mr. Ferguson was no longer Respondent’s President.

⁵ At hearing, Mr. Ferguson testified that he knew about multiple cars at the home and that he had been contacted by another homeowner who had seen the VRBO listings. There were other underlying concerns that clouded this case and the parties’ tense relationship: (1) while cleaning up the overgrown lot after purchasing the home, Petitioner had a trailer in the driveway and received a call from the HOA about that being a violation (additionally, a letter was sent [Exhibit D]); (2) there were prior comments about multiple cars at the property; and (3) there were some demands to produce copies of leases to the tenants.

⁶ This would be an indication that the Board was apparently not satisfied with Petitioner’s indication that the short-term rentals would stop. The first noted contact with an attorney was April 26, 2018. See Exhibit K. Because the first letter to Petitioner is dated May 11, 2018, this referenced Board determination to consult with an attorney happened after the April 2018 telephone conversation.

1 You have already been verbally warned that your actions are
2 in violation of the CC&Rs.

3 ...

4 Your failure to comply with the clear terms of the CC&Rs has
5 caused the Board to hire our office to send this demand
6 letter.

7 If you do not cease and desist from all rentals of your
8 Property for a period less than thirty days, or renting less
9 than all of your Property in one lease, within ten (10) days of
10 your receipt of this written demand, the Board has directed
11 our office to file suit as authorized in Section 1.1 of the
12 CC&Rs. Based upon your violations of the CC&Rs as a
13 breach of contract, CRHOA will also seek to recover its
14 attorney's fees and costs from you in addition to having an
15 injunction put in place prohibiting your short term rentals.

16 See Exhibit 5.

17 15. There is no method set forth in the May 11, 2018 letter for Petitioner to
18 demonstrate compliance with the demand letter to the Board.

19 16. Rather than accept Petitioner's May 11, 2018 email explanation and
20 information provided in response, and consider the matter resolved,⁷ Respondent sent
21 another Cease & Desist letter, dated June 1, 2018, to Petitioner. See Exhibit 7. The
22 letter states, in pertinent part:

23 Mr. Ferguson provided you a courtesy call as a verbal
24 warning of the violations being caused by your VRBO rentals
25 of multiple units within the Property. You say that you
26 ceased rentals, but acknowledge that the listing stayed up
27 on the VRBO website. ... You claim the listing would not
28 have allowed a booking, but there was no statement in the
29 listing saying the unit was not open for booking. CRHOA
30 has no duty to try to pay for a rental to "see if it would go
through".

It is important to note in your [April] call with Mr. Ferguson
that you indicated that did not believe that your rentals could
be restricted. You did not say that you would be ceasing
such operations.

...

⁷ See Exhibit 6.

1 You have [now] indicated in writing that you will not again
2 rent the Property for less than the required minimum term,
3 that does not alter your months of prior violations. While the
4 CRHOA will therefore no longer consider filing suit to enjoin
5 you from VRBO rentals, based upon your violations of the
6 CC&Rs as a breach of contract, CRHOA hereby demands
7 payment from you on or before July 2, 2018 in the amount of
8 \$1,500.00 to recover attorney's fees and costs for bringing
9 you into compliance. Please note that this is a number
10 authorized by the Board as a flat amount to resolve the
11 matter; however, if a suit or collection process is necessary
12 to collect such amount, CRHOA reserves the right to pursue
13 collection of all its fees and costs in excess of that number.

14 17. On June 17, 2018, Respondent sent another Cease & Desist letter to
15 Petitioner. See Exhibit 9. The letter states, in pertinent part:

16 In our May demand to cease and Desist, we noted that short
17 term rentals of the property were prohibited. We also
18 explicitly stated that Section 1.1 of the CC&Rs also requires
19 that a lease must be for no less than the "owner's entire lot."
20 After you and your son were told to cease renting the
21 Property out through [VRBO], you and your son apparently
22 decided to continue violating the CC&Rs by trying to rent the
23 Property in three separate units through Facebook
24 Marketplace ...

25 What is particularly egregious about this ongoing intentional
26 pattern of activity to violate the CC&Rs is that your son ...
27 actually acknowledges in the Facebook post that very intent.
28 He clearly indicates that he is renting a two bedroom, one
29 bath "basement unit" while noting that "there are two other
30 month-to-month renters in separate parts of this home. He
still calls himself a "property manager" that "lives on
location." He even states that this was a "short-term vacation
rental" that is "now transitioning to monthly rentals." Your
son's statements are further supported by the neighborhood
observation of multiple cars parked there daily. You are
responsible for your son's actions in the Property and your
son is not able to rent the Property piecemeal any more than
you are.

...

If you do not cease and desist from all rentals of your
Property for a period of less than thirty days as well as
renting less that all of you Property in one lease, on or
before August 17, 2018, the Board has directed our office to

1 file suit as authorized in Section 1.1 of the CC&Rs. ... You
2 are now required to also pay \$2,600.00 in attorney's fees for
3 the repeated necessity of our firm's involvement to bring you
4 into compliance.

4 18. The matter was not resolved informally after the filing of the Petition.

5 19. Initially, Petitioner had believed that the law permitted vacation rentals.
6 Petitioner's son indicated there were three VRBO listings (apparently to demonstrate
7 the various sleeping accommodations). After Petitioner received the phone call from Bill
8 Ferguson regarding the CC&R violation, Petitioner's son discontinued all active
9 bookings, and took down two of the listings but kept one listing posted. The evidence
10 provides several explanations for that remaining posting: to "show" the accommodation;
11 to be able to contact persons who had booked for less than 30 days in order to cancel
12 that booking; and, to have a calendar reference for already blocked-out dates (that were
13 planned for their own use). At hearing, Petitioner's son indicated that, although the
14 listing was still posted, it was not possible to "book" the rental because it was not an
15 active listing. In his explanation in response to the June 1, 2018 letter, Petitioner noted
16 that a person only had to click on any date and a message on the listing would have
17 popped up indicating that there was a minimum 30-day booking.⁸ See Exhibit 8.

18 20. Respondent's position was that the remaining listing, as could be seen on
19 VRBO, and the fact that the "presence of vehicles outside the home changed on a
20 regular basis" demonstrated to the Board that the [short-term] leasing was still going
21 on.⁹

22 21. The provision of copies of leases to the Board was another matter of
23 contention between the parties. It is not clear whether and when any or all of the
24 redacted leases were provided to the Board.¹⁰ In regard to a copy of a lease being
25 demonstrative of activity of leasing, the hearing record does not evidence any copies of
26 short-term leases prior to the April 2018 phone call to Petitioner from Mr. Burolla.

27 _____
28 ⁸ Neither party walked through the VRBO booking process at the time of the hearing.

29 ⁹ First Audio Hearing Record at 1:20:18 - 1:20:58. When questioned as to whether a phone call to
30 Petitioner might have clarified the situation, Mr. Burolla agreed it may have clarified the matter but further
stated "there's no reason to suspect we would have been told the truth." First Audio Hearing Record at
1:32:30 – 1:32:58.

¹⁰ In this regard, see Exhibits 14 and 15.

1 However, Petitioner does not dispute the fact that there were short-term leases prior to
2 that time. Further, the hearing record does not evidence any copies of short-term
3 leases executed after the April 2018 phone call by Petitioner with any tenant. Petitioner
4 disputes that there were any short-term leases after April 2018.¹¹

5 22. Based on an explanation provided by Petitioner following the June 17,
6 2018 Cease & Desist letter, Petitioner had not been aware of his son's Facebook
7 posting offering to lease bedrooms separately. See Exhibit 11. Once he was so
8 informed, he told his son to take the posting down; the explanation further indicates that
9 there were no leases from the Facebook posting.

10 23. Upon request of Petitioner, and despite the Board maintaining that he
11 was not entitled to a meeting (because the Board had proceeded under Section 1.1,
12 which did not provide for such¹²), three members of the Board met with Petitioner on
13 September 4, 2018.¹³ This was a meeting agreed to with specific conditions; the
14 meeting was not arranged as an official or a special Board meeting. See Exhibit 14. A
15 recording and a subsequent transcript were made. See Exhibits 12 and A.

16 24. The meeting transcript reflects the tense relationship between the parties.
17 For example, at one point, after Petitioner and his son again indicated that the short-
18 term leases had stopped, that the listings were taken down, that leases had been
19 provided, and that there was "nobody under lease," Ms. Tucker asked "[w]ho's there
20 then?" to which Petitioner replied "[i]t's not anybody's business who's in our house,
21 really." See Exhibit 2 at 22:38 to 23:24. Another example is a discussion about the
22 number of cars, where Mr. Burolla stated that the Board was not complaining about the
23 cars and Petitioner's son noted the Cease and Desist Letter had stated "multiple cars
24 parked there daily"¹⁴ to which Mr. Burolla replied "[t]hat is evidence of something else
25 that's going on, that might be a violation."

26 25. At hearing, Mr. Burolla stated that he was not aware of any specific

27 ¹¹ See Exhibit 10 (para 2).

28 ¹² In its letter agreeing to meet with Petitioner, Mr. Burolla informed Petitioner that Section 18 applied
29 when the HOA intended to impose "a fine" and that Section 18 did not apply when the violations were of
30 the more specific rental requirement set forth in Section 1.1. See Exhibit 12.

¹³ The Board members were Secretary Burolla, Treasurer Griffin, and Vice-president Tucker. Another
member, Dick Ellis may have come in after the meeting started. See Exhibit A at 56:42.

¹⁴ See Exhibit 9, page 2.

1 instructions in the CC&Rs about notifying a homeowner about a violation, and that there
2 was no description therein about how to notify a homeowner.¹⁵ Mr. Burolla further
3 stated that the Board has proceeded under Section 1.1 of the CC&Rs.¹⁶

4 26. Section 1.1 of the CC&Rs provides as follows:

5 Any agreement for the leasing or rental of a lot (hereinafter
6 in this Section referred to as “lease”) shall provide that the
7 terms of such lease shall be subject in all respects to the
8 provisions of this Declaration and the By-laws of the
9 Association. Said lease will be restricted to a single family
10 and shall further provide that any failure by the occupant
11 thereunder to comply with the terms of the foregoing
12 documents shall be a default under the lease. All leases
13 shall be in writing. No owner shall be permitted to lease his
14 property for transient or hotel purposes, which shall be
15 defined as rental [of] any period of less than thirty (30)
16 consecutive days. No owner may lease less than such
17 owner’s entire lot. Any owner who shall lease the owner’s lot
18 shall be responsible for *assuring compliance by the*
19 *occupant* with the Declaration and the By-laws of the
20 Association.¹⁷ *Failure by an owner to take legal action,*
21 *including the institution of a forcible entry and detainer*
22 *procedure against an occupant who is in violation of this*
23 *Declaration and By-laws within ten (10) days after receipt of*
24 *written demand to do so from the Board of Directors, shall*
25 *entitle the Association, through the Board, to take any and all*
26 *such action as attorney in fact for owner* including the
27 institution of proceedings in forcible entry and detainer *on*
28 *behalf of such owner against owner’s occupant.* Any
29 expenses incurred by the Association, including attorney’s
30 fees and costs of suit, shall be repaid to it by such owner as
a special assessment levied against such owner and the
owner’s lot. In the event of a failure of the lot owner to pay
such special assessment within thirty (30) days of its due
date, for which the owner shall also be personally liable, the
amount of the unpaid assessment shall constitute a lien
upon the lot owned by the owner. The lien may be enforced
in equity as the case of a real estate mortgage judicial like
foreclosure in accordance with Arizona law and such policies
as the Board of Directors may from time to time adopt. The

¹⁵ First Audio Hearing Record at 1:11:52 – 1:12:39.

¹⁶ See Exhibit 12.

¹⁷ Emphasis added here. In the context of this Section, the owner is responsible for compliance with the CC&Rs by the lessee of the Property, *i.e.*, the “occupant.”

1 foreclosure judgment may award to the Association
2 reasonable attorney fees and taxable court costs incurred in
3 connection with the foreclosure, such fees and costs to be
4 fixed by the court without a jury.

5 27. Section 18 of the CC&Rs is entitled "Enforcement of Covenants." Section
6 18 requires that, when the Board believes there has been a breach or a threatened
7 breach of the covenants, the Board's required enforcement action is to "notify the
8 [owner] in writing of the breach." See Exhibit 2. Section 18 also requires that the
9 owners are to be given 30 days thereafter to appear before the Board and respond.
10 Finally, Section 18 further requires that the owner is to be given a time period, as
11 reasonably determined by the Board not to exceed 60 days to remedy the breach. If the
12 breach is not remedied, the Board is authorized to levy a fine, which would be a special
13 assessment and result in a lien on the owner's Property.

14 **CONCLUSIONS OF LAW**

15 1. The Department has jurisdiction to receive petitions, hear disputes
16 between a property owner and a homeowners association, and take other actions
17 pursuant to Arizona Revised Statutes (A.R.S.), Title 33, Chapter 16.

18 2. In this proceeding, Petitioner bear the burden of proving by a
19 preponderance of the evidence that Respondent violated A.R.S. § 33-1806.01 and the
20 Respondent's own CC&Rs pursuant to Arizona Administrative Code (A.A.C.) R2-19-
21 119.

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

26 4. Petitioner alleged that Respondent violated Section 1.1 and Section 18 of
27 the CC&Rs and A.R.S. § 33-1806.01.

28 5. A.R.S. § 33-1806.01(A) provides that a planned community property
29 owner may use his or her property as a rental "unless prohibited in the declaration and
30 shall use it in accordance with the declaration's rental time period restrictions."¹⁸

¹⁸ A.R.S. § 33-1806.01(C) provides that the HOA may require disclosure regarding a tenant only of the name of the tenant, contact information of the adult (tenant), the time period of the lease, description of

1 6. Section 1.1 of the CC&Rs contains multiple provisions. The
2 Administrative Law Judge concludes that all the provisions are not connected to one
3 single action or the activity of the same person.

4 7. Section 1.1 mandates that a lease agreement is subject to the CC&Rs.
5 Leases must be in writing. Leases are restricted to a single family.¹⁹ Owners are not
6 permitted to lease for transient or hotel purposes, defined as “rental [of] any period of
7 less than thirty (30) consecutive days.” Finally, the owner may not lease less than the
8 entire property. When an owner creates a lease agreement that violates these lease
9 provision requirements, that circumstance would be a violation by the owner.

10 8. Section 1.1 of the CC&Rs mandates that “any failure *by the occupant*
11 [under a lease agreement] to comply with the CC&Rs “shall be a default under the
12 lease” and indicates that one proposed legal action regarding such failure, and resulting
13 default, is institution of a forcible entry and detainer procedure *against the occupant who*
14 *is in violation*. Thus, the Administrative Law Judge concludes that the written demand
15 language is connected to requiring an owner to take action against a lessee who has
16 failed to comply with the CC&Rs. The 10-day period is a time frame within which an
17 owner is supposed to take action against the lessee. Actions that the Board may take
18 after the 10-day period are on behalf of the owner against the lessee. Those were not
19 the circumstances in this case. Therefore, the Administrative Law Judge concludes that
20 the Respondent inappropriately proceeded with its May 11, 2018 Cease and Desist
21 Letter regarding violations by the owner of lease provision requirements, as such action
22 against an owner is not anticipated in Section 1.1. Additionally, the Respondent’s
23 continued inappropriate actions in the subsequent Cease and Desist letters were
24 unreasonable given that Petitioner indicated to Mr. Ferguson in the call and to
25 Respondent in his responses that the lease requirement violations had ended and that
26 there were no existing leases in violation of the CC&Rs.²⁰

27 _____
28 the cars, and the license plate numbers.

29 ¹⁹ Enforcement of this provision is questionable at best.

30 ²⁰ The characterization of Petitioner and his son “intentionally” continuing to violate the CC&Rs in the July 17, 2018 Cease and Desist Letter simply demonstrates that the Board members did not and were not going to believe Petitioner or his son no matter what information they provided as to having stopped any leasing activity that was in violation of the requirements. See Finding of Fact #20 herein.

1 9. Based on the hearing record, the Administrative Law Judge concludes that
2 the appropriate action that was required to be taken by Respondent was set forth in
3 Section 18 of the CC&Rs. Accordingly, the Administrative Law Judge concludes that
4 Petitioner has established a violation by Respondent of Section 1.1 and Section 18 of
5 the CC&Rs.

6 10. In its June 1, 2018 Cease and Desist Letter, Respondent had demanded a
7 payment in the amount of \$1,500.00 "to recover attorney's fees and costs." However,
8 the letter then specified that the stated amount of \$1,500.00 was "authorized by the
9 Board as a flat amount to resolve the matter." In no instance, would an amount of
10 "attorney's fees and costs" be determined by anything other than the actual fees and
11 costs. Therefore, the stated amount could only be looked at as either a settlement offer
12 or as some sort of fine, which is not authorized under Section 1.1 but only under Section
13 18. In any event, as a result of Respondent's violation of the CC&Rs, the asserted legal
14 fees are not assigned to Petitioner.

15 11. Finally, it is implausible that the Board's Secretary was unaware of how to
16 proceed, with any CC&R violation enforcement action. Section 18 of the CC&Rs clearly
17 states that a written notice of the breach is to be given along with a 30-day time frame
18 within which the owner may appear before "the Board of Directors."²¹ A verbal warning,
19 in this case the call from Mr. Ferguson, while appropriate in the nature of education and
20 in the spirit of garnering compliance with the CC&Rs, is not an "enforcement" action
21 under the CC&Rs and does not comply with the Board's responsibilities of enforcement
22 as set forth in Section 18 of the CC&Rs.

23 RECOMMENDED ORDER

24 IT IS ORDERED that the Petition be granted and Respondent be required to
25 reimburse Petitioner the \$500.00 filing fee.

26 NOTICE

27 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties**
28 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S.**
29 **§ 41-1092.09, a request for rehearing in this matter must be filed with the**

30 ²¹ "To appear before the Board of Directors to respond to the notice" can only mean to appear at a Board meeting, whether a regular meeting or a special meeting, and not to have a discussion with a few members of the Board.

1 **Commissioner of the Department of Real Estate within 30 days of the service of**
2 **this Order upon the parties.**

3 Done this day, November 15, 2019.

4 /s/ Kay A. Abramsohn
5 Administrative Law Judge

6 Transmitted electronically to:

7 Judy Lowe, Commissioner
8 Arizona Department of Real Estate

9 Transmitted through U.S. Mail to:

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12 Mesa, AZ 85207

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15 Sedona, AZ 86340

16 L AND C SERVICE LLC
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