

1 **Final agency action regarding decision below:**

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3 **ALJCERT ALJ decision certified as final**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 R.L. Whitmer,

8 Petitioner,

No. 14F-H1415004-BFS

9 vs

10 Hilton Casitas Council of Co-Owners,

11 Respondent.

ADMINISTRATIVE LAW JUDGE

DECISION

12
13 **HEARING:** December 23, 2014, at 8:00 a.m.

14 **APPEARANCES:** R. L. Whitmer (hereinafter "Mr. Whitmer" or "Petitioner")
15 appeared on his own behalf. Hilton Casitas Council of Co-Owners (hereinafter "Hilton
16 Casitas" or "Respondent") was represented by Robert Anderson, Esq.

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18 **ADMINISTRATIVE LAW JUDGE:** M. Douglas

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20 Evidence and testimony were presented and the following Findings of Fact,
21 Conclusions of Law, and Recommended Order are made:

22 **FINDINGS OF FACT**

23 **Background and Procedure**

- 24 1. The Department of Fire, Building and Life Safety (the "Department") is authorized by
25 statute to receive Petitions for Hearings from members of homeowners' associations
26 and from homeowners' associations in Arizona.
- 27 2. Hilton Casitas is a homeowners' association located in Scottsdale, Arizona.
- 28 3. Petitioner owns a percentage of a residence in and is a member of Hilton Casitas.
- 29 4. Petitioner filed a petition with the Department alleging that Hilton Casitas had
30 violated the provisions of A.R.S. § 33-1243(D). Petitioner specifically alleged as follows:

1 Mrs. Karatz has ignored A.R.S. § 33-1243(D) in overspending
2 more than the budgeted legal expenses in 2013 and 2014. The
3 2013 budget for legal was \$2,500 and 2014 was \$1,000 for a total
4 of \$3,500.00. Mrs. Karatz has misused her position as President
to spend over \$9,250 for legal expenses without proper
ratification.

5 5. Respondent's Answer to the Petition provided, in relevant part, as follows:

6 **There has been no violation of A.R.S. § 33-1243.**

7
8 The [Hilton Casitas] consists of twenty-nine (29) homes located
9 behind the Scottsdale Hilton. In large part, the majority of the
10 maintenance and management of the Casitas is taken care of by
11 the hotel. The Association adopts its proposed budget at the
12 annual meetings and adopted a proposed budget for 2013 at the
annual meeting. The proposed budget was insufficient because
Mr. Whitmer has made multiple legal challenges requiring the
Association's counsel to respond.

13
14 **TESTIMONY**

15 **Testimony of Michael Bengson**

16 6. Michael Bengson (hereinafter "Mr. Bengson") testified that he was elected to be a
17 member of the Board for Hilton Casitas in October 2014. Mr. Bengson stated that there
18 has been no Board meeting since October 15, 2014. Mr. Bengson testified that he
19 retained Respondent's counsel, Robert Anderson, Esq., as a friend to help Hilton
20 Casitas out. Mr. Bengson stated that he wanted to resolve the chaos that Hilton Casitas
21 was currently involved in. Mr. Bengson testified that Hilton Casitas' prior counsel had
22 resigned and that he felt it was imperative for Hilton Casitas to have legal representation
at the hearing.

23 7. Mr. Bengson testified that he had been a member of the association since May
24 2011. Mr. Bengson stated that there had not been a meeting of the Board since his
25 election to the Board on October 15, 2014. Mr. Bengson testified that the Board was
26 aware of the budget problems and intended to meet soon to adopt an amended budget.

27 8. Mr. Bengson testified that the amended budget would ratify the increased legal
28 expenses incurred by Hilton Casitas. Mr. Bengson stated that he and the new Board
29 wanted to "get everything on the right track."
30

1 **Testimony of Esther Sue Karatz**

2 9. Esther Sue Karatz (hereinafter "Mrs. Karatz") testified that she had previously been
3 president of the Board for Hilton Casitas. Mrs. Karatz stated that Hilton Casitas' prior
4 legal counsel was hired on January 31, 2013. Mrs. Karatz acknowledged that there was
5 no record of the Board's decision to retain legal counsel.

6 10. Mrs. Karatz testified that Hilton Casitas had suffered a computer crash and that
7 there were no records for meetings or actions of the Board for Hilton Casitas after
8 January 10, 2013, and that there were no records regarding the retention of Hilton
9 Casitas' prior legal counsel. Mrs. Karatz said that the majority of the Board approved
10 the hiring of the prior legal counsel by "a telephone vote."

11 11. Mrs. Karatz acknowledged that Hilton Casitas' legal fees in 2014, substantially
12 exceeded the amount of money that had been budgeted for legal fees in 2014. Mrs.
13 Karatz testified that the increased legal expenses were incurred because Petitioner had
14 filed two or three law suits against Hilton Casitas and that the law suits necessitated
15 increased legal fees. Mrs. Karatz stated that the increased legal fees had not been
16 anticipated by Hilton Casitas.

17 **PROVISIONS OF LAW REFERENCED AT HEARING**

18 1. A.R.S. § 33-1243(D) provides as follows:

19 Except as provided in the declaration, within thirty days after
20 adoption of any proposed budget for the condominium, the board
21 of directors shall provide a summary of the budget to all the unit
22 owners. Unless the board of directors is expressly authorized in
23 the declaration to adopt and amend budgets from time to time,
24 any budget or amendment shall be ratified by the unit owners in
25 accordance with the procedures set forth in this subsection. If
26 ratification is required, the board of directors shall set a date for a
27 meeting of the unit owners to consider ratification of the budget
28 not fewer than fourteen nor more than thirty days after mailing of
29 the summary. Unless at that meeting a majority of all the unit
30 owners or any larger vote specified in the declaration rejects the
budget, the budget is ratified, whether or not a quorum is present.
If the proposed budget is rejected, the periodic budget last ratified
by the unit owners shall be continued until such time as the unit
owners ratify a subsequent budget proposed by the board of
directors.

CONCLUSIONS OF LAW

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3 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to
4 file a petition with the Department for a hearing concerning violations of planned
5 community documents or violations of statutes that regulate planned communities.
6 That statute provides that such petitions will be heard before the Office of
7 Administrative Hearings.

8 2. The burden of proof at an administrative hearing falls to the party asserting a
9 claim, right, or entitlement and the standard of proof on all issue in this matter is by a
10 preponderance of the evidence. See A.A.C. R2-19-119.

11 3. Proof by “preponderance of the evidence” means that it is sufficient to persuade
12 the finder of fact that the proposition is “more likely true than not.” *In re Arnold and*
13 *Baker Farms*, 177 B.R. 648, 654 (9th Cir. BAP (Ariz.) 1994).

14 4. A.R.S. § 33-1243(D) provides that within thirty days after adoption of any
15 proposed budget for the condominium, the Board shall provide a summary of the
16 budget to all the unit owners and that unless the Board is expressly authorized in the
17 declaration to adopt and amend budgets from time to time, any budget or amendment
18 shall be ratified by the unit owners in accordance with the procedures set forth in this
19 subsection. Mrs. Karatz acknowledged that Hilton Casitas’ legal fees in 2014 exceeded
20 the amount of money that had been budgeted for legal fees in 2014. Mr. Bengson
21 stated that there had not been a meeting of the Board since his election to the Board
22 on October 15, 2014. Mr. Bengson testified that the Board was aware of the budget
23 problems and intended to meet soon to adopt an amended budget. Mr. Bengson
24 stated that the amended budget would ratify the increased legal expenses incurred by
25 Hilton Casitas. Hilton Casitas has not ratified the increased expenses and adopted an
26 amended budget as required by applicable statute. This Tribunal concludes that Hilton
27 Casitas failed to comply with the applicable provisions of A.R.S. § 33-1243(D).

RECOMMENDED ORDER

1 In view of the foregoing, it is ORDERED that Petitioner be deemed the prevailing
2 party in this matter.

3 It is further ORDERED that Hilton Casitas shall fully comply with the applicable
4 provisions of A.R.S. § 33-1243(D) in the future.

5 It is further ORDERED that Hilton Casitas shall pay Petitioner his filing fee of
6 \$550.00, to be paid directly to Petitioner within thirty (30) days of this Order.

7 It is further ORDERED that no civil penalty shall be imposed in this matter.

8 *In the event of certification of the Administrative Law Judge Decision by the*
9 *Director of the Office of Administrative Hearings, the effective date of this Order will be*
10 *five (5) days from the date of that certification.*

11 Done this day, January 7, 2015.

12 /s/ M. Douglas
13 Administrative Law Judge

14 Transmitted electronically to:

15 Gene Palma, Director
16 Department of Fire Building and Life Safety
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