

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 MAXINE FAIRBANKS,

8 Petitioner,

9
10 vs

11 SANTA BIRD CONDOMINIUM
12 ASSOCIATION,

13 Respondent.

No. 15F-H1516012-BFS

**ADMINISTRATIVE LAW JUDGE
DECISION**

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17 **HEARING:** March 17, 2016, at 8:00 a.m.

18 **APPEARANCES:** Maxine Fairbanks (hereinafter "Petitioner" or "Ms. Fairbanks")
19 appeared on her own behalf. Santa Bird Condominium Association (hereinafter
20 "Respondent" or "SBCA") was represented by its attorney, Julianne C. Wheeler, Esq.

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

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23
24 Evidence and testimony were presented and the following Findings of Fact,
25 Conclusions of Law and Recommended Order are made:

26 **FINDINGS OF FACT**

27 **Background**

- 28 1. The Department of Fire, Building and Life Safety (the "Department") is authorized by
29 statute to receive Petitions for Hearings from members of homeowners' associations
30 and from homeowners' associations in Arizona.
2. Respondent is a condominium association located in Sun City, Arizona.
3. Petitioner owns a residence in and is a member of SBCA.

1 4. Petitioner filed a petition with the Department alleging that Respondent had violated
2 provisions of A.R.S. §§ 33-1254, 33-1243, 33-1258, and paragraph 9E of the
3 Respondent's Covenants, Conditions and Restrictions ("CC&Rs"). Petitioner
4 specifically alleged, in relative part, as follows:

- 5 a. A.R.S. 33-1254 Surplus monies - Board using
6 surplus monies with no approved budget for expenditures.
- 7 b. A.R.S. 1243 D - Failure of Board to adhere to
8 approved budget.
- 9 c. A.R.S. 33-1258 – Financial records – Board refusing
10 to provide a financial report.
- 11 d. Declaration Paragraph 9E – Individual board member
12 making decisions without a vote of the Board.

13 5. Respondent's December 17, 2015, response to the petition provides, in relevant
14 part, as follows:

15 We the newly elected Members of the Board of Directors of
16 the Santa Bird Condominium Association admit to the
17 following allegations made by Ms. Maxine Fairbanks:
18 -Number One: ARS 33-1254 Surplus Monies: Board using
19 surplus monies with no approved budget for expenditures.
20 -Number Two: ARS 33-1243 Failure of Board to adhere to
21 approved budget.
22 -Number Three: ARS 33-1258 Financial Records: Board
23 refusing to provide a financial report.
24 -Number Four: Declaration Paragraph 9#: Individual Board
25 member making decisions without a vote of the Board.
26 We are aware of our responsibility to always comply with the
27 law established by Legislation. Moving forward, this newly
28 elected Board is committed to comply with the law and the
29 Declaration.
30

31 6. On February 12, 2016, the Department issued a Notice of Hearing to the parties
32 notifying them that a hearing on the Petition would be conducted by the Office of
33 Administrative Hearings.

34 7. On March 17, 2016, a hearing was held on the Petition and the parties presented
35 evidence and argument regarding the violation alleged in the Petition.

Hearing Evidence

1 8. Ms. Fairbanks testified that Respondent had violated provisions of A.R.S. §§ 33-
2 1254, 33-1243, 33-1258, and paragraph 9E of the Respondent's Covenants,
3 Conditions and Restrictions ("CC&Rs"). Ms. Fairbanks acknowledged that Respondent
4 had admitted to the alleged violations. Ms. Fairbanks stated that she wanted an Order
5 from the Department to ensure that Respondent would comply with all applicable
6 statutory provisions and CC&Rs in the future.

7 9. Patricia Benner (hereinafter "Ms. Benner") testified that she is the chairman of the
8 new Board for Respondent. Ms. Benner stated that Respondent's records were in
9 disarray when the new Board for Respondent was elected. Ms. Benner detailed the
10 extensive steps that Respondent has taken to comply with all applicable statutes and
11 CC&Rs. Ms. Benner said that the Board has now hired a management company to
12 assist the Board in complying with all application statutes and CC&Rs.

13 10. Ms. Benner's testimony is found to be credible.
14

15 **Applicable statutes and CC&Rs referenced at hearing**

16 1. A.R.S. § 33-1254 provides, in relevant part, as follows:
17

18 Unless otherwise provided in the declaration, any surplus
19 monies of the association remaining after payment of or
20 provision for common expenses and any prepayment of
21 reserves shall be paid to the unit owners in proportion to
22 their common expense liabilities or credited to them to
23 reduce their future common expense assessments.

24 2. A.R.S. § 33-1243 provides, relevant part, as follows:
25

26 A. Except as provided in the declaration, the bylaws,
27 subsection B of this section or other provisions of this
28 chapter, the board of directors may act in all instances on
29 behalf of the association.

30 B. The board of directors shall not act on behalf of the
association to amend the declaration, terminate the
condominium, elect members of the board of directors or
determine the qualifications, powers and duties or terms of
office of board of directors members. The board of directors
may fill vacancies in its membership for the unexpired
portion of any term.

1 C. If any contract, decision or other action for compensation
2 taken by or on behalf of the board of directors would benefit
3 any member of the board of directors or any person who is a
4 parent, grandparent, spouse, child or sibling of a member of
5 the board of directors or a parent or spouse of any of those
6 persons, that member of the board of directors shall declare
7 a conflict of interest for that issue. The member shall declare
8 the conflict in an open meeting of the board before the board
9 discusses or takes action on that issue and that member
10 may then vote on that issue. Any contract entered into in
11 violation of this subsection is void and unenforceable.

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

30 E. The declaration may provide for a period of declarant
control of the association, during which period a declarant or
persons designated by the declarant may appoint and
remove the officers and members of the board of directors.
Regardless of the period provided in the declaration, a
period of declarant control terminates no later than the
earlier of:

1. Ninety days after conveyance of seventy-five percent of the units that may be created to unit owners other than a declarant.
2. Four years after all declarants have ceased to offer units for sale in the ordinary course of business.

F. A declarant may voluntarily surrender the right to appoint and remove officers and members of the board of directors before termination of the period prescribed in subsection E of this section, but in that event the declarant may require,

1 for the duration of the period of declarant control, that
2 specified actions of the association or board of directors, as
3 described in a recorded instrument executed by the
4 declarant, be approved by the declarant before they become
5 effective.

6 G. Not later than the termination of any period of declarant
7 control the unit owners shall elect a board of directors of at
8 least three members, at least a majority of whom must be
9 unit owners. The board of directors shall elect the officers.
10 The board members and officers shall take office on
11 election.

12 H. Notwithstanding any provision of the declaration or
13 bylaws to the contrary:

14 1. The unit owners who are eligible to vote at the time of the
15 meeting may remove any member of the board of directors,
16 other than a member appointed by the declarant, by a
17 majority vote of those voting on the matter at a meeting of
18 the unit owners.

19 2. The meeting of the unit owners shall be called pursuant to
20 this section and action may be taken only if a quorum is
21 present.

22 3. The unit owners may remove any member of the board of
23 directors with or without cause, other than a member
24 appointed by the declarant.

25 4. For purposes of calling for removal of a member of the
26 board of directors, other than a member appointed by the
27 declarant, the following apply:

28 (a) In an association with one thousand or fewer members,
29 on receipt of a petition that calls for removal of a member of
30 the board of directors and that is signed by the number of
persons who are eligible to vote in the association at the
time the person signs the petition equal to at least twenty-
five percent of the votes in the association or by the number
of persons who are eligible to vote in the association at the
time the person signs the petition equal to at least one
hundred votes in the association, whichever is less, the
board shall call and provide written notice of a special
meeting of the association as prescribed by section 33-1248,
subsection B.

(b) Notwithstanding section 33-1248, subsection B, in an
association with more than one thousand members, on
receipt of a petition that calls for removal of a member of the
board of directors and that is signed by the number of
persons who are eligible to vote in the association at the
time the person signs the petition equal to at least ten

1 percent of the votes in the association or by the number of
2 persons who are eligible to vote in the association at the
3 time the person signs the petition equal to at least one
4 thousand votes in the association, whichever is less, the
5 board shall call and provide written notice of a special
6 meeting of the association. The board shall provide written
7 notice of a special meeting as prescribed by section 33-
8 1248, subsection B.

9 (c) The special meeting shall be called, noticed and held
10 within thirty days after receipt of the petition.

11 (d) For purposes of a special meeting called pursuant to this
12 subsection, a quorum is present if the number of owners
13 who are eligible to vote in the association at the time the
14 person attends the meeting equal to at least twenty percent
15 of the votes of the association or the number of persons who
16 are eligible to vote in the association at the time the person
17 attends the meeting equal to at least one thousand votes,
18 whichever is less, is present at the meeting in person or as
19 otherwise permitted by law.

20 (e) If a civil action is filed regarding the removal of a board
21 member, the prevailing party in the civil action shall be
22 awarded its reasonable attorney fees and costs.

23 (f) The board of directors shall retain all documents and
24 other records relating to the proposed removal of the
25 member of the board of directors for at least one year after
26 the date of the special meeting and shall permit members to
27 inspect those documents and records pursuant to section
28 33-1258.

29 (g) A petition that calls for the removal of the same member
30 of the board of directors shall not be submitted more than
once during each term of office for that member.

I. For an association in which board members are elected
from separately designated voting districts, a member of the
board of directors, other than a member appointed by the
declarant, may be removed only by a vote of the members
from that voting district, and only the members from that
voting district are eligible to vote on the matter or be counted
for purposes of determining a quorum.

J. Unless any provision in the condominium documents
requires an annual audit by a certified public accountant, the
board of directors shall provide for an annual financial audit,
review or compilation of the association. The audit, review or
compilation shall be completed no later than one hundred
eighty days after the end of the association's fiscal year and

1 shall be made available on request to the unit owners within
2 thirty days after its completion.

3 K. This section does not apply to timeshare plans or
4 associations, or the period of declarant control under
5 timeshare instruments, that are subject to chapter 20 of this
6 title.

7 3. A.R.S. § 33-1258 provides, in relevant part, as follows:

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

22 B. Books and records kept by or on behalf of the association
23 and the board may be withheld from disclosure to the extent
24 that the portion withheld relates to any of the following:

- 25 1. Privileged communication between an attorney for the
26 association and the association.
- 27 2. Pending litigation.
- 28 3. Meeting minutes or other records of a session of a board
29 meeting that is not required to be open to all members
30 pursuant to section 33-1248.
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.
5. Records relating to the job performance of, compensation
of, health records of or specific complaints against an
individual employee of the association or an individual
employee of a contractor of the association who works under
the direction of the association.

1 C. The association shall not be required to disclose financial
2 and other records of the association if disclosure would
3 violate any state or federal law.

4 D. This section does not apply to an association for a
5 timeshare plan that is subject to chapter 20 of this title.

6 4. Declaration 9E of Respondent's CC&Rs provides as follows:

7 A majority vote of the Managers shall entitle said Board to
8 carry out actions on behalf of the owners of the units.

9 **CONCLUSIONS OF LAW**

10 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to
11 file a petition with the Department for a hearing concerning violations of planned
12 community documents or violations of statutes that regulate planned communities.

13 That statute provides that such petitions will be heard before the Office of
14 Administrative Hearings.

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

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

21 4. The Respondent admitted that the previous Board had used surplus monies with
22 no approved budget for expenditures, that the previous Board had failed to adhere to
23 the approved budget, that the previous Board had failed to provide a financial report,
24 and that individual members of the previous Board had made decisions without a vote
25 of the Board. Ms. Benner credibly testified as to the extensive steps that Respondent
26 has taken to comply with all applicable statutes and CC&Rs. Therefore, the
27 Administrative Law Judge concludes that Respondent's admissions substantiate that
28 Respondent violated the charged provisions of A.R.S. §§ 33-1254, 33-1243, 33-1258,
29 and paragraph 9E of the Respondent's CC&Rs. Ms. Benner's credible testimony is
30 found to be a matter in mitigation of the admitted violations.

RECOMMENDED ORDER

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

3
4 It is further ORDERED that Respondent fully comply with the applicable
5 provisions of A.R.S. §§ 33-1254, 33-1243, 33-1258, and paragraph 9E of the
6 Respondent's CC&Rs.

7 It is further ORDERED that Respondent pay Petitioners' filing fee of \$2,000.00, to
8 be paid directly to Petitioners within thirty (30) days of this Order.

9 In view of Ms. Benner's credible mitigating testimony, no civil penalty is found to
10 be appropriate in this matter.

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

14 Done this day, March 28, 2016.

15 /s/ M. Douglas
16 Administrative Law Judge

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19 Transmitted electronically to:

20 Debra Blake, Interim Director
21 Department of Fire Building and Life Safety
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