

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2  
3 Sean McCoy  
4 Petitioner,  
5 vs.  
6 Barclay Place Homeowners Association,  
7 Respondent.

**No. 19F-H1919062-REL**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

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8 **HEARING:** August 2, 2019

9 **APPEARANCES:** Petitioner Sean McCoy (Petitioner) appeared on his own  
10 behalf. Respondent Barclay Place Homeowners Association (Respondent or  
11 Association) was represented by Nathan Tennyson.

12 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer

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13 **FINDINGS OF FACT**

14 1. On or about May 8, 2019, Petitioner Sean McCoy filed a Homeowners  
15 Association (HOA) Dispute Process Petition (Petition) with the Arizona Department of  
16 Real Estate (Department). Petitioner indicated a three issues would be presented, paid  
17 the appropriate \$1,500.00 filing fee, and asserted violations of A.R.S. § 33-1810, A.R.S.  
18 § 33-1805, A.R.S. § 33-1804, Barclay Place Homeowners Association Bylaws Article  
19 VIII, Section 8(D), and Amendment to the Bylaws 3.3, and Desert Ranch Bylaw 2.4.  
20 Petitioner summarized his three issues as follows:

21 Complaint One: Failure to allow videotaping, discriminatory application. . .

22 Complaint Two: Failure to provide required Compiled Financial  
23 Statement. . . .

24 Complaint Three: Denial of Homeowner's right to reasonable access and  
25 communication.

26 2. On or about May 31, 2019, Respondent submitted an Answer to the  
27 Petition in which it denied all of the complaint items in the Petition.

28 3. On or about June 11, 2019, the Department issued a Notice of Hearing in  
29 which it set forth the issue for hearing as follows:

30 The Petitioner alleges that the Barclay Place Homeowners Association  
violated A.R.S. § 33-1810, 33-1805, 33-1804 and Community Document

1 Bylaws Article VIII, Section 8(D), Amendment to Bylaws in a multiple issue  
2 petition.

3 4. At hearing, Petitioner testified on his own behalf. Frank Puma, Jamie  
4 Murad, and Dana Young Jungclaus testified on behalf of Respondent.

5 Complaint Item One

6 5. Prior to October 10, 2017, members were allowed to audio or video record  
7 meetings of the Association.

8 6. At the October 10, 2017 Board meeting, Petitioner was asked not to record  
9 the meeting because the Board was going to record the meeting and make the  
10 recording available to the members.

11 7. The October 10, 2017 Board meeting was recorded on Mr. Puma's iPhone  
12 and was made available to the membership.

13 8. Mr. Puma testified that another meeting was recorded on someone else's  
14 phone, but the file was corrupted and could not be extracted.

15 9. Mr. Puma acknowledged another meeting may not have been recorded  
16 because no one thought to turn on a recorder at the time of the meeting.

17 10. Respondent's witnesses denied that any meeting was intentionally not  
18 recorded.

19 Complaint Item Two

20 11. On or about May 1, 2017, Respondent changed management companies  
21 and Arizona Community Management Services, LLC (AZCMS) became the  
22 management company.

23 12. At the conclusion of 2017, AZCMS failed to compile the documents  
24 necessary to complete the required annual financial compilations.

25 13. Petitioner requested the 2017 compiled financial statements from  
26 Respondent multiple times since early 2018.

27 14. The 2018 compiled financial statements were completed timely.

28 15. Petitioner filed the Petition in May 2019.

29 16. Mr. Puma testified that AZCMS provided the documents to the certified  
30 public accountant in the month prior to the hearing because he "forgot" the 2017  
financials had not been done.

1 Complaint Item Three

2 17. Petitioner's third complaint item was less clear than the two previous  
3 items. Petitioner alleged that the direction from the Board, AZCMS, and the Board's  
4 attorney that all of his communication with the Board or AZCMS go through the Board's  
5 attorney was a violation. Petitioner cited A.R.S. § 33-1805(A), A.R.S. § 10-3621, and  
6 A.R.S. § 10-3830 in support of his allegation.

7 18. Petitioner asserted that his "rights to verbal or written communication with  
8 management and all Board Members outside of HOA Board Meetings were terminated."  
9 At hearing, Petitioner referenced his First Amendment rights being infringed upon by the  
10 limitation that he not contact the Board or AZCMS directly.

11 19. Petitioner asserted that requiring him to go through the attorney to request  
12 documents that should otherwise be available to him constituted an additional charge in  
13 violation of A.R.S. § 33-1805(A).

14 20. Petitioner also argued that his right to communicate directly with the Board  
15 or AZCMS constituted a termination of his right's without cause, notice, and an  
16 opportunity for appeal in violation of A.R.S. § 10-3621.

17 21. Mr. Puma testified that such limitations are not uncommon in the industry  
18 when the homeowner is a physical or emotional threat or engaging in harassing  
19 behaviors that prevents the management company from doing their work. Mr. Puma  
20 stated that the numerous records requests from Petitioner were overly cumbersome and  
21 he notified the Board that AZCMS would have to start billing the Board for the staff time  
22 involved in responding to Petitioner's requests.

23 **CONCLUSIONS OF LAW**

24 1. Arizona statute permits an owner or a planned community organization to  
25 file a petition with the Department for a hearing concerning violations of planned  
26 community documents or violations of statutes that regulate planned communities.  
27 A.R.S. § 41-2198.01. That statute provides that such petitions will be heard before the  
28 Office of Administrative Hearings.  
29  
30

1           2.       Petitioner bears the burden of proof to establish that Respondent committed  
2 the alleged violations by a preponderance of the evidence.<sup>1</sup> Respondent bears the  
3 burden to establish affirmative defenses by the same evidentiary standard.<sup>2</sup>

4           3.       “A preponderance of the evidence is such proof as convinces the trier of  
5 fact that the contention is more probably true than not.”<sup>3</sup> A preponderance of the  
6 evidence is “[t]he greater weight of the evidence, not necessarily established by the  
7 greater number of witnesses testifying to a fact but by evidence that has the most  
8 convincing force; superior evidentiary weight that, though not sufficient to free the mind  
9 wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one  
10 side of the issue rather than the other.”<sup>4</sup>

11 Complaint Item One

12           4.       A.R.S. § 33-1804(A) provides, in pertinent part, as follows:

13           Persons attending may audiotape or videotape those portions of the  
14 meetings of the board of directors and meetings of the members that are  
15 open. The board of directors of the association shall not require advance  
16 notice of the audiotaping or videotaping and may adopt reasonable rules  
17 governing the audiotaping and videotaping of open portions of the  
18 meetings of the board and the membership, but such rules shall not  
19 preclude such audiotaping or videotaping by those attending, unless the  
20 board audiotapes or videotapes the meeting and makes the unedited  
21 audiotapes or videotapes available to members on request without  
22 restrictions on its use as evidence in any dispute resolution process.

23           5.       Beginning in October 2017, the Board determined it would audio or video  
24 record the meetings and advised attendees that a recording would be made available  
25 following the meeting. Nothing in A.R.S. § 33-1804(A) requires that the Board notify  
26 members in advance of the meeting that they would not be permitted to record the  
27 meeting. As such, the decision of the Board to prohibit recordings of the meetings  
28 because the Board would be recording the meeting and making the recordings available  
29 was not a violation of the statute.

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<sup>1</sup> See ARIZ. REV. STAT. section 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*,  
74 Ariz. 369, 372, 249 P.2d 837 (1952).

<sup>2</sup> See A.A.C. R2-19-119(B)(2).

<sup>3</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

<sup>4</sup> BLACK’S LAW DICTIONARY 1220 (8<sup>th</sup> ed. 1999).

1           6.     While there may have been two instances since October 2017 in which  
2 the recordings were not available following the meeting, once because the recording  
3 was corrupted and once because no one remembered to record the meeting, such  
4 issues or oversights did not constitute a violation of the statute.

5           7.     Thus, Petitioner failed to sustain his burden to establish a violation of  
6 A.R.S. § 33-1804(A).

7     Complaint Item Two

8           8.     A.R.S. § 33-1810 provides, in relevant part, as follows:

9           Unless any provision in the planned community documents requires an  
10          annual audit by a certified public accountant, the board of directors shall  
11          provide for an annual financial audit, review or compilation of the  
12          association. The audit, review or compilation shall be completed no later  
13          than one hundred eighty days after the end of the association's fiscal year  
14          and shall be made available upon request to the members within thirty  
15          days after its completion.

16          9.     The uncontroverted evidence presented at hearing established that  
17          Respondent failed to provide an annual financial compilation for 2017 within 108 days  
18          after the end of Respondent's fiscal year. Mr. Puma acknowledged that the information  
19          necessary to complete the 2017 financial compilation was not forwarded to the  
20          accountant until approximately one month prior to the hearing despite the petition in this  
21          matter being filed on or about May 4, 2019.

22          10.    Thus, Petitioner established that Respondent violated A.R.S. § 33-1810.

23     Complaint Item Three

24          11.    A.R.S. § 33-1805(A) provides, in relevant part, as follows:

25          The association shall not charge a member or any person designated by  
26          the member in writing for making material available for review.

27          12.    A.R.S. § 10-3621 involves the termination, expulsion, and suspension of  
28          the members of a corporation. Thus, the statute is inapplicable to this matter.

29          13.    A.R.S. § 10-3830 addresses the requirement that directors in a  
30          corporation are required to act in good faith.

          14.    The direction from the Board, AZCMS, and the Board's attorney that all of  
          Petitioner's communication with the Board or AZCMS go through the Board's attorney

1 was a standard practice in the industry when a homeowner's communication or  
2 requests become onerous to the Board or management company such that they are  
3 unable to complete their duties. Petitioner was not prohibited from making requests or  
4 asking questions of the Board or management company, but was simply limited in the  
5 manner in which to do so.

6 15. Thus, Petitioner failed to establish that the direction to cease all direct  
7 communication with the Board or AZCMS was a violation of any applicable statute.

8 **ORDER**

9 **IT IS ORDERED** that Petitioner's petition is granted in part and denied in part as  
10 set forth above.

11 **IT IS FURTHER ORDERED** that Petitioner be deemed the prevailing party with  
12 respect to Complaint Item Two and that Respondent be deemed the prevailing party  
13 with respect to Complaint Item One and Complaint Item Three.

14 **IT IS FURTHER ORDERED** that Respondent pay Petitioner that part of his filing  
15 fee related to Complaint Item Two, that is \$500.00, to be paid directly to Petitioner within  
16 thirty (30) days of this Order.

17 **NOTICE**

18 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the**  
19 **parties unless a rehearing is granted pursuant to A.R.S. § 32-**  
20 **2199.04. Pursuant to A.R.S. § 41-1092.09, a request for rehearing in**  
21 **this matter must be filed with the Commissioner of the Department of**  
22 **Real Estate within 30 days of the service of this Order upon the**  
23 **parties.**

24 Done this day, August 27, 2019.

25 /s/ Tammy L. Eigenheer  
26 Administrative Law Judge

27  
28 Transmitted by either mail, e-mail, or facsimile August 27, 2019, to:

29 Judy Lowe, Commissioner  
30 Arizona Department of Real Estate

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