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Explanation of the Arizona Department of Real Estate Administrative Law Judge Dispute Process

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In Arizona, when planned communities and condominiums - colloquially referred to as community or homeowner associations (hereafter “HOAs”) - seek to enforce their applicable restrictive covenants and/or rules and regulations, HOAs must first do the following pursuant to Arizona’s respective Planned Communities Act and Condominium Act:

Give the member written notice of the member’s option to petition for an administrative hearing on the matter in the state real estate department pursuant to section 32-2199.01. At any time before or after completion of the exchange of information pursuant to this section, the member may petition for a hearing pursuant to section 32-2199.01 if the dispute is within the jurisdiction of the state real estate department as prescribed in section 32-2199.01.

See, A.R.S. § 33-1242(D) (Condominiums) and A.R.S. § 33-1803(E) (Planned Communities).

A.R.S. § 32-2199.01 requires HOAs to participate in what is referred to in the HOA industry as the Administrative Law Judge (“ALJ”) process with the Arizona Department of Real Estate (“AZDRE”) and the Arizona Office of Administrative Hearings (“OAH”). While HOAs are required to participate in the ALJ process, HOAs are mostly involved in defending complaints brought against HOAs versus bringing affirmative complaints against owners. There are many reasons for this dichotomy.

The ALJ Process from the HOA’s Perspective.

HOAs are hesitant to take advantage of the ALJ process for many reasons. The most prevalent reason is that there is no mechanism for an HOA to recoup its attorney fees if it prevails. While attorney representation is not required under A.R.S. § 32-2199.01(H), most HOAs, however, will request that its retained counsel represent the HOA at the legal proceeding. Since there is no mechanism to recoup attorney fees upon prevailing like there is in Superior Court or Justice Court, many HOAs would simply file claims in such respective Courts instead of using the ALJ process.

Additionally, the relief received in the ALJ process is limited. Pursuant to A.R.S. § 32-2199.02:

The administrative law judge may order any party to abide by the statute, condominium documents, community documents or contract provision at issue and may levy a civil penalty on the basis of each violation. All monies collected pursuant to this article shall be deposited in the condominium and planned community hearing office fund established by section 32-2199.05 to be used to offset the cost of administering the administrative law judge function. If the petitioner prevails, the administrative law judge shall order the respondent to pay to the petitioner the filing fee required by section 32-2199.01.

If the ALJ orders an owner to “abide by the statute, condominium documents, community documents or contract provision at issue,” under relevant caselaw, there is no effective way to enforce the ALJ decision or judgment through contempt proceedings using its own ALJ process.

While A.R.S. § 32-2199.02(A) states “[t]he order issued by the administrative law judge is enforceable through contempt of court proceedings,” recent caselaw suggests that the ALJ does not have the power to conduct contempt of court proceedings regarding ALJ decisions.

As seen in Whitmer v. Hilton Casitas Homeowners Ass’n, 425 P.3d 253 (Ariz. App. 2018), the Court of Appeals held that the OAH does not have the ability to enforce judgments awarded in the ALJ process through contempt. The Appeals Court in Whitmer stated, “OAH’s mandate does not include enforcement authority generally, much less contempt powers. *See generally* A.R.S. §§ 41-1092 to - 1092.12.” Whitmer, 425 P.3d at 256. As reasoning, the Court further held:

Accordingly, the superior court erred by concluding that OAH had jurisdiction to enforce the ALJ’s order by contempt, much less *exclusive* jurisdiction (assuming OAH qualifies as “another court”) depriving the superior court of original jurisdiction to consider Whitmer’s enforcement action.

Whitmer, 425 P.3d at 257.

The lack of an effective enforcement mechanism for ALJ decisions further pushes HOAs to either Superior Court or Justice Court.

For the above reasons, most HOAs do not file complaints before the AZDRE.

Tips for Representing HOAs Regarding the ALJ Process

Most HOAs experience the ALJ process as a respondent - defending itself against a complaint. When an HOA receives an ALJ complaint, it is advisable that the HOA take certain consideration into mind.

When an HOA receives the ALJ complaint, the HOA should ensure that jurisdiction is proper. Pursuant to A.R.S. § 32-2199.01(A):

The owner or association may petition the department for a hearing concerning violations of condominium documents or planned community documents or violations of the statutes that regulate condominiums or planned communities... The department does not have jurisdiction to hear:

1. Any dispute among or between owners to which the association is not a party.

2. Any dispute between an owner and any person, firm, partnership, corporation, association or other organization that is engaged in the business of designing, constructing or selling a condominium as defined in section 33-1202 or any property or improvements within a planned community as defined in section 33-1802, including any person, firm, partnership, corporation, association or other organization licensed pursuant to this chapter, arising out of or related to the design, construction, condition or sale of the condominium or any property or improvements within a planned community.

Once the HOA has determined that the AZDRE has proper jurisdiction pursuant to A.R.S. § 32-2199.01(A), it is prudent for the HOA to determine whether the issue may be resolved without a hearing. A number of ALJ complaints are based on “miscommunication” or “misunderstanding” of relevant law or procedures. It is always helpful to try and resolve the complaint without the ALJ’s involvement.

If the issue cannot be resolved initially, the HOA should consider tendering the complaint to its insurance carriers for indemnity and defense. If the insurance carrier covers the claim, this could aid the HOA with its inevitable attorney’s fees.

Speaking of attorney’s fees, an attorney representing an HOA in an ALJ action should inform its client that even if the HOA prevails, there is no mechanism to recoup attorney’s fees in the ALJ process. This fact may aid the HOA in attempting to resolve the dispute without the ALJ’s involvement.

Practitioners should also understand that the rules of evidence and civil procedure are “relaxed” in the ALJ process. The OAH’s website, <https://www.azoah.com> (see Tab entitled “Practice Pointers”), provides an excellent discussion on how the rules of evidence and civil procedure are applied in OAH hearings. The website <https://www.azoah.com> is a wealth of knowledge regarding how to put on the best case before the OAH.

The above being said, the evidentiary standard of proof before the OAH is a “preponderance of the evidence.”

It is also important to limit the issues presented at an OAH hearing to the issue discussed in the OAH’s Notice of Hearing. Only issues discussed in the OAH Notice of Hearing should be litigated at the actual hearing.

Once the OAH Hearing has concluded and a ruling provided, pursuant to A.R.S. § 32-2199.02(B):

The order issued by the administrative law judge is binding on the parties unless a rehearing is granted pursuant to section 32-2199.04 based on a petition setting forth the reasons for the request for rehearing, in which case the order issued at the conclusion of the rehearing is binding on the parties. The order issued by the administrative law judge is enforceable through contempt of court proceedings and is subject to judicial review as prescribed by section 41-1092.08.

Therefore, the ALJ's final order may be reheard upon request or appealed to the Superior Court upon request. Pursuant to A.R.S. § 41-1092.09, a request for rehearing must be filed with the Commissioner of the Department of Real Estate within thirty (30) days of the service of the AZDRE final order.

As stated above, enforcement of the ALJ's final order must be through contempt proceedings in Superior Court.

Conclusion

An HOA's involvement in the ALJ process is nuanced. In my experience, HOA involvement in the ALJ process may increase if clear judgment enforcement options in the ALJ process were created and a mechanism for recouping attorney's fees and costs were also incorporated.

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