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No. 22F-H2222064-REL

ADMINISTRATIVE LAW JUDGE DECISION

V.

Respondent

APPEARANCES: Petitioner Kathy J. Green, MD appeared on her own behalf. Peter Calogero appeared as a witness for Petitioner. Nick Eicher, Esq. represented Respondent Cross Creek Ranch Community Association. Greg Chambers appeared as a witness for Respondent.

FINDINGS OF FACT

2. On or about June 24, 2022, Kathy J. Green, MD (“Petitioner”) filed a petition with the Arizona Department of Real Estate (“Department”), alleging that Respondent had violated the provisions of A.R.S. § 33-1804. Petitioner paid the required \$500.00 filing fee to address the one issue claimed in the petition.

4. Petitioner alleges that Respondent held a closed executive session on June 9, 2022, to discuss comments solicited from homeowners regarding proposed changes to the Architectural Review Committee Design Guidelines (“Guidelines”).

1 5. Petitioner submitted into evidence a copy of an email dated June 4,
2 2022, from Board President, Greg Chambers, to Respondent's property management
3 representative that stated the following:

4 We are planning on having a meeting on Thursday, June 9th with the Board
5 and ARC members to discuss the new ARC guideline feedback. I don't want
6 this to be an open meeting. Can we classify it under ARC Legal Review and
7 keep it closed? I assume we would still have to announce the meeting is
8 taking place, correct?¹

9 6. On June 6, 2022, Respondent emailed the homeowners to advise
10 of the following: "[t]he Board of Directors will be meeting in an Executive Session on
11 Thursday, June 9th, at 8:00 a.m., pursuant to ARS Section 33-1804(A)(1)."²

12 7. Petitioner testified that she spoke with Mr. Chambers after the June
13 9, 2022 executive session meeting and that Mr. Chambers told her that it "took the Board
14 and the architectural committee two hours to get through the 80 comments, so you can
15 imagine how difficult it would have been had we had homeowners there."³ Petitioner
16 further testified that Mr. Chambers admitted to not being familiar with the rules and
17 statutes pertaining to open meetings.⁴

18 8. Petitioner submitted into evidence a copy of the Executive Session
19 Meeting Minutes from June 9, 2022, that indicated that the Board members were present,
20 as well as architectural committee members.⁵ The Meeting Minutes state in pertinent part:

- 21 • Review community comments on the proposed changes to the Design
22 Guidelines. Some owners of responses did not want their names made
23 public. There was also concern around the legality of some of the proposed
24 changes.
25 • Agreed to communicate with community on proposed changes and next
26 steps after legal counsel has reviewed all feedback and changes, and given
27 us a written opinion.⁶

28 ¹ See Petitioner's Exhibit 5.

29 ² See Petitioner's Exhibit 6.

30 ³ See Petitioner's Exhibit 8a.

⁴ *Id.*

⁵ See Petitioner's Exhibit 1.

⁶ *Id.*

1 9. Petitioner asserted that the Meeting Minutes demonstrate that the
2 executive session was not held to discuss pending litigation or solicit legal advice from
3 counsel.

4 10. Petitioner submitted a variety of emails to illustrate that the June 9,
5 2022 executive session was contrary to law. Petitioner testified that one such email from
6 the architectural committee chair to the Board members set forth what was discussed at
7 the meeting.⁷ Petitioner testified that there were 72 owner comments that were discussed
8 at the meeting, and therefore, the majority of the business conducted at the meeting did
9 not fall into an exception to the public meeting law.

10 11. Petitioner submitted email correspondence dated June 20, 2022,
11 eleven days after the executive session, between Mr. Chambers and the property
12 management representative regarding the meeting.⁸ Mr. Chambers stated in the email
13 that the topics discussed during the executive session were: i) possible litigation by a
14 homeowner as that homeowner copied their attorney on correspondence; ii) discussion of
15 the personal responses to the Guidelines and the concern that some of the homeowners
16 did not want their comments made public or their names to be used; and iii) legal concerns
17 regarding the Guideline changes.⁹ The response to the inquiry indicated the following in
18 pertinent part:

19 I can see ARC Guidelines being a grey area, but if they have it under
20 attorney feedback of the guidelines as they had them reviewed by an
21 attorney and such feedback discussed during the meeting would work. If
22 they were just simply reviewing the guidelines and said requested changes
23 from the committee without any attorney feedback or legal discussion
24 points, it should have been more like an open Board workshop where no
25 voting took place and members could have attended, unless quorum was
26 not present then they would not need to post it.¹⁰

27 12. Prior to the June 9, 2022 executive session, an attorney had not yet
28 reviewed the proposed revisions to the Guidelines and therefore, did not provide feedback
29 for discussion at that meeting.

30 ⁷ See Petitioner's Exhibit 2.

⁸ See Petitioner's Exhibit 3.

⁹ *Id.*

¹⁰ *Id.*

1 13. Petitioner submitted an email dated June 21, 2022, twelve days
2 after the June 9, 2022 executive session, from a Board member to Respondent's attorney
3 requesting to engage the attorney to assist with the revisions to the Guidelines, asking five
4 specific questions with regard to the Guidelines that were discussed during the executive
5 session, and requesting a written opinion to support the changes to be shared with the
6 community.¹¹

7 14. During the course of the hearing, Respondent stipulated that: i) no
8 legal advice was given at the June 9, 2022 executive session; and ii) the meeting was
9 noticed under A.R.S. § 33-1804(A)(1).

10 15. Petitioner testified that the majority of the comments that were
11 discussed at the June 9, 2022 executive session were not contemplative of litigation, and
12 there is no pending litigation concerning the Guidelines. Petitioner submitted into
13 evidence the spreadsheet containing the homeowner comments.¹² Petitioner testified
14 that she is aware that there are some subjects, such as pending litigation and
15 contemplated litigation that warrant a closed meeting, however, this was not the case with
16 the instant meeting. Petitioner testified that a simple comment such as "can and will be
17 challenged in court" does not put the Board on notice that someone is imminently going to
18 sue the Board. Petitioner asserted that all of the comments not discussing pending
19 litigation should have been discussed in an open meeting.

20 16. Mr. Chambers testified on behalf of Respondent. Mr. Chambers
21 explained that the architectural review committee wanted the Guidelines to be "more
22 professional" as they contained typographical errors, the photographs contained therein
23 needed to be updated, and the Guidelines needed to be revised in such a way to make
24 them less complicated to interpret. Mr. Chambers further testified that some lot owners
25 are proposing to "become their own architect and builder" and that the architectural review
26 committee wanted to ensure that licensed architects and builders were utilized for
27 construction. Mr. Chambers explained that historically, revisions have always been
28 completed by the architectural review committee and homeowner input has not been

29 ¹¹ See Petitioner's Exhibit 4.

30 ¹² See Petitioner's Exhibit 2c.

requested. However, in this instance, one of the homeowners became “contentious” and at least three lot owners are “not happy.” Specifically, Mr. Chambers referenced one lot owner who copied his attorney on a letter to the Board, and testified that the Board “thought he would file litigation.” However, Mr. Chambers acknowledged that the letter was not a letter of intent to sue. Mr. Chambers referenced a few specific comments made by homeowners, characterized those comments as “challenging,” and asserted that the Board “thought of it as a threat of litigation” and that the Board “wanted a legal opinion.”

17. Mr. Chambers testified that he attended the June 9, 2022 executive session via Zoom and that at the meeting, they reviewed the feedback provided by homeowners and “sent it off to legal for comment.” The 72 comments were reviewed and the participants discussed the risks of litigation versus owner support for the revisions to the Guidelines. The feedback was discussed and the Board was “fearful of pending litigation.” The Board published the comments on August 17, 2022, and held an open meeting on August 29, 2022, to discuss the revisions, the legal review, and vote.

18. Mr. Chambers acknowledged that not all of the comments submitted by lot owners threatened litigation and that the Board could have had a separate executive session to discuss only the one letter with which the Board was concerned.

CONCLUSIONS OF LAW

1. The Department has jurisdiction to hear disputes between a property owner and a planned community association.¹³

2. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated A.R.S. § 33-1804.¹⁴

3. A preponderance of the evidence is “[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.”¹⁵

¹³ A.R.S. § 32-2199 *et seq.*

¹⁴ A.A.C. R2-19-119.

¹⁵ BLACK’S LAW DICTIONARY 1182 (6th ed. 1990).

1 4. A.R.S. § 33-1804 provides, in relevant part, as follows:

2 A. Notwithstanding any provision in the declaration, bylaws or other
3 documents to the contrary, all meetings of the members' association
4 and the board of directors, and any regularly scheduled committee
5 meetings, are open to all members of the association or any person
6 designated by a member in writing as the member's representative and
7 all members or designated representatives so desiring shall be
8 permitted to attend and speak at an appropriate time during the
9 deliberations and proceedings. The board may place reasonable time
10 restrictions on those persons speaking during the meeting but shall
11 permit a member or member's designated representative to speak once
12 after the board has discussed a specific agenda item but before the
13 board takes formal action on that item in addition to any other
14 opportunities to speak. The board shall provide for a reasonable number
15 of persons to speak on each side of an issue. Persons attending may
16 audiotape or videotape those portions of the meetings of the board of
17 directors and meetings of the members that are open. The board of
18 directors of the association shall not require advance notice of the
19 audiotaping or videotaping and may adopt reasonable rules governing
20 the audiotaping and videotaping of open portions of the meetings of the
21 board and the membership, but such rules shall not preclude such
22 audiotaping or videotaping by those attending, unless the board
23 audiotapes or videotapes the meeting and makes the unedited
24 audiotapes or videotapes available to members on request without
25 restrictions on its use as evidence in any dispute resolution process. Any
26 portion of a meeting may be closed only if that closed portion of the
27 meeting is limited to consideration of one or more of the following:

19 1. Legal advice from an attorney for the board or the
20 association. On final resolution of any matter for which the
21 board received legal advice or that concerned pending or
22 contemplated litigation, the board may disclose
23 information about that matter in an open meeting except
24 for matters that are required to remain confidential by the
25 terms of a settlement agreement or judgment.

25 2. Pending or contemplated litigation.

26

27 B. Notwithstanding any provision in the community documents, all
28 meetings of the members' association and the board shall be held in this
29 state. A meeting of the members' association shall be held at least once
30 each year. Special meetings of the members' association may be called

1 by the president, by a majority of the board of directors or by members
2 having at least twenty-five percent, or any lower percentage specified in
3 the bylaws, of the votes in the association. Not fewer than ten nor more
4 than fifty days in advance of any meeting of the members the secretary
5 shall cause notice to be hand-delivered or sent prepaid by United States
6 mail to the mailing address for each lot, parcel or unit owner or to any
7 other mailing address designated in writing by a member. The notice
8 shall state the date, time and place of the meeting. A notice of any
9 annual, regular or special meeting of the members shall also state the
10 purpose for which the meeting is called, including the general nature of
11 any proposed amendment to the declaration or bylaws, changes in
12 assessments that require approval of the members and any proposal to
13 remove a director or an officer. The failure of any member to receive
14 actual notice of a meeting of the members does not affect the validity of
15 any action taken at that meeting.

16

17 F. It is the policy of this state as reflected in this section that all meetings of a
18 planned community, whether meetings of the members' association or
19 meetings of the board of directors of the association, be conducted
20 openly and that notices and agendas be provided for those meetings
21 that contain the information that is reasonably necessary to inform the
22 members of the matters to be discussed or decided and to ensure that
23 members have the ability to speak after discussion of agenda items, but
24 before a vote of the board of directors or members is taken. Toward this
25 end, any person or entity that is charged with the interpretation of these
26 provisions, including members of the board of directors and any
27 community manager, shall take into account this declaration of policy
28 and shall construe any provision of this section in favor of open
29 meetings.

30 5. When construing a statute, the primary goal is to ascertain the legislature's
intent.¹⁶ This is accomplished by first looking to the text of the statute.¹⁷ If the language is
clear, its plain meaning is ascribed, unless it would lead to absurd results.¹⁸ If ambiguity
exists, secondary principles of statutory construction are used to determine the intent.¹⁹

6. A.R.S. § 33-1804(A) requires that all meetings of the board of directors of a

¹⁶ *State ex rel. Thomas v. Contes*, 216 Ariz. 525, 527, 169 P.3d 115, 117 (App. 2007).

¹⁷ *Id.*

¹⁸ *Id.*; *Marsoner v. Pima County*, 166 Ariz. 486, 488, 803 P.2d 897, 899 (1991).

¹⁹ *Contes*, 216 Ariz. at 527.

1 planned community association must be open to the members unless the topic being
2 addressed is one of the identified exceptions. A.R.S. § 33-1804(F) sets forth that it is the
3 policy of this state that all meetings of a planned community be conducted openly. A.R.S.
4 § 33-1804(F) further requires that any person or entity that is charged with the
5 interpretation of the statutes, including members of the board of directors and any
6 community manager, shall construe any provision of the statute in favor of open meetings.

7 7. In this case, the executive session was noticed pursuant to A.R.S. § 33-
8 1804(A)(1). Respondent stipulated that no legal advice was given at the June 9, 2022
9 executive session.

10 8. Regarding Respondent's assertion that it conducted an executive session
11 under the authority of A.R.S. § 33-1804(A)(2), pending or contemplated litigation, the
12 Administrative Law Judge does not find Respondent's argument persuasive, as it is
13 tenuous at best. In this case, Petitioner presented credible and substantial evidence
14 establishing that the topic discussed at the executive session concerned the
15 approximately 72 comments submitted by homeowners in response to the solicitation by
16 Respondent regarding revisions to the Guidelines. Only a select few of those comments
17 were considered "challenging" to the Board, and more specifically, only one that copied an
18 attorney. None of the comments reflected pending litigation and there was no evidence
19 presented establishing pending litigation. Further, the Administrative Law Judge
20 concludes that none of the comments can be reasonably construed as contemplating
21 litigation. As acknowledged by Mr. Chambers, the Board could have held an executive
22 session to discuss only that one comment/letter in which an attorney was copied, and held
23 an open meeting to discuss the other solicited comments. Therefore, the Administrative
24 Law Judge concludes, based upon the probative and credible evidence presented at
25 hearing, that the issue discussed at the June 9, 2022 executive session does not fall
26 under the exceptions listed in A.R.S. §§ 33-1804(A)(1) or (A)(2), and Respondent did not
27 properly consider the issue in an executive session closed to its members.

28 9. Accordingly, Petitioner established by a preponderance of the evidence that
29 Respondent committed the alleged violation of A.R.S. § 33-1804.

30 10. Based on the facts presented, the Administrative Law Judge finds no civil

penalty is appropriate in this matter.

ORDER

IT IS ORDERED that Petitioner's petition is affirmed.

IT IS FURTHER ORDERED that Respondent reimburse Petitioner the \$500.00 filing fee.

IT IS FURTHER ORDERED Respondent is directed to comply with the requirements of A.R.S. § 33-1804 going forward.

NOTICE

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

Done this day, September 29, 2022.

/s/ Sondra J. Vanella
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile September 29, 2022 to:

Louis Dettorre, Commissioner
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