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No. 23F-H020-REL

ADMINISTRATIVE LAW JUDGE DECISION

Scottsdale North Homeowners Association, Inc.

Respondent

HEARING: February 3, 2023

APPEARANCES: Petitioner Daniel Mayer appeared on his own behalf. Sandy Chambers appeared on behalf of Scottsdale North Homeowners Association, Inc.

ADMINISTRATIVE LAW JUDGE: Adam D. Stone

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1. On or about November 17, 2022, Petitioner Daniel Mayer filed a Homeowners Association (HOA) Dispute Process Petition (Petition) with the Arizona Department of Real Estate (Department) alleging a violation of community documents by Respondent Scottsdale North Homeowner's Association (SNHA). Petitioner indicated a single issue would be presented, paid the appropriate \$500.00 filing fee, and asserted a violation of A.R.S. § 33-1812.

2. On or about December 21, 2022, the Department issued a Notice of Hearing in which it set forth the issue for hearing as follows:

The Petitioner states the Respondent violation ARS 33-1812 on 5/18/22 by ‘... [combining] 2 separate ‘proposed action’ into one as a single vote action.’

3. At hearing, Petitioner testified on his own behalf and Respondent presented the testimony of Sandy Chambers. Based on the evidence presented at hearing, the following occurred:

1 a. On or about May 18, 2022, SNHA issued a letter to homeowners
2 informing them that it wanted to spend \$30,000.00 to make repairs to the
3 roadways and the common area security gates. The letter also included
4 a ballot which read:

5 I hereby approve of the Scottsdale North Homeowners
6 Association to access the Reserves Fund in the sum of
7 \$30,000 for the roadway asset preservation & common area
8 gate replacement.

9 b. Petitioner argued that every time the proposal was mentioned,
10 Respondent separated out the two expenditures with the separate costs
11 for each. Petitioner argued however, that on the ballots, there was no
12 opportunity to vote for a separate expenditure. According to Petitioner
13 therefore, the ballot ran afoul of A.R.S. 33-1812. Petitioner was also
14 requesting that SNHA be fined for failing to follow the statute.

15 c. Ms. Chambers argued that the ballot was valid as the statute only
16 requires separate proposals for votes taken at meetings, and this ballot
17 was sent in advance of a meeting. Ms. Chambers testified that the votes
18 were sent to the property management company who tallied the votes
19 and provided the results to her just prior to the meeting on June 25,
20 2022, where the results were read aloud.

21 **CONCLUSIONS OF LAW**

22 1. Arizona statute permits an owner of a planned community organization to
23 file a petition with the Department for a hearing concerning violations of planned
24 community documents or violations of statutes that regulate planned communities.
25 A.R.S. § 32-2199. That statute provides that such petitions will be heard before the Office
26 of Administrative Hearings.

27 2. Petitioner bears the burden of proof to establish that Respondent committed
28 the alleged violations by a preponderance of the evidence. See ARIZ. REV. STAT. section
29 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazzano v. Superior Court*, 74
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1 Ariz. 369, 372, 249 P.2d 837 (1952). Respondent bears the burden to establish affirmative
2 defenses by the same evidentiary standard. See A.A.C. R2-19-119(B)(2).

3 3. "A preponderance of the evidence is such proof as convinces the trier of fact
4 that the contention is more probably true than not." MORRIS K. UDALL, ARIZONA LAW OF
5 EVIDENCE § 5 (1960). A preponderance of the evidence is "[t]he greater weight of the
6 evidence, not necessarily established by the greater number of witnesses testifying to a fact
7 but by evidence that has the most convincing force; superior evidentiary weight that, though
8 not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a
9 fair and impartial mind to one side of the issue rather than the other." BLACK'S LAW
10 DICTIONARY at page 1220 (8th ed. 1999).

11 4. A.R.S. § 33-1812 provides, in pertinent part, as follows:

12 A. Notwithstanding any provision in the community documents, after
13 termination of the period of declarant control, votes allocated to a unit
14 may not be cast pursuant to a proxy. The association shall provide
15 for votes to be cast in person and by absentee ballot and, in addition,
16 the association may provide for voting by some other form of
17 delivery, including the use of e-mail and fax delivery.
18 Notwithstanding section 10-3708 or the provisions of the community
19 documents, any action taken at an annual, regular or special meeting
20 of the members shall comply with all of the following if absentee
21 ballots or ballots provided by some other form of delivery are used:

18 1. The ballot shall set forth each proposed action.

19 2. The ballot shall provide an opportunity to vote for or against
20 each proposed action.

20 . . .

21 5. In addition, A.R.S. § 10-3708 provides, in pertinent part, as follows:

22 A. Unless prohibited or limited by the articles of incorporation or
23 bylaws, any action that the corporation may take at any annual,
24 regular or special meeting of members may be taken without a
25 meeting if the corporation delivers a written ballot to every member
26 entitled to vote on the matter.

26 B. A written ballot shall:

27 1. Set forth each proposed action.
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2. Provide an opportunity to vote for or against each proposed action.

...

6. The first inquiry is to whether or not two issues were on the ballot. Based upon the cover letter and all discussions leading up to the vote, it was clear that these were two separate projects for which SNHA was seeking approval from homeowners. Thus, the tribunal finds the ballot improper because it did not contain the opportunity to vote on each separate proposal.

7. The next issue is whether this ballot was still nonetheless valid because the vote did not occur at a meeting. While there was no dispute that the ballots were issued prior to the meeting, the "action" could not be taken until announced at the meeting. Further, A.R.S. § 33-1812 also directs one to examine A.R.S. §10-3078, which clearly contemplates this situation. According to that statute, the ballots still must set for each action and provide an opportunity to vote for or against each action. As previously mentioned the ballot did not provide an option to vote for the road improvement or gate repairs separately. Therefore, this ballot runs afoul of A.R.S. § 33-1812.

8. Accordingly, Petitioner established Respondent acted in violation of the community documents and A.R.S. § 33-1812(A)(1).

9. The Administrative Law Judge does not have the authority under the A.R.S. § 32-2199.02 to order the projects rescinded as the statute, provides, in pertinent part, as follows:

A. 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.

10. Petitioner has requested that a civil penalty be levied against Respondent for failing to abide by the statutes. In this case, although the vast majority of homeowners approved the proposals, the Administrative Law Judge is concerned that this type of ballot could be used in the future, leaving virtually no remedy. Therefore, the Administrative Law Judge finds that a Civil Penalty of \$500.00 is appropriate in this action.

ORDER

IT IS ORDERED that Petitioner be deemed the prevailing party in this matter.

IT IS FURTHER ORDERED that Respondent pay Petitioner his filing fee of \$500.00, to be paid directly to Petitioner within thirty (30) days of this Order.

IT IS FURTHER ORDERED that Respondent pay a \$500.00 Civil Penalty directly to Petitioner within thirty (30) days of this Order.

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, February 17, 2023.

/s/ Adam D. Stone
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile February 5, 2023 to:

James Knupp
Acting Commissioner
Arizona Department of Real Estate
100 N. 15th Avenue, Suite 201
Phoenix, Arizona 85007
Attn:
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By: OAH Staff

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