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No. 23F-H027-REL

ADMINISTRATIVE LAW JUDGE DECISION

V.

Respondent.

APPEARANCES: Petitioner Kimberly Martinez appeared on her own behalf. Susan Goeldner and Warren Doty appeared on behalf of Respondent Pineglen Owner's Association. Christine McCabe, Tim Mahoney, Mark McElvain, and Fred Bates observed the proceedings.

FINDINGS OF FACT

1. Pineglen Owner's Association ("Respondent") is a planned community association in Show Low, Arizona.

3. On or about November 21, 2022, Petitioner filed a three-issue Petition with the Arizona Department of Real Estate (“Department”) alleging that Respondent had violated its Bylaws, Article III, Section 3, and Article IV, Sections 1 and 2, and A.R.S. §§ 33-1812(A)(6) and 33-1805(A). The three issues identified in the Petition, for which Petitioner paid the requisite \$1,500.00 filing fee, are as follows:

i) The ballot for the annual election of Board members did not have the proper resident identifiers, lot number or physical address; and the email with the ballot, and the ballot itself, though it displayed

1 a place for write in candidates, did not provide or outline the process
2 should there have been a write in candidate.

3 ii) At the Annual Meeting the Board President announced 2 new
4 Board positions, but did not follow the electoral process for filling the
5 2 positions, instead appointed 2 residents to the new positions.

6 iii) The Board Secretary refused to comply to my request, per
7 ARS 33-1805(A) of supplying me with copies of HOA records, either
8 electronically or by purchase of hard copies.

9 4. Respondent, through its Board Secretary, Susan Goeldner, filed a
10 written answer to the Petition, denying that it had violated any Bylaws or statutory
11 provisions.

12 5. The Department referred the Petition to the Office of Administrative
13 Hearings, an independent state agency, for an evidentiary hearing.

14 6. A hearing was held on February 17, 2023. Administrative Notice
15 was taken of the agency record. Petitioner testified on her own behalf. Ms. Goeldner and
16 Warren Doty, Respondent's Vice-president, testified on behalf of Respondent.

17 **REFERENCED BYLAWS**

18 7. Article III, Section 3 of the Bylaws provides in relevant part as
19 follows:

20 **Meetings.**

21 The annual meeting of the members shall be held at the office of the
22 Association, or such other place as may be designated in the notice
23 thereof, on any day in the month of June of each year. If that day is a
24 legal holiday, the meeting shall be held at the same hour on the next
25 succeeding day which is not a legal holiday, or Sunday. The annual
26 meeting shall be for the purpose of erecting [sic] directors anti [sic] of
27 transacting any other business authorized to be transacted by the
28 members. Special meeting of the members may be called by the
29 President or by a majority of the Board of Directors or by members
30 having one-third (1/3) or more of the total votes entitled to be cast at such
a meeting.

8. Article IV, Sections 1 and 2 of the Bylaws provides in relevant part
as follows:

1 **Section 1: Number and Qualification.**

2 The Board of Directors shall consist of not less than three (3) nor more
3 than seven (7) members. The first Board of Directors shall consist of the
4 three (3) members who are named in the Articles of Incorporation of the
5 Association, and said members of the Board of Directors shall hold office
6 until the first meeting of the members of the Association or until
7 successors are designated by Declarant, all as set forth in the
8 Declaration. Thereafter, the Board may act to increase or decrease its
9 membership within the aforesaid limits and to fill vacancies in its
10 membership and that appointee shall serve until the next election. Each
11 member of the Board of Directors shall be either an owner of a Unit or the
12 spouse of an owner, or if an owner is a corporation, partnership or trust,
13 such director may be an officer, director, partner, beneficiary, or trustee
14 of such owner; provided, however, that neither the directors nominated
15 or designated by Declarant pursuant to the Declaration nor the directors
16 constituting the first board shall be required to meet the above
17 requirement. Subject to the provisions above stated, if a director shall
18 cease to meet the above qualifications during his term, he shall
19 thereupon cease to be a director and his place on the board shall be
20 deemed vacant.

21 **Section 2: Election of Directors.**

22 The Board of Directors of the Association shall be elected at the annual
23 meeting of members and the candidates for director receiving the most
24 votes shall be elected.

25 **REFERENCED STATUTES**

26 **9.** A.R.S. § 33-1812 provides as follows:

27 Proxies; absentee ballots; definition

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

6. The completed ballot shall contain the name, address and signature of the person voting, except that if the community documents permit secret ballots, only the envelope shall contain the name, address and signature of the voter.

10. A.R.S. § 33-1805(A) provides as follows:

Association financial and other records

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

HEARING EVIDENCE

COMPLAINT NUMBER 1:

The ballot for the annual election of Board members did not have the proper resident identifiers, lot number or physical address; and the email with the ballot, and the ballot itself, though it displayed a place for write in candidates, did not provide or outline the process should there have been a write in candidate.

11. Petitioner testified that the ballot that was distributed to members by Respondent does not contain the Lot numbers or addresses for the candidates, nor does it contain a "process" for write-in candidates.¹ Petitioner asserted that the Board was aware of the requirement to include addresses or lot numbers for candidates yet "purposefully" did not include them because residents did not want the information shared. Petitioner asserted that the addresses are public record.

¹ See Petitioner's Exhibit C1-4.

12. Mr. Doty testified regarding Respondent's process for obtaining votes for the election. Mr. Doty explained that voting for Board members occurs during the annual meeting, however, not many members attend the annual meeting. Consequently, the Board went door to door to obtain member votes, utilizing a plot plan to ensure there was no duplication of votes and that only member votes were obtained, and the lot numbers were written on each ballot.² Thereafter, the ballots were given to the Secretary. Mr. Doty testified that at the annual meeting, there was also a "show of hands" vote.

13. Mr. Doty further testified that the process for write-in candidates was explained to the members at a meeting as follows: write-in candidates would be notified of the nomination and if they accepted the nomination, a new vote would take place. Mr. Doty testified that there were write-in candidates, however, none of them accepted the nominations. Mr. Doty testified that the Bylaws do not contain a process for write-in candidates and to make such a change, a quorum of sixty percent of the members would be necessary.

COMPLAINT NUMBER 2:

At the Annual Meeting the Board President announced 2 new Board positions, but did not follow the electoral process for filling the 2 positions, instead appointed 2 residents to the new positions.

14. Petitioner testified that Board members are elected at the annual meeting and if there are vacancies, the Board has a right to fill the vacancies. However, at the most recent annual meeting, the Board announced two new Board positions, an RV Lot Manager and an Architectural Review Manager. Both of the positions were appointed by the Board and Petitioner asserted that there was no electoral process, and by appointing two new members that have voting rights, the Board increased its membership.

15. Ms. Goeldner testified that the two positions added to the Board are not new positions. Ms. Goeldner explained that Respondent is a small community

² See Respondent's Exhibits 6 and 7.

1 comprised of 84 lots, some of which are not occupied and some of which are occupied by
2 renters. Ms. Goeldner explained that the Board is comprised of “elderly volunteers” and
3 that the Board President is 89 years old. Ms. Goeldner testified that it is difficult to find
4 volunteers, and therefore, the Board decided to add these two positions and appoint them
5 as Board members, and in the next election, the positions would be added to the ballot.

6
7 **COMPLAINT NUMBER 3:**

8 The Board Secretary refused to comply to my request, per ARS 33-
9 1805(A) of supplying me with copies of HOA records, either
10 electronically or by purchase of hard copies.

11 16. On September 6, 2022, Petitioner emailed Respondent requesting
12 the following documents: i) Board Minutes; ii) any document used in the decision to
13 contract with Navapache Electric Cooperative (“NEC”), a copy of the contract, all
14 communication received from NEC regarding the agreement with Respondent; and iii)
15 any email notification from the Board to all the residents.³

16 17. On September 17, 2022, Petitioner emailed Respondent again
17 requesting the above delineated documents and citing to A.R.S. § 33-1805(A).⁴ Petitioner
18 specified in the email that she was requesting documents from April 16, 2022, through
19 September 17, 2022, and that she “fully expected an invoice to be delivered with the
20 copies.”⁵

21 18. In response, Respondent sent an email to Petitioner on September
22 18, 2022, in which Respondent stated:⁶

23 In our last communication with you, we clearly stated that we would make
24 the requested documents available for you to view, in the presence of the
25 Board, after the Board meeting yesterday. Or, if you could not view the
26 documents on that date, we could arrange for a meeting at a mutually
27 agreeable time. . . .

28 ³ See Petitioner’s Exhibit C31-2.

29 ⁴ *Id.* at C3-2.

30 ⁵ *Id.*

⁶ *Id.* at C3-3.

We are not going to email you any of the documents in question. In fact, you have received most of them via email. We have collected the documents in question, and can meet with you to view them, as we stated previously.

19. On September 19, 2022, Petitioner responded via email, “[m]y renewed request as stated in my email of September 17, 2022 stands. My request is for copies of the documents listed.”⁷

20. On September 20, 2022, Respondent replied to Petitioner via email, “[a]nd, as we have replied, we will make all the documents in question available to you for viewing at a time mutually agreeable to you and the Board. We will not be sending you copies”⁸

21. Petitioner testified that Respondent told her she could bring her own printer to print the documents. Petitioner testified that because her mobility is compromised, she could not do so.

22. Ms. Goeldner testified that she relied on Article VII Section 3 of the Bylaws that states in pertinent part:⁹

Each member entitled to vote, upon written demand stating the purpose of the examination, may examine, in person or by agent or attorney, at any reasonable time for any proper purpose, the Association’s relevant books and records of account, minutes and record of members and may make copies of or extracts from the books, records or minutes.

23. Ms. Goeldner further testified that the Board gave Petitioner several opportunities to meet and review the documents, however, Petitioner refused to meet with the Board.

24. Petitioner explained at the conclusion of the hearing that she had repeatedly declined in person meetings with the Board due to a hearing deficit and that is why she requests communications in writing. Petitioner had a friend present during the hearing in the event Petitioner needed assistance due to her hearing deficit.

CONCLUSIONS OF LAW

⁷ *Id.*

⁸ *Id.*

⁹ See Petitioner’s Exhibit BL9.

1. A.R.S. § 32-2199.01 permits a member of a planned community to file a petition with the Department for a hearing concerning the planned community association's alleged violations as set forth in Title 33, Chapter 16. This matter lies within the Department's jurisdiction. That statute provides that such petitions will be heard before the Office of Administrative Hearings.

2. Petitioner bears the burden of proof to establish that Respondent violated applicable statutes, CC&Rs, and/or Bylaws by a preponderance of the evidence.¹⁰ Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.¹¹

3. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."¹² A preponderance of the evidence is "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."¹³

COMPLAINT NUMBER 1:

The ballot for the annual election of Board members did not have the proper resident identifiers, lot number or physical address; and the email with the ballot, and the ballot itself, though it displayed a place for write in candidates, did not provide or outline the process should there have been a write in candidate.

4. A.R.S. § 33-1812(A)(6) provides that completed ballots "*shall contain the name, address and signature of the person voting*, except that if the community documents permit secret ballots, only the envelope shall contain the name, address and signature of the voter."

¹⁰ See A.A.C. R2-19-119(A) and (B)(1); see also *Vazzano v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952).

¹¹ See A.A.C. R2-19-119(B)(2).

¹² MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

¹³ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

5. The ballots utilized by Respondent did not contain the address of the person voting. Therefore, Petitioner established by a preponderance of the evidence that Respondent violated A.R.S. § 33-1812(A)(6).

COMPLAINT NUMBER 2:

At the Annual Meeting the Board President announced 2 new Board positions, but did not follow the electoral process for filling the 2 positions, instead appointed 2 residents to the new positions.

6. Article IV, Section 1 of the Bylaws provides that the Board of Directors shall consist of not less than three (3) nor more than seven (7) members and that the Board may act to increase or decrease its membership within the limits and to fill vacancies in its membership and that *appointee shall serve until the next election*.

7. In this case, Petitioner failed to establish by a preponderance of the evidence that Respondent violated its Bylaws with regard to the Board appointing an RV Lot Manager and an Architectural Review Manager. The credible evidence of record established that Respondent appropriately appointed these positions and that the positions will appear on the ballot of the next election.

COMPLAINT NUMBER 3:

The Board Secretary refused to comply to my request, per ARS 33-1805(A) of supplying me with copies of HOA records, either electronically or by purchase of hard copies.

8. A.R.S. § 33-1805(A) provides that all financial and other records of the association shall be made reasonably available for examination by any member *and on request for purchase of copies of records by any member, the association shall have ten business days to provide copies of the requested records.* An association may charge a fee for making copies of not more than fifteen cents per page.

9. Petitioner requested in writing for Respondent to provide specific documents and Petitioner offered to pay for those documents. Respondent refused to provide copies of the requested documents and would only allow Petitioner to view the

documents, contrary to its statutory obligation. Therefore, based on a review of the credible and relevant evidence of record, it is held that Petitioner established by a preponderance of the evidence that Respondent violated A.R.S. § 33-1805(A).

ORDER

IT IS ORDERED that Petitioner be deemed the prevailing party in this matter regarding Petition Issues 1 and 3.

IT IS FURTHER ORDERED that Respondent be deemed the prevailing party in this matter regarding Petition Issue 2.

IT IS FURTHER ORDERED that Respondent pay Petitioner the filing fee of \$1,000.00, to be paid directly to Petitioner within thirty (30) days of this Order.

IT IS FURTHER ORDERED Respondent is directed to comply with the requirements of A.R.S. § 33-1812(A)(6) and A.R.S. § 33-1805(A) going forward.

No Civil Penalty is found to be appropriate in this matter.

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, March 9, 2023.

/s/ Sondra J. Vanella
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile March 9, 2023 to:

Susan Nicolson, Commissioner
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