

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of

No. 23F-H031-REL

4 Clifford S Burnes

**ADMINISTRATIVE LAW JUDGE
DECISION**

5 Petitioner

6
7 vs

8 Saguaro Crest Homeowners' Association

9 Respondent

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11 **HEARING:** March 29, 2023

12 **APPEARANCES:** Petitioner Clifford (Norm) Burnes appeared via Google Meet on
13 his own behalf. Respondent Saguaro Crest Homeowners Association was represented
14 by John T. Crotty who appeared via Google Meet.

15 **ADMINISTRATIVE LAW JUDGE:** Adam D. Stone

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17 **FINDINGS OF FACT**

18 **BACKGROUND AND PROCEDURE**

19 1. The Department is authorized by statute to receive and to decide petitions
20 for hearings from members of homeowners' associations and from homeowners'
21 associations in Arizona.

22 2. On or about December 12, 2022, Petitioner filed a single issue petition with
23 the Arizona Department of Real Estate (Department) which alleged that the Association
24 failed to hold Board of Directors elections in violation Saguaro Crest Homeowners
25 Association (SCHA) Bylaws Article 2.1.

26 3. On or about January 10, 2023, Respondent submitted its ANSWER to the
27 Department whereby it denied Petitioner's claim.

28 4. On or about February 7, 2023, the Department referred this matter to the
29 Office of Administrative Hearings (OAH), an independent state agency, for an evidentiary
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1 hearing on March 29, 2023, to determine whether the alleged violation of Article 2.1 of the
2 SCHA Bylaws occurred.

3 **THE PARTIES AND GOVERNING DOCUMENTS**

4 5. Respondent is a homeowners' association whose members own properties
5 in the Saguaro Crest residential real estate development located in Tucson, Arizona.
6 Membership for the Association is compromised of the Saguaro Crest subdivision.

7 6. Petitioner is a Saguaro Crest subdivision property owner and a member of
8 the Association.

9 **HEARING EVIDENCE**

10 7. Petitioner testified on his own behalf and submitted exhibits A through G.
11 Respondent did not submitted any exhibits and called Esmerelda Martinez as a witness.
12 The Department's electronic file and NOTICE OF HEARING were also admitted into the
13 record. The substantive evidence of record is as follows:

- 14 a. On December 11, 2021, SCHA held its annual meeting.
 - 15 b. At the meeting, the voting members of SCHA, properly voted to
16 dissolve the SCHA.
 - 17 c. The Board President, Esmerelda Martinez, and well as the Board's
18 Vice President, Dave Madill, offered to volunteer to remain in their
19 respective positions to assist with the dissolution process, although their
20 terms were ending on December 31, 2021.
 - 21 d. There were no elections held for the 2022 calendar year.
 - 22 e. There were no objections noted to Ms. Martinez and Mr. Madill
23 remaining in their respective positions until the dissolution occurred.
 - 24 f. Petitioner was present at the meeting, and abstained from the
25 dissolution vote and did not voice an objection to Ms. Martinez and Mr.
26 Madill's offer to assist with the dissolution.
 - 27 g. As of the date of the hearing, the dissolution was still not completed.
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ARGUMENTS

Petitioner's argument

8. Petitioner argued that the SCHA failed to hold elections as required, and therefore was in violation of the SCHA Bylaws.

9. Petitioner argued that he did not object at the meeting because he did not know of the potential violation of the bylaws.

10. Ultimately, Petitioner asked the Tribunal to issue an order granting his petition, including requiring the Association to comply with the Bylaws. Petitioner also asked his filing fee be reimbursed, and that a civil fine be imposed against Respondent if it was held in violation.

Esmerelda Martinez's testimony

11. Ms. Martinez stated that once the vote for the dissolution passed, she and Mr. Madill offered to remain in their respective positions to assist with the dissolution process. Further Ms. Martinez testified that nobody, including Petitioner, objected.

12. In addition, Ms. Martinez testified that had the vote for the dissolution not passed, there would have been an election as her term was ending.

13. Further, Ms. Martinez testified that in 2018 there were no elections held as there were no open positions at that time.

14. Ms. Martinez also testified that Petitioner was very familiar with the Bylaws and the voting of the same as he previously ran for a Board position in 2020 and previously served as a member of the Architectural Committee.

Respondent's argument

15. Respondent asserted that it there was nothing in the Bylaws which required the Board to hold elections at the annual meeting. Further, Petitioner "waived" his claim of violation of the Bylaws because he did not object at the meeting, it was only sometime later.

16. Ultimately, Respondent requested that the Tribunal deny Petitioner's appeal.

CONCLUSIONS OF LAW

1 1. This matter lies within the Department's jurisdiction pursuant to ARIZ. REV.
2 STAT. §§ 32-2102 and 32-2199 *et seq.*, regarding a dispute between an owner and a
3 planned community association. The owner or association may petition the department
4 for a hearing concerning violations of community documents or violations of the statutes
5 that regulate planned communities as long as the petitioner has filed a petition with the
6 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

7 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
8 32-2199.02, and 41-1092 *et seq.* OAH has the authority to hear and decide the contested
9 case at bar. OAH has the authority to interpret the contract between the parties.¹

10 3. In this proceeding, Petitioner bears the burden of proving by a
11 preponderance of the evidence that Respondent violated Article 2.1 of the Bylaws.²

12 4. “A preponderance of the evidence is such proof as convinces the trier of fact
13 that the contention is more probably true than not.”³ A preponderance of the evidence is
14 “[t]he greater weight of the evidence, not necessarily established by the greater number of
15 witnesses testifying to a fact but by evidence that has the most convincing force; superior
16 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
17 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
18 the other.”⁴

19 5. Article 2.1 of the SCHA Bylaws provides as follows:

20 **Annual meeting.** An annual meeting of the Members of the
21 Association shall be held at least once every twelve (12) months at a
22 date and time determined by the Board of Directors for the purpose of
23 electing or announcing the results of the election of Directors and
24 transacting such other business as may properly come before the
meeting.

25 6. In this case, there was no dispute that the annual meeting was held,
26 however, Petitioner has not met his burden proving that it was required to hold elections at

27 ¹ See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

28 ² See ARIZ. ADMIN. CODE R2-19-119.

29 ³ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

30 ⁴ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

1 the meeting. As written, there was no *requirement* that the elections be held because
2 according to the language the election could have occurred earlier with the results being
3 announced at the meeting. Further, the voting members clearly approved the dissolution
4 vote, so there would not be a need for the Board once that had passed. Perhaps most
5 harmful to Petitioner, was that he failed to place an objection or even raise the issue at the
6 meeting. Based upon the evidence presented, the tribunal finds that Petitioner was aware
7 or should have been aware of the Bylaws and while Petitioner may have been concerned
8 with perceived time-limits on objections or in the "new business" section of the meeting,
9 there was no record of him objecting to Ms. Martinez and/or Mr. Madill remaining on the
10 Board to oversee the dissolution.

11 7. Therefore, the undersigned Administrative Law Judge concludes that
12 Petitioner has not sustained his burden of proof that Respondent violated Article 2.1 of the
13 SCHA Bylaws.

14 8. Consequently, Petitioner's petition should be dismissed and Respondent be
15 deemed the prevailing party in this matter

16 **ORDER**

17 **IT IS ORDERED** that Petitioners' petition be denied.

18 **NOTICE**

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

24 Done this day, April 13, 2023.

25 /s/ Adam D. Stone
26 Administrative Law Judge
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Transmitted by either mail, e-mail, or facsimile April 13, 2023 to:

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By: OAH Staff