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vs
Saguaro Crest Homeowners' Association
Respondent

ADMINISTRATIVE LAW JUDGE DECISION

APPEARANCES: Petitioner Clifford (Norm) Burnes appeared on his own behalf. Independent Saguaro Crest Homeowners Association was represented by John T. Crotty.

FINDINGS OF FACT

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

2. On or about December 12, 2022, Petitioner filed a single issue petition with the Arizona Department of Real Estate (Department) which alleged that the Association failed to fulfill Petitioner's records request in violation of ARIZ. REV. STAT. § 33-1812(A)(6).

3. On or about January 9, 2023, Respondent returned its ANSWER to the Department whereby it denied Petitioner's claim.

4. On or about January 31, 2023, the Department referred this matter to the Office of Administrative Hearings (OAH), an independent state agency, for an evidentiary hearing on March 28, 2023, to determine whether the alleged violation of A.R.S. § 33-1812(A)(6) occurred.

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

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

HEARING EVIDENCE

7. Petitioner testified on his own behalf, presented the testimony of Esmeralda Sarina Ayala-Martinez, HOA Board President, and submitted exhibits A through I. Respondent did not call any witnesses or submit any exhibits. Administrative notice was taken was the Department's electronic file and NOTICE OF HEARING. The substantive evidence of record is as follows:

- a. On or about December 11, 2021, Respondent conducted a vote by written ballot.
- b. The ballots distributed to the owners were a single page that read as follows:

Voting Ballot to Determine the Future of Saguaro Crest HOA

_____ The Saguaro Crest HOA Board of Directors "SHOULD" move ahead to dissolve the Saguaro Crest Home Owners Association.

_____ The Saguaro Crest HOA Board of Directors "SHOULD NOT" move ahead to dissolve the Saguaro Crest Home Owners Association.

- c. The ballot envelopes distributed with the ballots included a handwritten statement that read as follows:

LOT _____

I HAVE READ THE SAGUARO CREST HOA BOARD OF DIRECTORS SUMMARY OF DISSOLUTION PLAN AND HAVE VOTED VIA THE BALLOT ENCLOSED IN THIS ENVELOP.

SIGNATURE OF HOMEOWNER

DATE

DATE RECEIVED FROM HOMEOWNER _____

1 d. A total of eleven ballots were received from homeowners.¹ Nine of the
2 ballots were marked with “should”; one ballot was marked with “should not”;
3 and one ballot did not have a vote for either option. The ballot without a vote
4 had a handwritten note at the bottom that read as follows:

5 As per my text message & email to the Board members & HOA gmail
6 Account I object to this vote because it does not comply with ARS 33-
7 1812

8 All errors in original.

9 8. The ballot envelopes were all signed except for the envelope for Lot 6,
10 Petitioner’s lot, which was “signed” with the notation “see enclosed”.

11 **ARGUMENTS**

12 Petitioner’s argument

13 9. Petitioner argued that the Association’s governing documents did not permit
14 secret ballots, and therefore, Arizona statute required that the name, address, and
15 signature of the owner be included on the ballot. Petitioner asserted that because the
16 ballots did not have that information included on the ballots, the Association had violated
17 the applicable statute.

18 10. Ultimately, Petitioner asked the Tribunal to issue an order granting his
19 appeal, including requiring the Association to comply with applicable laws. Petitioner also
20 asked his filing fee be reimbursed.

21 Respondent’s argument

22 11. Respondent asserted that the signature on the envelope constituted both
23 the name and signature required under the statute. Further, Respondent argued that the
24 ballot and envelope together constituted the ballot as referenced in the statute and
25 therefore name, address, and signature appeared on the ballot. Finally, Respondent
26 maintained that, because the Association’s governing documents did not preclude a
27 secret ballot, secret ballots were permitted under the governing documents.

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29

¹ Two ballot envelopes indicated the homeowner was the owner of two lots. Therefore a total of thirteen lots
30 voted in the matter.

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

CONCLUSIONS OF LAW

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

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

3. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1812(A) (6).³

4. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."⁴ 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."⁵

5. In Arizona, when construing statutes, we look first to a statute's language as the best and most reliable index of its meaning. If the statute's language is clear and unambiguous, we give effect to that language and apply it without using other means of

² See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

³ See ARIZ. ADMIN. CODE R2-19-119.

⁴ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁵ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

1 statutory construction, unless applying the literal language would lead to an absurd result.
2 Words should be given "their natural, obvious, and ordinary meaning."⁶

3 6. Statutes should be interpreted to provide a fair and sensible result.
4 *Gutierrez v. Industrial Commission of Arizona*; see also *State v. McFall*, 103 Ariz. 234,
5 238, 439 P.2d 805, 809 (1968) ("Courts will not place an absurd and unreasonable
6 construction on statutes.").

7 7. When the legislature uses a word or words in one section of a statute, but
8 not another, the tribunal may not read those words into the section where the legislature
9 did not include them.⁷ Unless defined by the legislature, words in statutes are given their
10 ordinary meanings.⁸

11 8. Each word, phrase, clause, and sentence of a statute or rule must be given
12 meaning so that no part will be void, inert, redundant, or trivial.⁹

13 9. ARIZ. REV. STAT. § 33-1812 provides, in pertinent part, as follows:

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

23

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

28 10. The plan language of the statute delineates between the ballot in a vote and
29 the envelope in a secret ballot vote. Nothing in the Association's governing documents
30 permitted secret ballots.

⁶ *Arpaio v. Steinle*, 201 Ariz. 353, 355 ¶ 5, 35 P.3d 114, 116 (App. 2001) (footnotes and citations omitted).

⁷ See *U.S. Parking v. City of Phoenix*, 160 Ariz. 210, 772 P.2d 33 (App. 1989).

⁸ *Id.*

⁹ See *Deer Valley, v. Houser*, 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007).

11. Further, the plain language of the statute identifies that each ballot must contain the name, address, *and* signature of the person voting. The signature is a separate requirement from the name, and the ballot was required to have all three items.

12. Accordingly, the completed ballots in the vote at issue were required to contain the name, address, and signature of the person voting.

13. A violation of ARIZ. REV. STAT. § 33-1812(A)(6) was established. Therefore, the undersigned Administrative Law Judge concludes that because Petitioner sustained his burden of proof that Respondent violated ARIZ. REV. STAT. § 33-1812(A)(6), his petition must be granted.

ORDER

Based on the foregoing,

IT IS ORDERED that Petitioners' petition be granted.

IT IS FURTHER ORDERED that Respondent reimburse Petitioner's filing fee of \$500.00 in certified funds.

IT IS FURTHER ORDERED that Respondent shall henceforth comply with ARIZ. REV. STAT. § 33-1812(A)(6).

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, April 17, 2023.

/s/ Tammy L. Eigenheer
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile April 17, 2023 to:

Susan Nicolson, Commissioner
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By: OAH Staff