

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of
4 Clifford S. Burnes
5 Petitioner
6 vs.
7 Saguaro Crest Homeowners' Association
8 Respondent.

No. 23F-H038-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

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11 **HEARING:** March 31, 2023

12 **APPEARANCES:** Petitioner Clifford S. Burnes appeared on behalf of himself.
13 John T. Crotty, Esq. appeared on behalf of Respondent Saguaro Crest Homeowners'
14 Association.

15 **ADMINISTRATIVE LAW JUDGE:** Velva Moses-Thompson

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18 **FINDINGS OF FACT**

19 1. The Arizona Department of Real Estate is authorized by statute to receive
20 and to decide Petitions for Hearings from members of homeowners' associations and
21 from homeowners' associations in Arizona. Homeowners' associations and their
22 members are governed by the Chapter 16 of Title 33, the Planned Communities Act,
23 A.R.S. §§ 33-1801 to 33-1818 ("the Act").

24 2. Respondent Saguaro Crest Homeowners' Association
25 is a homeowners association whose members own lots in the Saguaro Crest
26 Subdivision in Tucson, Arizona.

27 3. Petitioner Clifford S. Burns owns a lot in the Saguaro Crest Subdivision
28 and is a member of Respondent.

29 4. On or about December 29, 2022, Petitioner filed a petition with the
30 Department alleging that Respondent had violated Arizona Revised Statutes (A.R.S.) §
33-1804. Petitioner paid \$1,000 for two issues. Specifically, Petitioner alleged that
Respondent failed to provide notice to the members of the March 31, 2022 board
meeting. Petitioner also alleged that Respondent conducted a board meeting on March
31, 2022 that was not open to the members.

1 5. On March 31, 2022, Respondent's Board consisted of only three
2 members.

3 6. On March 31, 2022, two of the board members, Esmeralda Sarina-Ayala
4 Martinez and Dave Madill, met with an attorney to obtain legal advice regarding
5 reorganization. Ms. Martinez took notes at the meeting, however, no other actions were
6 taken at the meeting. During the March 31, 2022, the board members received legal
7 advice from an attorney. There were no other discussions or information provided at the
8 board meeting.

9 7. Respondent did not provide notice of the March 31, 2022 Board meeting
10 to the members prior to the meeting. The March 31, 2022 meeting was not open to the
11 members.

12 8. On February 7, 2023, the Department issued a Notice of Hearing setting
13 the petition for hearing on March 31, 2023. The Notice of Hearing provided that the
14 issue set for determination was whether Respondent violated A.R.S. § 33-1804 when it
15 conducted an unnoticed board meeting.

16 9. The matter was referred to the Office of Administrative Hearings for an
17 evidentiary hearing.

18 10. A hearing was conducted on March 31, 2023.

19 11. At hearing, Petitioner testified on behalf of himself. Respondent presented
20 the testimony of Ms. Martinez.

21 12. Respondent contended that it had not violated A.R.S. § 33-1804 because
22 the statute allows for the Board to go into a closed session to consider legal advice from
23 an attorney.

24 13. Petitioner contended that a quorum was present during the meeting with
25 the attorney where 2 out of the 3 board members were present. As a result, the meeting
26 should have been properly noticed and open to the members of the association
27 pursuant to A.R.S. § 33-1804.

28 **CONCLUSIONS OF LAW**

29 1. A.R.S. § 32-2199(1) permits an owner or a planned community organization
30 to file a petition with the Department for a hearing concerning violations of planned

community documents under the authority Title 33, Chapter 16.¹ This matter lies with the Department's jurisdiction.

2. Petitioner bears the burden of proof to establish that Respondent violated the CC&Rs by a preponderance of the evidence.² Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.³

3. "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

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

A. Notwithstanding any provision in the declaration, bylaws or other documents to the contrary, all meetings of the members' association and the board of directors, and any regularly scheduled committee meetings, are open to all members of the association or any person designated by a member in writing as the member's representative and all members or designated representatives so desiring shall be permitted to attend and speak at an appropriate time during the deliberations and proceedings. The board may place reasonable time restrictions on those persons speaking during the meeting but shall permit a member or member's designated representative to speak once after the board has discussed a specific agenda item but before the board takes formal action on that item in addition to any other opportunities to speak. The board shall provide for a reasonable number of persons to speak on each side of an issue. Persons attending may audiotape or videotape those portions of the meetings of the board of directors and

¹ See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce the development's CC&RSs

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

³ See A.A.C. R2-19-119(B)(2).

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

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

meetings of the members that are open. The board of directors of the association shall not require advance notice of the audiotaping or videotaping and may adopt reasonable rules governing the audiotaping and videotaping of open portions of the meetings of the board and the membership, but such rules shall not preclude such audiotaping or videotaping by those attending, unless the board audiotapes or videotapes the meeting and makes the unedited audiotapes or videotapes available to members on request without restrictions on its use as evidence in any dispute resolution process. Any portion of a meeting may be closed only if that closed portion of the meeting is limited to consideration of one or more of the following:

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

C. Before entering into any closed portion of a meeting of the board of directors, or on notice of a meeting under subsection D of this section that will be closed, the board shall identify the paragraph under subsection A of this section that authorizes the board to close the meeting.

D. Notwithstanding any provision in the declaration, bylaws or other community documents, for meetings of the board of directors that are held after the termination of declarant control of the association, notice to members of meetings of the board of directors shall be given at least forty-eight hours in advance of the meeting by newsletter, conspicuous posting or any other reasonable means as determined by the board of directors. An affidavit of notice by an officer of the corporation is prima facie evidence that

notice was given as prescribed by this section. Notice to members of meetings of the board of directors is not required if emergency circumstances require action by the board before notice can be given. Any notice of a board meeting shall state the date, time and place of the meeting. The failure of any member to receive actual notice of a meeting of the board of directors does not affect the validity of any action taken at that meeting.

E. Notwithstanding any provision in the declaration, bylaws or other community documents, for meetings of the board of directors that are held after the termination of declarant control of the association, all of the following apply:

.....

4. Any quorum of the board of directors that meets informally to discuss association business, including workshops, shall comply with the open meeting and notice provisions of this section without regard to whether the board votes or takes any action on any matter at that informal meeting.

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

Emphasis in bold and italics.

5. Upon consideration of the evidence presented at hearing, the

Administrative Law Judge concludes that Respondent was required under A.R.S. § 33-1804 to provide notice to its members that it would be conducting a board meeting to consider legal advice from an attorney that would be closed to members. In this case, Respondent failed to do so. However, the March 31, 2022 was not required to be open to the members because the Board members were receiving legal advice from an attorney. There were no other matters considered or discussed at the March 31, 2022 meeting.

6. Therefore, the Administrative Law Judge concludes that Respondent violated A.R.S. § 33-1804 when it failed to provide notice to its members of the March 31, 2022 board meeting where it obtained legal advice from an attorney.

7. The Administrative law Judge further concludes that Respondent did not violate A.R.S. § 33-1804 when it failed to make the March 31, 2022 board meeting open to members when the only information discussed and obtained was legal advice from an attorney.

ORDER

IT IS ORDERED that Petitioner be deemed the prevailing party in this matter regarding Petitioner's allegation that Respondent violated A.R.S. § 33-1804 by conducting an unnoticed board meeting.

IT IS FURTHER ORDERED that Respondent be deemed the prevailing party in this matter regarding Petitioner's allegation that Respondent violated A.R.S. § 33-1804 when it held a board meeting to obtain legal advice from an attorney that was closed to the members.

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 is directed to comply with the notice requirements of A.R.S. § 33-1804 going forward.

In all other respects the petition is denied.

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, April 20, 2023.

/s/ Velva Moses-Thompson
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile April 20, 2023 to:

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