

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of

No. 23F-H053-REL

4 Deborah L. Masear,

**ADMINISTRATIVE LAW JUDGE
DECISION**

5 Petitioner

6 v.

7 Paradise Park Condominiums Phase II
8 Homeowners Association,

9 Respondent
10

11 **HEARING:** June 19, 2023

12 **APPEARANCES:** Deborah Masear appeared on her own behalf. Ashley Moscarello
13 appeared on behalf of Respondent. Carl Westlund was a witness on behalf of
14 Respondent.

15 **ADMINISTRATIVE LAW JUDGE:** Brian Del Vecchio
16

FINDINGS OF FACT

BACKGROUND AND PROCEDURE

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18 1. The Arizona Department of Real Estate (Department) is authorized by
19 statute to receive petitions for hearings from members of homeowners' associations and
20 from homeowners' associations in Arizona.

21 2. On or about April 10, 2023, Deborah Masear (Petitioner) filed a single issue
22 petition with the Department which alleged that the Paradise Park Condominiums Phase
23 II Homeowners Association (Respondent) failed to hold an annual meeting as required by
24 Respondent's bylaws Article II Section 3.

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

27 4. On or about May 1, 2023, the Department referred this matter to the Office
28 of Administrative Hearings (OAH), an independent state agency, for an evidentiary
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30

1 hearing on June 19, 2023, to determine whether the alleged violation of Article II Section 3
2 of Respondent's bylaws occurred.

3 THE PARTIES AND GOVERNING DOCUMENTS

4 5. Respondent is an association of condominium owners whose members
5 own properties in the Paradise Park Condominiums residential real estate development
6 located in Phoenix, Arizona. Membership for the Association is comprised of the
7 Paradise Park Condominiums subdivision.

8 6. Petitioner is a Paradise Park Condominiums property owner and a member
9 of the Association.

10 HEARING EVIDENCE

11 7. Petitioner testified on her own behalf. Respondent submitted Exhibits A
12 through F. Respondent called Carl Westlund as a witness. The Department's electronic
13 file and NOTICE OF HEARING were also admitted into the record. The substantive evidence
14 of record is as follows:

15 a. Respondent's bylaws originally required an annual meeting to be
16 held on the second Wednesday in March.¹

17 b. Notice of all meetings of the members must be given no less than 10
18 days and no more than 50 days prior to the meeting.²

19 c. In December of 1996, the relevant section of Respondent's bylaws
20 regarding the annual meeting was amended requiring the annual meeting to
21 be held on the second Monday in March each year at 7:00 PM, Mountain
22 Standard Time.³

23 d. The date the 2023 annual meeting was supposed to be held on was
24 March 13, 2023. Notice for said meeting must have been given no later than
25 March 3, 2023 and no earlier than January 22, 2023.

28 ¹ See Respondent Exhibit A

29 ² *Id.*

30 ³ See Respondent Exhibit B

1 e. On April 20, 2023, a notice of the 2023 annual meeting of the
2 Respondent was sent to its members. The notice indicated the annual
3 meeting was scheduled for May 8, 2023.⁴

4 f. In order to hold the annual meeting quorum must be met. In the case
5 of the Respondent, 25% of members must be present to meet quorum.⁵

6 **ARGUMENTS**

7 Petitioner's argument

8 8. Petitioner argued Respondent's bylaws expressly state the annual meeting
9 must be held on the second Monday of March each year at 7:00 PM Mountain Standard
10 Time, unless that date is a legal holiday. March 13, 2023 was not a legal holiday and the
11 annual meeting was neither noticed nor scheduled in compliance with Respondent's
12 bylaws.

13 9. On March 13, 2023, the annual meeting was not held.

14 Carl Westlund's testimony

15 10. Mr. Westlund testified the annual meeting was in fact noticed and held. The
16 notice of the annual meeting was sent on April 6, 2023, and a second notice was sent on
17 April 20, 2023. Both notices set the annual meeting for May 8, 2023, at 3:00 PM.

18 11. Mr. Westlund further testified in order to meet quorum a minimum of 35
19 members must be present either in person or by mail. On May 8, 2023, quorum was not
20 met. Because quorum was not met, the annual meeting could not be conducted.

21 Respondent's argument

22 12. Respondent asserted while it may be true the annual meeting was not held
23 on March 13, 2023 the annual meeting was attempted to be held on May 8, 2023, and but
24 for the lack of quorum, the annual meeting would have been held.

25 13. Ultimately, Respondent requested that the Tribunal dismiss Petitioner's
26 appeal.

27 **CONCLUSIONS OF LAW**

28
29 ⁴ See Respondent Exhibit D

30 ⁵ See Respondent Exhibit A

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.⁶

10 3. In this proceeding, Petitioner bears the burden of proving by a
11 preponderance of the evidence that Respondent violated Article II Section 3 of the
12 Bylaws.⁷

13 4. “A preponderance of the evidence is such proof as convinces the trier of fact
14 that the contention is more probably true than not.”⁸ A preponderance of the evidence is
15 “[t]he greater weight of the evidence, not necessarily established by the greater number of
16 witnesses testifying to a fact but by evidence that has the most convincing force; superior
17 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
18 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
19 the other.”⁹

20 5. Article II Section 3 of Respondent's bylaws as amended in 1996 provides as
21 follows:

22 **Meetings.** The Annual meeting of the Members shall be held at the
23 office of the Association on the second Monday in March of each
24 year at 7:00 P.M., Mountain Standard Time.

25 6. In this case, there was no dispute that the annual meeting was attempted to
26 be held; however, a plain reading of Article II Section 3 as amended in 1996 explicitly
27 states the meeting must be held on the second Monday of March. Respondent attempted

28 ⁶ See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

29 ⁷ See ARIZ. ADMIN. CODE R2-19-119.

30 ⁸ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁹ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

1 to hold an annual meeting on May 8, 2023, and but for the lack of quorum, the meeting
2 was not held.

3 7. Respondent's Bylaws state, "[t]he annual meeting of the members shall be
4 held," at the designated date and time annually. The phrase "shall be held" is not
5 permissive; there is no changing the date of the annual meeting. Respondent was
6 obligated to hold the meeting on March 13, 2023. Respondent admitted they failed to
7 schedule the annual meeting for March 13, 2023. May 8, 2023, is 56 days late in violation
8 of Article II Section 3 of Respondent's bylaws.

9 8. Based upon a review of the credible and relevant evidence in the record,
10 Petitioner sustained her burden of proof.

11 9. Therefore, the Administrative Law Judge concludes that Respondent's
12 conduct, as outlined above, was in violation of Article II Section 3 of Respondent's bylaws.

13 **ORDER**

14 **IT IS ORDERED** that Petitioner's petition in this matter be affirmed.

15 **IT IS FURTHER ORDERED** that Petitioner's request to levy a civil penalty against
16 Respondent is denied.

17 **IT IS FURTHER ORDERED** Respondent shall reimburse Petitioner's filing fee of
18 \$500.00 pursuant to ARIZ. REV. STAT. § 32-2199.02(A).

19 **NOTICE**

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

25 Done this day, July 10, 2023.

26 /s/ Brian Del Vecchio
27 Administrative Law Judge
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29 Transmitted by either mail, e-mail, or facsimile July 10, 2023 to:
30

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