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No. 23F-H052-REL
No. 23F-H064-REL

ADMINISTRATIVE LAW JUDGE DECISION

HEARING: August 11, 2023

ADMINISTRATIVE LAW JUDGE: Brian Del Vecchio

BACKGROUND AND PROCEDURE

2. On or about March 27, 2023, R.L. Whitmer (Petitioner) filed a single issue petition with the Department which alleged that the Hilton Casitas Council of Homeowners Association, Inc. (Respondent or Association) failed to hold the annual meeting prior to March 31, 2023, as required by Article III Section 3 of the Bylaws of Hilton Casitas Council of Co-owners ("Bylaws"). Said petition was assigned matter number 23F-H052-REL.

3. On or about May 1, 2023, Petitioner filed another single issue petition with the Department which alleged Respondent allowed voting to take place through video conferencing over the internet which allegedly violated ARIZ. REV. STAT. § 33-1250(C)¹. Said petition was assigned matter number 23F-H064-REL.

C. Notwithstanding any provision in the condominium documents, after termination of the period of declarant control, votes allocated to a unit 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.

1 4. On or about March 4, 2023, Respondent submitted its ANSWER to the
2 Department in matter number 23F-H052-REL whereby it denied Petitioner's claim.

3 5. On or about March 15, 2023, the Department referred matter number 23F-
4 H052-REL to the Office of Administrative Hearings (OAH), an independent state agency,
5 for an evidentiary hearing on July 13, 2023.

6 6. On or about June 14, 2023, Respondent submitted its ANSWER to the
7 Department in matter number 23F-H064-REL whereby it denied Petitioner's claim.

8 7. On or about June 15, 2023, the Department referred matter number 23F-
9 H064-REL to the OAH for an evidentiary hearing on August 11, 2023.

10 8. On June 26, 2023, Respondent filed a Motion to Consolidate matter
11 numbers 23F-H052-REL and 23F-H064-REL.

12 9. On July 5, 2023, Respondent's Motion to Consolidate was granted and the
13 matters were scheduled for hearing on August 11, 2023, to determine whether the
14 Association violated Article III Section 3 of the Bylaws and whether the Association
15 violated ARIZ. REV. STAT. § 33-1250(C).

16 **THE PARTIES AND GOVERNING DOCUMENTS**

17 10. Respondent is an association of townhome owners whose members own
18 properties in the Hilton Casitas Condominiums real estate development located in
19 Scottsdale, Arizona. Membership for the Association is compromised of the Hilton Casitas
20 subdivision.

21 11. Petitioner is a Hilton Casitas Condominiums property owner and a member
22 of the Association.

23 **HEARING EVIDENCE**

24 12. Petitioner testified on his own behalf. Respondent's Exhibits A through H
25 were admitted. Petitioner called Robert Westbrook and Sebeck Eli as witnesses. The
26 Department's electronic files and NOTICE OF HEARING in both matters were also admitted
27 into the record. The substantive evidence of record is as follows:

- 28 a. Pursuant to by Article III Section 3 of the Bylaws, annual meetings of
29 the Association's membership are to be held "within three months after the
30 end of each accounting year". The end of each accounting year is

December 31. The Annual Meeting of the Members must take place each year, on or before March 31.²

b. On March 31, 2023, Respondent notified the Membership of the 2023 Annual Meeting.

c. On April 27, 2023, the Annual Meeting was held. It is undisputed the Annual Meeting was not held by the date required by the Bylaws.

d. Mr. Westbrook testified there were two reasons the Annual Meeting was held late. First, the Association hired a new management company and the transition to the new management company was taking longer than anticipated due to COVID. Second, there was a calendaring error by the new management company. Mr. Westbrook further testified the Annual Meeting allowed voting by mail/email or video conference. Mr. Westbrook testified he encouraged Members who were unable to attend the meeting digitally to mail in ballots.

e. Mr. Eli testified he was unable to attend the meeting because he was not given an option to attend the meeting in person. Because the meeting was only held via online video conference, Mr. Eli testified he was not tech savvy, so he could not attend the meeting.

ARGUMENTS

Petitioner's argument

13. Petitioner argued the intent of the board was to prevent people like Mr. Eli from attending the Annual Meeting. Petitioner argued the Association was aware of people like Mr. Eli but failed to accommodate them.

Respondent's argument

14. Respondent stipulated the Annual Meeting was held late in violation of the Bylaws. Respondent argued the reason the Annual Meeting was held via Zoom for two reasons. First, the Annual Meeting was held virtually for the convenience of the Members,

² See Department electronic file "Petition.pdf" at 7.

1 a majority of which lived out of town. Second, Zoom meetings did not cost money, but to
2 hold a meeting in person the Association had to pay to rent space in order to hold said
3 meeting. Respondent argued the intent of the Association was not to discriminate, rather
4 it was to be more accommodating for out of town Members and fiscally responsible.

5 15. Ultimately, Respondent requested that the Tribunal dismiss Petitioner's
6 appeals.

7 **CONCLUSIONS OF LAW**

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

14 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
15 32-2199.02, and 41-1092 *et seq.* OAH has the authority to hear and decide the contested
16 case at bar. OAH has the authority to interpret the contract between the parties.³

17 3. In this proceeding, Petitioner bears the burden of proving by a
18 preponderance of the evidence that Respondent violated Article 10 Section 4 of the
19 CC&Rs.

20 4. "A preponderance of the evidence is such proof as convinces the trier of fact
21 that the contention is more probably true than not."⁴ A preponderance of the evidence is
22 "[t]he greater weight of the evidence, not necessarily established by the greater number of
23 witnesses testifying to a fact but by evidence that has the most convincing force; superior
24 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
25 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
26 the other."⁵

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

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

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

5. Respondent stipulated it failed to adhere to Article III Section 3 of the Bylaws when it held the Annual Meeting on April 27, 2023, 27 days after the deadline. Thus, Petitioner met their burden in matter number 23F-H052-REL. Because Petitioner met their burden they sought civil penalties, pursuant to ARIZ. REV. STAT. § 32-2199.02.⁶ Here, the evidence did not give rise to the awarding of civil penalties.

6. Based upon a review of the credible and relevant evidence in the record, Petitioner failed to meet his burden of proof in matter number 23F-H064-REL. Petitioner claimed the Association violated ARIZ. REV. STAT. § 33-1250(C) when it failed to allow voting to occur in person at the April 27, 2023, Annual Meeting.

7. Petitioner's argument depends on a narrow interpretation of the phrase "in person." According to Petitioner "in person" excluded remote video attendance. However, Petitioner failed to provide sufficient evidence said interpretation ought to be employed. One example of an alternative interpretation of the phrase "in person" was utilized throughout the COVID-19 pandemic. Social distancing required all "in person" meetings be conducted remotely thus expanding the interpretation of "in person." Homeowners association meetings were held remotely in compliance with ARIZ. REV. STAT. § 33-1250(C) at the time. While "in person" could be interpreted as corporeal presence in a defined space, Petitioner failed to provide sufficient evidence said definition ought to be used, not the COVID-19 social distancing definition of "in person," or some other definition of the phrase "in person." Thus, Petitioner failed to meet his burden in docket number 23F-H052-REL.

8. Therefore, the Administrative Law Judge concludes that Respondent did violate Article III Section 3 of the Bylaws.

9. Therefore, the Administrative Law Judge concludes that Respondent did not violate ARIZ. REV. STAT. § 33-1250(C).

ORDER

⁶ ARIZ. REV. STAT. § 32-2199.02(A), provides, in pertinent part, as follows:

The administrative law judge may order any party to abide by the statute, condominium documents, community documents or contract provision at issue and may levy a civil penalty on the basis of each violation.

IT IS ORDERED that Petitioner's petition in matter 23F-H064-REL be dismissed.

IT IS FURTHER ORDERED that Petitioner's petition in matter 23F-H052-REL is affirmed.

IT IS FURTHER ORDERED that Respondent reimburse Petitioner his \$500.00 filing fee for the issue on which he prevailed.

IT IS FURTHER ORDERED denying Petitioner's request to levy a civil penalty against Respondent.

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, August 28, 2023.

/s/ Brian Del Vecchio
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile August 31, 2023 to:

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