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No. 23F-H039-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

APPEARANCES: Michael A. Holland (Petitioner) represented himself. Attorney John A. Buric represented Tonto Forest Estates Homeowner's Association (HOA).

FINDINGS OF FACT

2. On or about January 21, 2023, Petitioner filed a one-issue petition (Petition) with the Department alleging that the HOA had violated A.R.S. § 33-1804(A):

3. On February 9, 2023, the HOA filed a Response to the Petition and requested that the Petition be dismissed as it was inaccurate as to the facts alleged. The HOA acknowledged that members may record open meetings and stated that, while this had been an open meeting, a portion was closed and members had been politely asked

1 not to record the portion of the meeting during which an attorney was providing legal
2 advice regarding pending/contemplated litigation against the HOA.

3 4. The matter was referred to the Arizona Office of Administrative Hearings
4 (Tribunal) for conduct of an administrative hearing regarding the Petition.

5 **Procedural Background**

6 5. After the matter was noticed for hearing, the matter was continued and reset
7 for administrative hearing to convene on May 25, 2023 by Order dated March 9, 2023.

8 6. On March 28, 2023, the Tribunal issued an ORDER denying the HOA's
9 Motion to Dismiss the matter, indicating that Petitioner's Petition had raised a valid issue,
10 pursuant to A.R.S. § 33-1804, regarding whether the HOA had improperly prevented
11 members in attendance at a Board meeting from recording the meeting. The matter was
12 subsequently reset for administrative hearing to convene on August 8, 2023 by ORDER
13 dated May 24, 2023.¹

14 7. Thereafter, the parties made a series of filings, including various motions
15 regarding evidence, witnesses, amendments to the matter, objections to exhibits; various
16 arguments and counter arguments; and a continuance. Of particular note, on August 9,
17 2023, Petitioner moved for summary judgment,² arguing therein that, in one of the HOA
18 filings, the HOA had appropriately specified the issue for hearing to be as follows:

19 The Petition is limited to the sole issue of whether Respondent, Tonto
20 Forest Estates, properly closed a portion of its September 2022 Board
21 Meeting.

22 8. On August 9, 2023, Petitioner then filed a recording of the September 28,
23 2022 meeting and, on August 24, 2023, filed an additional recording from the meeting date.³

24 9. On August 27, 2023, the Tribunal reset the matter for hearing and declared the
25 various motions as either moot or conceded by the parties and ordered disclosure of any
26 additional or supplemental witness list and exhibits to be filed no later than August 15,

27 ¹ The Tribunal set a disclosure date of July 21, 2023 for the August 8, 2023 hearing.

28 ² On August 22, 2023, the HOA attempted to file its response to Petitioner's motion for summary judgment;
29 however, only the cover sheet was received.

30 ³ The Tribunal advised the parties that any parties' use of a recording during an administrative hearing is
heard on the record only as to relevant portions that can be located through clocked timing.

2023.⁴ Further, the Tribunal reminded the parties that the sole issue for hearing was as stated on the Petition and that, at the hearing, the parties should present for consideration only relevant evidence and testimony regarding the September 28, 2022 meeting and that only relevant evidence would be admitted to the hearing record.

10. Tonto Forest Estates is a property consisting of 52 lots and 47 owners. The HOA consists of all owners and the HOA has officers who sit on a Board of Directors; those officers are members who are elected to the various positions.⁵

11. The HOA conducted its Board Meeting on September 28, 2022. Members were able to attend the meeting in person or online. Appellant attended the meeting in person.

12. A member who attended the September 28, 2022 meeting in person recorded the meeting.⁶

13. Once he received a copy of the recording, Petitioner used a software program to prepare an unofficial meeting transcript from the recording.⁷

14. At the administrative hearing, Petitioner raised multiple arguments regarding the September 28, 2022 meeting. While acknowledging the meeting had been noticed as an open meeting, Petitioner argued that the “closed” portion of the meeting had not been properly noticed for two reasons: the statutory reference on the notice, A.R.S. § 33-1804 A, D and F, had not specifically included the exceptions listed in subsection A;⁸ and the HOA had not noticed the “closed” meeting with 48 hours advance notice. Additionally, procedurally, Petitioner argued that HOA President had not specifically stated the meeting was “closed” and there had only been some discussion that the attorney was going to be giving advice, and that the attorney had asked for the advice not to be recorded (to prevent

⁴ The parties continued to make 10 more filings regarding arguments and objections.

⁵ Petitioner is a former officer of the Board.

⁶ At hearing, member Jill Burns (a former officer) testified that she had been present in person and, when the request to stop recording was made, she had not stopped recording the meeting. At hearing, Ms. Burns stated that Arizona is a one-person consent state with regard to making a recording. It must be noted that the law to which Ms. Burns generally referred is a law within the criminal statutes and would not be applicable to the open meeting law requirements under the Planned Community statutes.

⁷ See Exhibit 6. Petitioner further indicated that he gave a copy to Mr. Buric and to HOA member Mr. Krahn.

⁸ See Exhibit 3.

possible future miscommunications regarding the advice).⁹ Petitioner further argued that the subsequent Minutes had not reflected that the meeting had, at any time, been “motioned” to be closed.¹⁰

15. Petitioner argued that he had been singled him out when the President of the Board directly asked if he was recording.¹¹ Petitioner argued that he had been afraid to continue to record as it had been stated (in the discussion) that it was against the law to record an attorney without the attorney’s permission and, thus, Petitioner did not know if he had the right to continue to record.¹²

16. The unofficial transcript of the first five (5) minutes of the meeting indicates there was a discussion about the attorney not wanting to be recorded followed by the President asking persons to stop recording:

- Member [Q to Attorney]: Can you give a reason why?
- Attorney: Sure. When I am recorded, sometimes people take what they want and then they post it online and it ends up being a big cluster.
- President: Okay, so those of you that are making recordings, please please halt. [Petitioner], are you making a recording?
- Petitioner: Not any more.
- President: Okay. Anyone else online who is making a recording, you’re subject to the same Arizona statute.

17. At the hearing, Kurt Meister, Board President, testified about the presence of the attorney at the September 28, 2022 meeting. The day before the meeting, Mr. Meister found out that the attorney would be present to give the HOA legal advice regarding the pending/contemplated litigation. Mr. Meister reviewed A.R.S. § 33-1804(A); he had known of the circumstance of closing a portion of a meeting and the open-meeting exceptions regarding receiving legal advice.

⁹ Petitioner argued such a reason (*i.e.*, asking not to be recorded) was not one of the statutory exceptions.

¹⁰ See Exhibit 5.

¹¹ See Exhibit 6.

¹² Arizona statutes contain multiple provisions regarding actions to record.

18. Mr. Meister indicated that after he asked people to stop recording, he had specifically asked Petitioner to stop only because he could see by the way Petitioner was holding his phone that Petitioner was, in fact, recording the meeting. Mr. Meister further noted that no member had to leave the meeting for the portion of the attorney advice, and that he had not threatened anyone with any adverse action. Mr. Meister also indicated the HOA typically allowed members to record meetings and that this was the first time a portion of a meeting has been “closed.” Mr. Meister acknowledged that the unofficial transcript does not demonstrate that he had used the word “closed.”

19. The unofficial transcript reflects that, after HOA President asked the members to stop recording, he then summarized the general agenda for the meeting. Additionally, the minutes from the prior meeting were discussed and approved. Those actions are aspects of what would be considered to be open meeting discussion and the HOA members would have been within the statutory parameters to have recorded those discussions. Thus, the evidence demonstrates that HOA President made his request to stop the recordings a few minutes before he needed to for the upcoming attorney/legal discussion. Finally, the hearing record demonstrates that no member attending, nor anyone attending online, was asked to leave the open meeting.

20. The hearing record does not contain any information regarding the remainder of the open meeting, *i.e.*, the portion of the meeting that proceeded after the legal discussion.

CONCLUSIONS OF LAW

1. This matter lies within the Department’s jurisdiction. Pursuant to A.R.S. §§ 32-2102 and 32-2199 et al., 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 condominium documents or violations of the statutes that regulate condominiums as long as the petitioner has filed a petition with the department and paid a filing fee as outlined in A.R.S. § 32-2199.05.

2. Pursuant to A.R.S. §§ 32-2199(2), 32-2199.01(D), 32-2199.02, and 41-1092, OAH has the authority to consider and decide the contested petitions, the authority to order any party to abide by the statute, community documents and contract provisions

1 at issue, the authority to interpret the contract *between the parties*, and the authority to
2 levy a civil penalty on the basis of each proven violation.¹³

3 3. In these proceedings, a petitioner bears the burden of proving by a
4 preponderance of the evidence that a respondent has violated the planned community
5 document(s') provisions or statutes alleged to have been violated.¹⁴

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

13 5. A.R.S. § 33-1804(A) provides, in pertinent part:

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

- 26 1. Legal advice from an attorney for the board or the association. . . .
27 2. Pending or contemplated litigation. . . .¹⁷

28 6. The hearing record demonstrates that HOA President attempted to close a
29 portion of the meeting for purposes of receiving legal advice regarding possible impending
30 or contemplate litigation. HOA President told the members who were present for the
meeting and, also for the attorney's presentation, that they could not record that portion of

¹³ See also *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

¹⁴ See ARIZ. ADMIN. CODE R2-19-119.

¹⁵ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

¹⁶ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

¹⁷ Emphasis added.

1 the meeting dealing with the legal advice. However, nothing in the record demonstrates
2 that this specific portion of the meeting was effectively "closed." In fact, Mr. Meister
3 confirmed that none of the members present, or anyone online, had to leave the meeting or
4 had to leave the meeting for the portion that included the attorney's advice. Thus, the
5 Administrative Law Judge concludes that the September 28, 2022 meeting cannot be
6 considered to have been "closed."

7 7. A.R.S. § 33-1804(A) allows a person to record "those portions of the
8 meetings of the board of directors and meetings of the members that are open." Because
9 no portion of the September 28, 2022 meeting was "closed," the HOA had no authority
10 under A.R.S. § 33-1804(A) to prevent the HOA members from recording the meeting.

11 8. Based on the foregoing, the Administrative Law Judge concludes that
12 Petitioner established that the HOA was in violation of A.R.S. § 33-1804(A) in requesting
13 that members stop recording the meeting or stop recording the portion of the September 28,
14 2022 Board meeting during which legal advice was being given.

15 **ORDER**

16 **IT IS ORDERED** that Petitioner's petition is granted and Petitioner is deemed the
17 prevailing party.

18 **IT IS FURTHER ORDERED** Respondent shall reimburse Petitioner his \$500.00
19 filing fee.

20 **NOTICE**

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

26 Done this day, October 20, 2023.

27 /s/ Kay Abramsohn
28 Administrative Law Judge
29
30

Transmitted by either mail, e-mail, or facsimile to:

Susan Nicolson, Commissioner
Arizona Department of Real Estate

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