IN THE OFFICE OF ADMINISTRATIVE HEARINGS

David B. Carr, Petitioner vs. Sunset Plaza Condo Association, Respondent	**No. 18F-H1817003-REL** **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: November 21, 2017

APPEARANCES: Petitioner David B. Carr appeared on behalf of himself. Paige Marks, Esq. appeared on behalf of Respondent Sunset Plaza Condo Association.

ADMINISTRATIVE LAW JUDGE: Velva Moses-Thompson

FINDINGS OF FACTS

1. On or about August 14, 2017, Petitioner David B. Carr ("Mr. Carr") filed a petition alleging that Sunset Plaza violated Ariz. Rev. Stat. section 33-1248 and Article XI of Sunset Plaza's bylaws. Mr. Carr's Petition provides, in relevant part, as follows:

> SUNSET PLAZA CONDOMINIUM ASSOCIATION BOARD OF MANAGEMENT TAKES ACTION WITHOUT HOLDING AUTHORIZED BOARD MEETING IN VIOLATION OF AZ STATUTE 33-1248. THESE UNAUTHORIZED MEETINGS HAVE RESULTED IN CONTRACTS WITH MANAGEMENT FIRMS AND ATTORNEYS. THESE CONTRACTS HAVE RESULTED IN EXPENSES NOT APPROVED OR REVIEWED BY CONDO OWNERS. THESE UNAUTHORIZED MEETINGS AND SUBSEQUENT ACTION S HAVE SPENT FUNDS AND CREATED CONTRACTS FOR, BUT NOT LIMITED TO, KINNEY MANAGEMENT (OCT 16), OSSELAER REAL ESTATE (SEPT 16), AND MULCAHY LAW FRIM (MAY 16). ALL CONTRACTS ENTERED INTO WITHOUT A PROPERLY CALLED BOARD MEETING SHOULD BE CANCELED AND ALL EXPENDITURES FROM THESE CONTRACTS, AND OTHER MONIES SPENT, SHOULD BE PAID BY THE SIGNATORY.
> ARTICLE XI OF THE SUNSET PLAZA BYLAWS REQUIRES CORRECT AND COMPLETE BOOKS AND RECORDS OF ACCOUNT AND SHALL ALSO KEEP MINUTES OF THE PROCEEDING OF ITS MEMBERS, BOARD OF MANAGEMENT, AND COMMITTEES HAVING ANY

> AUTHORITY OF THE BOARD OF MANAGEMENT…" THE ASSOCIATION 2015 YEAR END BALANCE SHEET IDENTIFIES $10,295.09 IN RESERVE EQUITY DISTRIBUTED ACROSS THE FIVE (5) RESERVE ACCOUNTS. THE 2016 YEAR END INCOME STATEMENT RECORDS AN ADDITIONAL $9,180.00 DEPOSIT. THE 2016 YEAR-END BALANCE SHEET INDICATES A TOTAL OF $2,295.44 IN RESERVES WITHOUT IDENTIFYING THE INDIVIDUAL ACCOUNT BALANCE (I.E. ROOF, PAINTING THERE WERE NO REPORTED RESERVE EXPENSES IN 2016. THIS REPRESENTS AN UNEXPLAINED RESERVE DEFICIT OF $10,295.09. THE SUNSET PLAZA 2016 YEAR-END BALANCE SHEET DOES NOT PROVIDE ANY IDENTIFICATION OF THE PRIOR YEAR AND CURRENT YEAR AND CURRENT YEAR OPERATING EQUITY. CALCULATING AN EXPANDED 2016 BALANCE SHEET A DISCREPANCY OF $2,808.42 IS NOTE. THE 2016 & 2017 SUNSET PLAZA FINANCIAL STATEMENT SHOULD BE AUDITED. ON-GOING REPORTING SHOULD IDENTIFY RESERVE BALANCES AND HOMEOWNER EQUITY.

2. The matter was referred to the Office of Administrative Hearings for an evidentiary hearing.

3. On September 26, 2017, the Arizona Department of Real Estate issued a Notice of Hearing setting the above-captioned matter for hearing at 9:00 a.m. on November 21, 2017 at the Office of Administrative Hearings in Phoenix, Arizona.

4. A hearing was held on November 21, 2017.

5. At all times relevant to this matter, Mr. Carr was a member of Respondent Sunset Plaza Condo Association ("Sunset Plaza").

6. Prior to September 2016, Sunset Plaza hired Mulcahy Law Firm, P.C.

7. In or around September 2016, Sunset Plaza decided to hire Kinney Management Services ("Kinney") to manage the affairs of Sunset Plaza.

8. On or about September 15, 2016, Kinney informed Sunset Plaza that it was retracting its acceptance of Sunset Plaza's offer to hire Kinney to perform management services. Kinney stated in its letter that it was retracting its acceptance because Kinney received a complaint filed by Mr. Carr with the Attorney General's Office against Kinney. *See* Exhibit 4.

9. On September 21, 2016, Sunset Plaza held an emergency board meeting and voted to hire Osselaer Management Company ("Osselaer") to manage all of its

affairs. Sunset Plaza kept the minutes of the board meeting. Sunset Plaza offered the minutes of its emergency board meeting into evidence. *See* Exhibit 5.

10. Osselaer categorizes its financial statements different from the company Sunset Plaza previously retained by the name of Kolby. Osselaer does not separate reserve amounts while Kolby previously separated reserve amounts.

11. At hearing, Sunset Plaza presented the testimony of Marilyn Gelroth. Ms. Gelroth testified that she has served on the board of Sunset Plaza for about eight years. Ms. Gelroth testified that all of the board members are volunteers. Ms. Gelroth testified that Sunset Plaza held a board meeting when it made the decision to hire the Mulcahy Law Firm. Ms. Gelroth testified that Sunset Plaza members were not informed of the board meeting.

12. Ms. Gelroth testified that the board held an emergency meeting when it made the decision to hire Osselaer Management Company. Ms. Gelroth testified that it was important that Sunset Plaza hire one company to handle all of its affairs. Ms. Gelroth testified that previously, Sunset Plaza hired one company that only managed its financial affairs. Ms. Gelroth testified that after Kinney informed Sunset Plaza that it would not accept its offers, Sunset Plaza needed to move quickly because members needed to know where to send payments.

13. I find Ms. Gelroth's testimony to be credible.

14. Mr. Carr testified that Sunset Plaza held board meetings without making them open to all members. Mr. Carr also testified that Sunset Plaza failed to keep accurate financial records. Mr. Carr alleged that there is a discrepancy between Sunset Plaza's 2015 year end balance statement and its 2016 income statement.

15. Sunset Plaza's position is that Mr. Carr erroneously compared Sunset Plaza's 2015 year end balance statement to its 2016 income statement. Sunset Plaza contended that the two documents should not be compared because they are two different types of financial records. Furthermore, Sunset Plaza contended that Osselaer categorizes financial categories different from Kolby. Sunset Plaza contended that Mr. Carr did not take into account that Osselaer does not separate out reserve amounts and is not required to do so by law.

16. Sunset Plaza concedes that it did provide notice of its board meetings when it decided to hire Kinney and the Mulcahy firm. Sunset Plaza contended that it did not understand the open meeting law. Sunset Plaza represented to the Tribunal that it will abide by the open meeting law in the future.

17. Sunset Plaza argued in its pre-hearing statement that "The Association was formed as condominiums pursuant to Arizona law. The Association recorded a Declaration of Restrictions, Establishment of Board of Management in Document NO. 1961-0111868 ("Declaration"), official records of Maricopa County, Arizona."

18. Sunset Plaza offered the Declaration into evidence. *See* Exhibit 1.
he Declaration provides in section 3(J) that the Board has the rights and powers "To employ workmen, maids, janitors and gardeners and to purchase supplies and equipment, to enter into contracts and generally to have the powers of an apartment house manager in connection with the ratters hereinbefore set forth, except that the Board, not any officer elected thereby, may not encumber or dispose of the interest of any owner except in order to satisfy a judgment against such owner for violation of the owner's covenant imposed by these restrictions."

19. Sunset Plaza's bylaws provide in Article VII, section 11, "Duties. The Board of Management shall carry out the purposes of the association as directed at the annual and/or the special meetings of the Members, shall enter into contracts on behalf of the association and shall take such actions as it deems necessary to establish and collect assessments, and to enforce the Deed Restrictions, these Bylaws and Rules and Regulations of the association." *See* Exhibit 2, page 7.

20. Sunset Plaza's bylaws provide in Article XI, "The association shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of its members, Board of Management, and committees having any of the authority of the Board of Management, and shall keep at is registers or principal office a record giving a name and addresses of the members entitled to vote…."

CONCLUSIONS OF LAW

1. "ARIZ. REV. STAT. section 41-2198.01 permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of planned community documents or violations of statutes that regulate

planned communities. That statute provides that such petitions will be heard before the Office of Administrative Hearings.

2. Petitioner bears the burden of proof to establish that Respondent ARIZ. REV. STAT. section 33-1258 by a preponderance of the evidence.[1] Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.[2]

3. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."[3] 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."[4]

4. Respondent ARIZ. REV. STAT. section provides, in relevant part, as follows:

> A. Notwithstanding any provision in the declaration, bylaws or other documents to the contrary, all meetings of the unit owners' 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 a 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 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 or videotaping of open portions of the meetings of the board and the

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[1] *See* A.R.S. § 41-1092.07(G)(2); 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).
[2] *See* A.A.C. R2-19-119(B)(2).
[3] MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).
[4] BLACK'S LAW DICTIONARY at page 1220 (8^{th} ed. 1999).

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 portion of the meeting is limited to consideration of one or more of the following:

* * * *

B. ………………….. The failure of any unit owner to receive actual notice of a meeting of the unit owners does not affect the validity of any action taken at that meeting.

* * * *

D. Notwithstanding any provision in the declaration, bylaws or other condominium documents, for meetings of the board of directors that are held after the termination of declarant control of the association, notice to unit owners 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 association is prima facie evidence that notice was given as prescribed by this section. **Notice to unit owners 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 unit owner 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 condominium 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:

* * * *

2. An emergency meeting of the board of directors may be called to discuss business or take action that cannot be delayed for the forty-eight hours required for notice. At any emergency meeting called by the board of directors, the board of directors may act only on emergency matters. The minutes of the emergency meeting shall state the reason necessitating the emergency meeting. The minutes of the emergency

> meeting shall be read and approved at the next regularly scheduled meeting of the board of directors. (Emphasis Added).

5. Mr. Carr failed to establish by a preponderance of the evidence that Sunset Plaza violated Article XI of Sunset Plaza's Bylaws.

6. Sunset Plaza did not violate Ariz. Rev. Stat. 33-1248 when it failed to notify it members of its board meeting to hire Osselaer. Sunset Plaza was exempt from the open meeting law because it made a decision to hire Osselaer at an emergency board meeting.

7. Mr. Carr established by preponderance of the evidence that Sunset Plaza violated Ariz. Rev. Stat. 33-1248 when it decided to hire Kinney and the Mulcahy law firms at its board meetings. Sunset Plaza did not dispute that it failed to inform its members of the board meetings.

ORDER

In view of the foregoing, it is ORDERED that Petitioner be deemed the prevailing party with regard to Sunset Plaza's violation of Ariz. Rev. Stat. section 33-1248.

It is further ORDERED that Sunset Plaza pay Petitioner his filing fee of $500.00, to be paid directly to Petitioner within thirty (30) days of this Order.

In all other respects, David Carr's Petition is dismissed.

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, November 22, 2017.

/s/ Velva Moses-Thompson
Administrative Law Judge

Transmitted electronically to:

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Done this day, December 11, 2017

Velva Moses-Thompson
Administrative Law Judge

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