

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Tom Barrs,
4 Petitioner,

No. 18F-H1818035-REL-RHG

5 vs.

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 Desert Ranch Homeowners' Association,
7 Respondent.

8 **HEARING:** December 6, 2018

9 **APPEARANCES:** Petitioner Tom Barrs appeared on his own behalf. Catherine
10 Overby, President, and Brian Schoeffler, Vice President, appeared on behalf of
11 Respondent Desert Ranch Homeowners' Association.

12 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer

13
14 **FINDINGS OF FACT**

15 1. On or about March 19, 2018, Petitioner Tom Barrs filed a Homeowners
16 Association (HOA) Dispute Process Petition (Petition) with the Arizona Department of
17 Real Estate (Department). Petitioner indicated a single issue would be presented and
18 paid the appropriate \$500.00 filing fee, but then asserted violations of A.R.S. § 33-1813,
19 A.R.S. § 33-1811, A.R.S. § 33-1804, Desert Ranch Bylaw 3.3, and Desert Ranch Bylaw
20 2.4. In detailing the single issue petition, Petitioner included a four page narrative.

21 2. On or about April 13, 2018, Petitioner filed an amended version of the
22 Petition (Amended Petition) in which he added an alleged violation of A.R.S. § 33-1812.
23 The Amended Petition still indicated Petitioner had paid only for a single issue.

24 3. On or about May 21, 2018, the Department issued a Notice of Hearing in
25 which it set forth the issue for hearing as follows:

26 The Petitioner alleges that the Carter Ranch Homeowners Association
27 [sic] (Respondent) has violated A.R.S. § 33-1813, 33-1811, 33-1812 and
28 33-1804 as well as the Association Bylaws 3.3 and 2.4 by not upholding
the election results of March 18,2017 [sic] as outlined in the petition.

29 4. On or about July 30, 2018, Petitioner submitted payment to convert the
30 single issue petition into a multiple issue petition. Petitioner also submitted a

1 "Clarification of Three Issues alleged in Petition." Petitioner set forth the three issues as
2 follows:

3 1. Two Directors (Jerome Klinger and Catherine
4 Overby) were elected to fill two vacant seats on the Board during the
5 March 18, 2017 Annual Meeting. Over a day later, though barred by
6 Bylaw 2.4, the third candidate challenged the election of Jerome Klinger to
7 the board and asked for a "re-vote" of his position. The board then sought
8 to remove Board Director Jerome Klinger in a variety of ways including
9 announcing the results to be overturned via a closed board meeting and
10 later calling for a "re-vote" based on a new tally of the election results.
11 Petitioner alleges that not only were his claims barred by Bylaw 2.4, the
12 methods used do not fall within proper protocol required to recall an
13 elected Director according to ARS 33-1813 and Bylaw 3.3. Furthermore,
14 Petitioner finds the means used highly suspicious based on information
15 and belief.

16 2. The board's actions relating to the March 18, 2017
17 Annual Election violated ARS 33-1812. Specifically, the Board disposed
18 of election materials required to be kept according to ARS 33-1812(7), and
19 selectively invalidated votes while accepting others cast on invalid ballots
20 [ARS 33-1812(A)(4-5)&(B)].

21 3. Meetings relating to the elections in 2017 were
22 held closed and/or without proper notice in violation of ARS 33-1804.
23 (January ??, March 18th, March 20th, March 22nd, March 24th, March ?? and
24 May 10th)

25 All errors in original.

26 5. At the initial hearing in this matter, Petitioner testified on his own behalf
27 and presented the testimony of Mr. Schoeffler, Catherine Overby, and Stephen Barrs.
28 Based on the evidence presented at hearing, the Administrative Law Judge concluded
29 that the following occurred:

30 a. In advance of the Annual Meeting, absentee ballots were sent to the
Association members. The absentee ballots listed the candidates as
Ms. Oberby and Mr. Schoeffler and had a place for a write-in
candidate.

b. The absentee ballot indicated that if the member intended to attend the
meeting, the ballot could be turned in then, but if the member was not
able to attend the meeting, the ballot could be emailed by March 16,

1 2017, to either Ms. Overby or Patrick Rice, both of whom were board
2 members at the time.

- 3 c. On March 18, 2017, at the Annual Meeting the members submitted
4 their ballots. The ballots were counted and Ms. Overby and Jerome
5 Klinger were announced as the winning candidates. None of the
6 members present raised an objection to the voting or the announced
7 results before the meeting was adjourned.
- 8 d. Immediately following the meeting, Mr. Rice gathered the ballots and
9 expressed his concerns with the election results.
- 10 e. All of the ballot envelopes were destroyed at or about the time of the
11 election.
- 12 f. On or about March 19, 2017, Mr. Schoeffler sent an email to Ms.
13 Overby, Mr. Rice, and three other individuals regarding the election
14 process and results. The email stated, "I'm asking you to review the
15 situation and make a decision if there is enough concern that there
16 should be a revote."
- 17 g. On or about March 20, 2017, Ms. Overby sent an email to the
18 members indicating, "In regard to the current election, it has been
19 contested. For that reason, the Board is obligated to look further into
20 the matter to determine that everything was done properly." Ms.
21 Overby further stated that Respondent's bylaws did not allow for a
22 write-in candidate, and therefore, Mr. Schoeffler and Ms. Overby were
23 the new directors per the current vote count.
- 24 h. Ms. Overby and Mr. Rice decided the Board should contact an attorney
25 regarding the issue. On or about March 29, 2017, certain Board
26 members including Ms. Overby and Mr. Rice met with an attorney at
27 Ms. Overby's house. During the meeting, it was discovered that there
28 were duplicate ballots and a proxy ballot that were improperly counted.
- 29 i. Following the meeting with the attorney, the Board members
30 determined that the valid votes resulted in a tie between Mr. Schoeffler
and Mr. Klinger. The Board members decided to have a run-off

1 between the two individuals, which was held on April 29, 2017. Mr.
2 Schoeffler was announced as the winner after the run-off election.

3 j. On or about May 10, 2017, the Board of Directors held an
4 organizational meeting.

5 6. Following the hearing, the Administrative Law Judge issued a decision in
6 which she determined that Petitioner's three issues presented at hearing were as
7 follows:

8 A. Respondent violated Bylaw 2.4 when it acted on Mr. Schoeffler's objection
9 to the election results raised the day after the Annual Meeting.

10 B. Respondent violated A.R.S. § 33-1812(A)(7) when it discarded the ballot
11 envelopes at or about the time of the election.

12 C. Respondent violated A.R.S. § 33-1804 when it held meetings that were
13 closed and/or without proper notice.

14 7. The Administrative Law Judge concluded that Petitioner failed to sustain
15 his burden to establish a violation of Respondent's Bylaw 2.4; established that
16 Respondent violated A.R.S. § 33-1812(A)(7); and established that Respondent violated
17 A.R.S. § 33-1804.

18 8. On or about October 1, 2018, after issuance of the decision in the initial
19 matter, Petitioner filed a Homeowner's Association (HOA) Dispute Rehearing Request
20 citing as particular grounds for the request as misconduct by the prevailing party;
21 insufficient penalties; error in the admission or rejection of evidence or other errors of
22 law occurring during the proceeding; that the findings of fact or decision was arbitrary,
23 capricious, or an abuse of discretion; and that the findings of fact or decision was not
24 supported by the evidence or was contrary to law. Petitioner included a five page
25 narrative outlining the errors he perceived having occurred in the underlying hearing.

26 9. On or about November 2, 2018, the Commissioner of the Arizona
27 Department of Real Estate issued an Order Granting Rehearing and Notice of Hearing.
28 In the order, the Commissioner provided that "the Department hereby grants the
29 Petitioner's request for rehearing for the reasons outlined in the Petitioner's Rehearing
30 Request" without providing any specific basis for the decision.

1 10. On December 6, 2018, the rehearing in this matter was conducted. At the
2 rehearing, Petitioner stated that he was not seeking reconsideration of the lack of
3 penalty for issues two or three and was only seeking reconsideration of the initial
4 decision as it related to issue one, the improper overturning of the election results.

5 11. At the rehearing, Petitioner provided clips of audio he recorded after the
6 Annual Meeting. Petitioner acknowledged he had an entire recording of the
7 conversations he had after the Annual Meeting, but he did not choose to provide the
8 entire recording at the hearing. Rather, Petitioner opted to play the snippets he
9 selected to support his position and arguments.

10 12. Petitioner argued that following the Annual Meeting, none of the board
11 members expressed any concern with the election results and therefore, their testimony
12 at the hearing that the investigation was instigated because of a board member.
13 Petitioner again argued that the board members were also members, and therefore, any
14 objection they had was required to be expressed before the close of the meeting.

15 CONCLUSIONS OF LAW

16 1. Arizona statute permits an owner or a planned community organization to
17 file a petition with the Department for a hearing concerning violations of planned
18 community documents or violations of statutes that regulate planned communities.
19 A.R.S. § 41-2198.01. That statute provides that such petitions will be heard before the
20 Office of Administrative Hearings.

21 2. Petitioner bears the burden of proof to establish that Respondent committed
22 the alleged violations by a preponderance of the evidence.¹ Respondent bears the
23 burden to establish affirmative defenses by the same evidentiary standard.²

24 3. “A preponderance of the evidence is such proof as convinces the trier of
25 fact that the contention is more probably true than not.”³ A preponderance of the
26 evidence is “[t]he greater weight of the evidence, not necessarily established by the
27 greater number of witnesses testifying to a fact but by evidence that has the most
28 convincing force; superior evidentiary weight that, though not sufficient to free the mind

29 ¹ See ARIZ. REV. STAT. section 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).

30 ² See A.A.C. R2-19-119(B)(2).

³ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one
2 side of the issue rather than the other.”⁴

3 4. On rehearing, the only issue argued was whether Respondent violated
4 Bylaw 2.4 when it acted on Mr. Schoeffler’s objection to the election results raised the
5 day after the Annual Meeting.

6 5. Bylaw 2.4 provides, in relevant part, as follows:

7 Any Member who fails to object to any perceived or actual irregularity at
8 the meeting (whether procedural, parliamentary, substantive or technical)
forever waives that claim.

9 6. Petitioner argued that because Mr. Schoeffler did not raise an objection to
10 the election results prior to the Annual Meeting adjourning, the Board was not allowed to
11 then investigate those concerns Mr. Schoeffler raised in the email the following day.

12 7. The testimony offered at the initial hearing and the rehearing established
13 that Mr. Rice, as a Board member, expressed his concerns with the vote immediately
14 after the Annual Meeting adjourned. Mr. Schoeffler’s email did not initiate the Board’s
15 investigation of the election.

16 8. Petitioner argued that “Member” used in the bylaw should be read as
17 including “the Board of Directors.” It should be noted that throughout the bylaws, the
18 terms “Member,” “Directors,” and “Board of Directors” were used with specific meanings
19 and were not interchangeable.

20 9. Petitioner made no showing that a Director could not raise questions as to
21 the validity of the election results after the meeting adjourned. Thus, Petitioner failed to
22 sustain his burden to establish a violation of Respondent’s Bylaw 2.4.

23 **ORDER**

24 In view of the foregoing, IT IS ORDERED that the Petition be dismissed as to
25 Issue 1.

27 **NOTICE**

28 **This administrative law judge order, having been issued as a result**
29 **of a rehearing, is binding on the parties. A.R.S. § 32-2199.02(B). A**
30 **party wishing to appeal this order must seek judicial review as**

⁴ BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

prescribed by A.R.S. § 41-1092.08(H) and title 12, chapter 7, article 6. Any such appeal must be filed with the superior court within thirty-five days from the date when a copy of this order was served upon the parties. A.R.S. § 12-904(A).

Done this day, December 26, 2018.

/s/ Tammy L. Eigenheer
Administrative Law Judge

Copy mailed/e-mailed/faxed December 26, 2018 to:

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