

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Scott Servilla & Heidi H Servilla,
4 Petitioner,

5 vs.

6 Village of Oakcreek Association,
7 Respondent.

No. 18F-H1817018-REL-RHG

**ADMINISTRATIVE LAW JUDGE
DECISION**

8 **HEARING:** November 29, 2018, with the record held open until December 20,
9 2018.

10 **APPEARANCES:** Petitioner Scott Servilla appeared on his own behalf.
11 Respondent Village of Oakcreek Association was represented by Mark Sahl.

12 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer
13

14 **FINDINGS OF FACT**

15 1. Village of Oakcreek Association (Respondent) is an association of 2436
16 homeowners located in Arizona.

17 2. Scott S. Servilla (Petitioner) filed a petition with the Arizona Department of
18 Real Estate (Department) on or about November 13, 2017, alleging that Respondent
19 had violated A.R.S. § 33-1817(1); A.R.S. § 1812(B)(2); and the community's Master
20 Declaration.

21 3. Initially, Petitioner filed a single issue petition and paid the corresponding
22 \$500.00 filing fee. Upon an order from the undersigned Administrative Law Judge
23 instructing Petitioner to identify the single issue upon which he wished to proceed or to
24 pay the additional filing fee for multiple issues, Petitioner paid an additional \$1000.00
25 filing fee and set forth the three issues he wished to be heard at the hearing.¹

26 4. The three issues Petitioner identified were as follows:

27 (1) the vote November 10, 2016 violated A.R.S. § 33-1817[(A)](1) and
28 Declaration because a majority of vote required 1173 votes to amend

29
30 ¹ Petitioner asserted that he believed he had set forth a single issue—Respondent failed to comply with the governing documents (Master Declaration and By-Laws) with respect to the Amendments to the Declaration voted on at the November 10, 2016 meeting.

1 the declaration as set forth in section B.1 of the Petition, and,
2 therefore, requests an order that the amendment to the declaration is
invalid and a civil penalty to be imposed on Respondent;

3 (2) the vote November 10, 2016 violated A.R.S. § 33-1812(B)(2) and
4 the Declaration because the written ballot used did not provide a
5 separate opportunity to vote for or against each proposed action as set
6 forth in section B.2. of the Petition, and, therefore, requests an order
that the amendment to the declaration is invalid and a civil penalty to
be imposed on Respondent; and

7 (3) the Respondent has violated and continues to violate By-Laws
8 Section 8, Article VIII by imposing fines in excess of \$50 per violation
9 before and after the Members of the Association voted against a
10 proposed Amendment to Section 8 of Article VIII of the By-Law to raise
the fines as set forth in section B.2. of the Petition, and therefore,
requests an order that the Association cannot levy fines in excess of
\$50 per violation and a civil penalty to be imposed on Respondent.

11
12 All errors in original.

13 5. Following a hearing in this matter, the Administrative Law Judge issued an
14 Administrative Law Judge Decision in which the Administrative Law Judge found that
15 Petitioner failed to prove his claim as to issues one and three listed above. The
16 Administrative Law Judge found that Petitioner established a violation of the applicable
17 statute as to issue two, but that, because the statute did not provide an enforcement
18 mechanism to the Administrative Law Judge, no remedy could be ordered.

19 6. Following the issuance of the Administrative Law Judge Decision,
20 Petitioner filed a Request for Reconsideration alleging that the conclusion there was no
21 remedy that could be ordered was contrary to the law.

22 7. On or about September 21, 2018, the Commissioner for the Arizona
23 Department of Real Estate granted the request for rehearing "for the reasons outlined in
24 the Petitioner's Rehearing Request."

25 8. At the rehearing, Petitioner argued that, pursuant to case law, the
26 Administrative Law Judge was authorized to declare the amendment to the Bylaws void
27 and unenforceable.

28 9. The underlying facts of the case, as set forth in the Administrative Law
29 Judge Decision, were not challenged and, to the extent they are relevant to the present
30 issue, are restated here.

1 10. Respondent issued a Notice of Special Meeting of Members (Notice)
2 indicating a meeting would be held on November 10, 2016, and that “[t]he sole purpose
3 of the Special Members Meeting is to [v]ote on the approval of the Leasing and
4 Schedule of Fines Assessment.” Included with the Notice was an absentee ballot
5 setting forth the proposed amendment. No allegation was raised that that notice
6 provided to the members was improper under the governing documents.

7 11. The proposed amendment listed changes to the Master Declaration
8 including the addition of a new section, 4.23 Leasing of Lots and Units; Restrictions and
9 Limitations and the complete replacement of an existing section, 5.08 Schedule of
10 Fines. The proposed amendment established a minimum lease term of 30 days,
11 prohibited leases of less than the entire lot or unit, and permitted the committee to adopt
12 a schedule specifying the recommended fines or range of fines for violations.

13 12. The absentee ballot allowed the member to cast a vote “FOR THE
14 LEASING AND SCHEDULE OF FINES AMENDMENT” or “AGAINST THE LEASING
15 AND SCHEDULE OF FINES AMENDMENT.” Petitioner returned an absentee ballot
16 voting against the proposed amendment.

17 13. On November 10, 2016, the special meeting of members was held. In
18 total, 1067 ballots were received on the proposed amendment, constituting
19 approximately 44 percent of the members voting. Of those voting, 564 voted in favor of
20 the proposed amendment, constituting approximately 53 percent of the votes cast.

21 14. This vote was the subject of a lawsuit brought by a different homeowner in
22 Yavapai County Superior Court. In that matter, the Yavapai County Superior Court
23 denied an Application for Preliminary Injunction and, in so doing, made extensive
24 preliminary findings and rulings. Of note, Petitioner requested that the Administrative
25 Law Judge give weight to the findings of the Yavapai County Superior Court as it related
26 to the alleged violation of A.R.S. § 33-1812(A), but ignore the other findings of the court
27 that were contrary to his position.

28 15. Petitioner also argued that because the By-Laws have a limitation on fines
29 of \$50.00 per day and a proposed amendment to the By-Laws to eliminate that
30 limitation was voted down in April 2017, the homeowners expressed their opposition to
that part of the proposed amendment at issue in this matter. Petitioner asserted that

1 had the proposed amendment been broken into two parts, the part of the proposed
2 amendment dealing with the fines most likely would have failed.² Petitioner
3 acknowledged that he did not raise any objections to the manner in which the
4 November 10, 2016 vote occurred until April 2017 and did not file the instant petition
5 until November 13, 2017. Petitioner urged that the fines should remain at \$50.00 per
6 violation.

7 16. At hearing, Respondent argued that Petitioner had waived any right to
8 object to the vote by not raising his objection prior to the vote occurring. Respondent
9 also asserted that, even if Respondent violated A.R.S. § 33-1812(A)(2), the statute does
10 not include an enforcement provision so no remedy exists. Respondent indicated that
11 the fines are \$50.00 per day per violation and not per occurrence.

12 **CONCLUSIONS OF LAW**

13 1. The Department has jurisdiction to hear disputes between a property
14 owner and a homeowners association. A.R.S. § 32-2199 *et seq.*

15 2. In this proceeding, Petitioner bears the burden of proving by a
16 preponderance of the evidence that Respondent violated the governing documents and
17 statutes. A.A.C. R2-19-119.

18 3. A preponderance of the evidence is “[t]he greater weight of the evidence, not
19 necessarily established by the greater number of witnesses testifying to a fact but by
20 evidence that has the most convincing force.” BLACK’S LAW DICTIONARY 1220 (8th ed.
21 2004).

22 4. A.R.S. § 33-1812(A) provides that absentee ballots may be used for voting
23 and requires that “[t]he ballot shall set forth each proposed action” and “shall provide an
24 opportunity to vote for or against each proposed action.”

25 5. Respondent asserted that the “proposed action” was to amend the Master
26 Declaration. Petitioner asserted that the “proposed actions” were 1) to add the new
27 section 4.23 Leasing of Lots and Units; Restrictions and Limitations and 2) to
28 completely replace the existing section, 5.08 Schedule of Fines.

29
30 ² Notably, Petitioner indicated that the vote as to this issue was 735 total ballots were received with 387
voting “No” and 361 voting “Yes”.

1 6. Respondent argued that, pursuant to the authority set forth by the Arizona
2 Supreme Court in *Zajac v. City of Casa Grande*, 209 Ariz. 357, 102 P.3d 297 (en banc)
3 (2004), Petitioner waived the right to raise a complaint regarding the vote after it was
4 completed. Petitioner responded that the logic of *Zajac* was not applicable to this
5 matter because it did not involve the recordation of an amendment, but involved the
6 election of individuals.

7 7. *Zajac* involved a rezoning ordinance passed by the City of Casa Grande
8 that was then upheld by the local electorate in a referendum election. When the
9 referendum passed, Mr. Zajac filed suit alleging that the city failed to comply with the
10 notice requirements applicable to the hearing and enactment process. The Court in
11 *Zajac*, relying on *Allen v. State*, 14 Ariz. 458, 130 P. 1114 (1913),³ ruled that an
12 individual, aware of a procedural issue with an election prior to the vote, cannot wait to
13 discover the results of the vote to lodge a complaint. That is, one cannot knowingly let a
14 defective vote proceed only to complain and seek redress if the results are not to the
15 individual's liking.

16 8. In the present case, Petitioner acknowledged he received the absentee
17 ballot on or about October 4, 2016, more than one month prior to the November 10,
18 2016 vote on the issue.

19 9. Like *Zajac* and *Allen*, Petitioner could have raised an objection to the
20 faulty ballot prior to the vote on November 10, 2016. If an objection had been made in
21 the early stages of the process, the error in the ballot could have been addressed and
22 corrected prior to the vote. Having failed to raise any objection, the vote proceeded as
23 scheduled. Dissatisfied with the vote results, Petitioner then filed the instant petition
24 about the ballot. "He cannot have it both ways; that is, he cannot allow the [vote] to

25 ³ The Court in *Zajac* described the facts in *Allen* as follows:

26 In *Allen* . . . the legislature enacted a statute making it a crime to kill a quail without a
27 license. After a sufficient number of the voters signed referendum petitioners, a state
28 referendum followed in which voters approved the law. The defendant, who was charged
29 under the statute and admitted killing the quail, argued that the statute was invalid, not as
30 to its substance, but because the matter was allegedly not submitted to the voters at the
proper election, and because pre-referendum publicity required by the state constitution
had not been provided.

Zajac, 209 Ariz. at 359, 102 P.3d at 299.

1 proceed without objection, and then be permitted thereafter to assert his protest.”
2 *Zajac*, 209 Ariz. at 361, 102 P.3d at 301.

3 10. As Petitioner was or should have been aware of the alleged issues with
4 the ballot, he waived his right to bring forth a complaint about the ballot when he
5 allowed the vote to proceed on November 10, 2016.

6 11. Therefore, Petitioner’s claim as to the ballot must fail.

7 **ORDER**

8 In view of the foregoing,

9 **IT IS ORDERED** that Petitioner’s petition is denied.

10
11 **NOTICE**

12 *This administrative law judge order, having been issued as a result of a*
13 *rehearing, is binding on the parties. A.R.S. § 32-2199.02(B). A party wishing to appeal*
14 *this order must seek judicial review as prescribed by A.R.S. § 41-1092.08(H) and title*
15 *12, chapter 7, article 6. Any such appeal must be filed with the superior court within*
16 *thirty-five days from the date when a copy of this order was served upon the parties.*
17 *A.R.S. § 12-904(A).*

18 Done this day, January 9, 2019.

19
20 /s/ Tammy L. Eigenheer
21 Administrative Law Judge
22

23
24 Transmitted by either mail, e-mail, or facsimile January 9, 2019 to:

25 Judy Lowe, Commissioner
26 Arizona Department of Real Estate
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