

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Lawrence Stewart,
4 Petitioner,

No. 18F-H1818052-REL-RHG

5 vs.

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 Canyon Gate Condominium Association,
7 Inc.,
8 Respondent.

9 **HEARING:** January 2, 2019

10 **APPEARANCES:** Lawrence Stewart on his own behalf; Nicolas C. S. Nogami, Esq.
11 for Respondent

12 **ADMINISTRATIVE LAW JUDGE:** Thomas Shedden

13
14 **FINDINGS OF FACT**

15 1. On November 16, 2018, the Arizona Department of Real Estate issued a
16 Notice of Rehearing setting the above-captioned matter for hearing on January 2, 2019
17 at the Office of Administrative Hearings in Phoenix, Arizona.¹

18 2. Petitioner Lawrence M. Stewart appeared at the rehearing and testified on
19 his own behalf. The Association was represented by counsel but presented no
20 witnesses.

21 3. On or about May 21, 2018, Mr. Stewart filed with the Department the
22 petition that gave rise to this matter.

23 4. The original Notice of Hearing shows that Mr. Stewart alleges that
24 Respondent Canyon Gate Condominium Association, Inc. violated Association Bylaws
25 section 5.4.

26 5. Mr. Stewart made changes to the common area and/or limited common
27 area around his unit without getting permission to do so. In a letter dated November 15,
28 2017, the Association, through counsel, informed Mr. Stewart that he was in violation of
29

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¹ The Notice has a typographical error and shows the rehearing date as January 2, 2018.

1 section 5.1 of the CC&Rs. The letter informed Mr. Stewart that he was required to
2 request in writing that the Board approve the changes he had made and that if he failed
3 to do so, the Association could bring a civil lawsuit against him.

4 6. Mr. Stewart did request that the Board approve a variance to allow the
5 changes he had made. At the time of his request, Mr. Stewart was on the Board. The
6 other Board members were Sandra Fernandez and David Larson.

7 7. Mr. Stewart's request was considered during a Board meeting on
8 February 18, 2018. At that meeting Mr. Stewart resigned from the Board and the other
9 two members voted to deny his request for a variance and to have Mr. Stewart restore
10 the areas to the original condition.

11 8. Bylaws Article V (Indemnification), Section 5.4 (Liability) provides in
12 pertinent part:

13 So long as he/she has acted in good faith on the basis of
14 information actually possessed, neither the Board nor any
15 member of the Board nor any officer of the ASSOCIATION
16 shall be liable to the ASSOCIATION, any OWNER, or to any
17 other party for any damage, loss, or prejudice suffered or
18 claimed on account of: (i) the approval or disapproval of any
19 plans, drawings, or specifications, whether or not
20 defective...or (v) any act or failure to act by the
21 ASSOCIATION, or Board.

22 9. The Association argues to the effect that Section 5.4 is not applicable to
23 Mr. Stewart's situation because neither the Board nor any member has been charged
24 with an act for which indemnity is required.

25 10. Mr. Stewart acknowledged that the Board had not violated section 5.4,
26 and he explained that his position is that the Board did not act in good faith when it
27 denied his request for a variance and that Mr. Larson was biased against him.

28 11. Mr. Stewart testified to the effect that he cited section 5.4 in his petition
29 because he could find no other reference to "good faith" in the governing documents.

30 12. Mr. Stewart also asserts that he has been treated unfairly because there
are other units that are not in conformity with the CC&Rs.

1 13. Regarding Mr. Stewart's allegation that Mr. Larson was biased against
2 him, Mr. Stewart had entered into evidence an October 3, 2018 letter from Mr. Larson
3 to the Association's members urging them not to vote for Mr. Stewart in an upcoming
4 election.²

5 14. Regarding his allegation that other units are not in conformity with the
6 CC&Rs, Mr. Stewart had entered into evidence photos of units that he believes are out
7 of compliance. Mr. Stewart testified to the effect that he had verified with the
8 Association that none of these units had received a variance in the last two years.

9 15. Mr. Stewart acknowledged however that he did not know if any of these
10 units had received variances more than two years ago or whether preapproval for the
11 changes had been granted (in which case no variance would be required).

12 **CONCLUSIONS OF LAW**

13 1. The Department of Real Estate has authority over this matter. ARIZ. REV.
14 STAT. Title 32, Ch. 20, Art. 11.

15 2. Mr. Stewart bears the burden of proof, and the standard of proof on all
16 issues in this matter is that of a preponderance of the evidence. ARIZ. ADMIN. CODE §
17 R2-19-119.

18 3. A preponderance of the evidence is:

19 The greater weight of the evidence, not necessarily
20 established by the greater number of witnesses testifying to a
21 fact but by evidence that has the most convincing force;
22 superior evidentiary weight that, though not sufficient to free
23 the mind wholly from all reasonable doubt, is still sufficient to
24 incline a fair and impartial mind to one side of the issue rather
25 than the other.

26 BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

27 4. The Bylaws are a contract between the parties and the parties are
28 required to comply with its terms. *See McNally v. Sun Lakes Homeowners Ass'n #1,*
29 *Inc.*, 241 Ariz. 1, 382 P.3d 1216 (2016 App.). In exercising its authority under the

30 ² Mr. Stewart also sought to have admitted into evidence an October 12, 2018 letter he sent to Mr.
Larson rebutting Mr. Larson's letter and demanding a retraction, but an objection to that letter was
sustained.

1 Bylaws, Respondent must act reasonably. See *Tierra Ranchos Homeowners Ass'n v.*
2 *Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

3 5. Bylaws Section 5.4 does not impose any duty on the Board members, but
4 rather shields them from liability if they have acted in good faith. Mr. Stewart
5 acknowledges that the Association has not violated Bylaws Section 5.4.

6 6. Mr. Stewart's petition should be dismissed and the Respondent be
7 deemed to be the prevailing party in this matter.

8 **ORDER**

9 **IT IS ORDERED** that Petitioner Lawrence M. Stewart's petition is dismissed.

10 **NOTICE**

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

17 Done this day, January 17, 2019.

18 /s/ Thomas Shedden
19 Thomas Shedden
20 Administrative Law Judge

21 Copy mailed/e-mailed/faxed January 17, 2019 to:

22 Judy Lowe, Commissioner
23 Arizona Department of Real Estate
24 100 N. 15th Avenue, Suite 201
25 Phoenix, Arizona 85007

26 Lawrence M. Stewart
27 7887 N. 16th St., #132
28 Phoenix, AZ 85020

29 Mark K. Sahl, Esq.
30 Nicolas C. S. Nogami, Esq.
CARPENTER, HAZLEWOOD,
DELGADO & BOLEN LLP
1400 E. Southern Ave, Suite 400
Tempe, AZ 85282

By F. Del Sol