

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Jason West,

4 Petitioner,

5 vs.

6
7 Desert Sage Two Homeowners
8 Association,

9 Respondent.

No. 19F-H1919065-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

10
11 **HEARING:** September 26, 2019, at 8:30 a.m.

12 **APPEARANCES:** Jason West ("Petitioner") appeared on his own behalf; Desert
13 Sage Two Homeowners Association ("Respondent") was represented by Bradley R.
14 Jardine, Esq., Jardine, Baker, Hickman, & Houston, PLLC.

15 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

16
17 **FINDINGS OF FACT**

18 **BACKGROUND AND PROCEDURE**

19 1. The Arizona Department of Real Estate ("the Department") is authorized by
20 statute to receive and to decide Petitions for Hearings from members of homeowners'
21 associations and from homeowners' associations in Arizona.

22 2. Respondent is a homeowners' association whose members own property
23 and/or residences in the Desert Sage Two development in Scottsdale, Arizona.

24 3. Petitioner owns a house on property in Desert Sage Two and is a member of
25 Respondent.

26 4. On or about May 20, 2019, Petitioner filed a single-issue petition with the
27 Department that alleged that Respondent had violated A.R.S. § 33-1804(B) and
28 Respondent's Bylaw 1.5 by failing to place a bylaw amendment that Petitioner proposed
29 on the agenda of Respondent's annual meeting. The proposed amendment added
30 Bylaw 3.13 that provided as follows:

Directors whose actions result in a paid claim

In an effort to reduce liability to the Association, any current or former director whose actions have resulted in a paid claim by the Association or its insurance carrier, is banned from serving as a director for a period of five years from the date of the final payment. This five year directorship ban also applies to any other individual co-owning an Association lot with the director. This Amendment is retroactive.¹

5. Respondent filed a written answer to the petition, denying that it had violated any statute or bylaw by refusing to add the proposed bylaw to the agenda or ballot. The Department referred the petition to the Office of Administrative Hearings ("OAH"), an independent state agency, for an evidentiary hearing.

6. A hearing was held on September 26, 2019. Petitioner submitted four exhibits, testified on his own behalf, and presented the testimony of four witnesses whom he had subpoenaed: (1) Edward A. ("Eddie") Padilla, Respondent's property manager in May 2017; (2) Joanelize Morales, Respondent's property manager since August 2018; (3) Bryan Robert Selna, the current Vice President of Respondent's Board; (4) David Epstein, the current President of Respondent's Board; (5) Linda Maria Seidler, the current Secretary of Respondent's Board; and (6) Michael David ("Mickey") Latz, the owner of Golden Valley Property Management, Respondent's current property management company.

HEARING EVIDENCE

Referenced Authorities

7. A.R.S. § 33-1804(B) provides as follows:

Notwithstanding any provision in the community documents, all meetings of the members' association and the board shall be held in this state. A meeting of the members' association shall be held at least once each year. Special meetings of the members' association may be called by the president, by a majority of the board of directors or by members having at least twenty-five percent, or any lower percentage specified in the bylaws, of the votes in the association. Not fewer than ten nor more than fifty days in advance of any meeting of the members the secretary shall cause notice to be hand-

¹ Petitioner's Exhibit 2.

delivered or sent prepaid by United States mail to the mailing address for each lot, parcel or unit owner or to any other mailing address designated in writing by a member. The notice shall state the date, time and place of the meeting. A notice of any annual, regular or special meeting of the members shall also state the purpose for which the meeting is called, including the general nature of any proposed amendment to the declaration or bylaws, changes in assessments that require approval of the members and any proposal to remove a director or an officer. The failure of any member to receive actual notice of a meeting of the members does not affect the validity of any action taken at that meeting.

8. Respondent's Bylaw 1.5 concerns amendment of the Bylaws and provides as follows:

These Bylaws may be amended, at a regular or special meeting of the Members, by a vote of the Members having a majority (more than 50%) of the votes entitled to be cast by the Members present in person or by proxy.²

9. Article 2 of Respondent's Bylaws concerns Meetings of Members and provides as follows:

2.1 Annual Meeting. The first annual meeting of the Members shall be held within one (1) year of the date of incorporation of the Association at such time and place as may be set by the Board. The annual meeting of the Members shall be held at least once every twelve (12) months thereafter at such time and place as is determined by the Board.

2.2 Special Meetings. Special meetings of the Members may be called at any time by the president or by the Board or upon written request signed by Members having at least one-fourth (1/4) of the authorized votes in Class A of the Association membership which request shall be delivered to the President or Secretary.

2.3 Notice of Meetings. Written notice of each meeting of the members shall be given by, or at the direction of, the secretary or person authorized to call the meeting by mailing a copy of each notice, postage prepaid, at least

² Petitioner's Exhibit 4 at 1.

1 fifteen (15) days before such meeting to each Member
2 entitled to vote thereat addressed to the Member's address
3 last appearing on the books of the Association or supplied by
4 such Member to the Association for the purpose of notice.
5 Such notice shall specify the place, day and hour of the
6 meeting, and, in the case of a special meeting, the purpose
7 of the meeting. . . .³

8 **The Parties' Previous Course of Dealings**

9 10. Respondent's Board currently has three members, the President, Vice-
10 President, and Secretary.

11 11. In August 2016, Petitioner was elected to the Board. Petitioner
12 subsequently resigned.

13 12. In April 2017, Petitioner proposed an amendment to Respondent's bylaws
14 to add Bylaw 3.13, which provided in relevant part:

15 Directors who are removed or resign

16 Any director who is removed or resigns from the board before the
17 completion of their term may not again serve as a board director
18 for a period of one year following the date of their removal or
19 resignation. This one year directorship ban also applies to any
20 other individual co-owning an association lot with the former
21 director.⁴

22 After consulting with Respondent's attorney, Respondent's Board at that time agreed to
23 submit the proposed Bylaw for the membership to vote on at the May 2017 annual
24 meeting.⁵

25 13. On April 10, 2017, Petitioner filed a petition against Respondent with the
26 Department, which was designated OAH Case No. 17F-H1716031-REL, challenging the
27 remaining members of Respondent's Board's failure to appoint members to fill vacant
28 positions on Respondent's Board.

29 14. At the May 2017 annual meeting, Petitioner's previously proposed
30 amendment adding Bylaw 3.12 was passed by a majority of the membership.⁶

³ Petitioner's Exhibit 4 at 2-3.

⁴ Petitioner's Exhibit 1.

⁵ See *id.*

⁶ See Petitioner's Exhibit 1.

1 15. On June 28, 2017, the Administrative Law Judge (“ALJ”) dismissed
2 Petitioner’s petition in OAH Case No. 17F-H1716031-REL because she concluded that
3 “Respondent established that the Board has done all it could to fill vacancies, but that at
4 this time, no eligible members are willing to serve, in part due to Petitioner’s
5 obstructionist tactics, including Petitioner and his claimed supporters.”⁷

6 16. Respondent’s current Board members were first elected in July 2017 and
7 subsequently reelected at the annual membership meetings in 2018 and 2019. Some
8 of Respondent’s current Board members may have been on the Board when
9 Respondent’s insurance carrier paid attorneys’ fees and other costs associated with
10 Petitioner’s previous petition to the Department and, possibly, other litigation.

11 **The Parties’ Dealings Relating to the Current Dispute**

12 17. On Sunday, December 23, 2018, Petitioner sent an email to Ms. Morales,
13 submitting his proposal to amend Respondent’s Bylaws by adding Bylaw 3.13.
14 Petitioner resent his proposed bylaw amendment to Ms. Morales on April 17, 2019,
15 June 23, 2019, and September 19, 2019.⁸

16 18. On January 3 and 4, 2019, Petitioner sent emails to Mr. Latz, with copies
17 to Respondent’s attorneys, asking to add his proposed amendment Bylaw 3.13 to the
18 agenda at Respondent’s next meeting and to add the proposed amendment to the ballot
19 for the meeting. Petitioner informed Mr. Latz that Respondent’s Board was required to
20 add the proposed Bylaw amendment to the agenda and ballot for Respondent’s next
21 regular or special meeting.⁹

22 19. In his January 4, 2019 email to Mr. Latz Petitioner stated that “I can also
23 force the Board to call a Special Meeting of the Members at any time with 10 signatures
24 from members of our Association. This is Article 2.2 of our Bylaws.”¹⁰

25 20. Between January 4, 2019, and June 24, 2019, Mr. Latz responded to
26 Petitioner’s emails, repeatedly informing him that the Board had decided not to add the
27

28 ⁷ ALJ Decision in Case No. 17F-H1716031-REL at 8, Conclusion of Law No. 5. Petitioner did not appeal
29 the decision and it became final.

30 ⁸ See Petitioner’s Exhibit 2.

⁹ See Petitioner’s Exhibit 3.

¹⁰ Petitioner’s Exhibit 3 at 9.

1 proposed amendment Bylaw 3.13 to the agenda of a meeting or a ballot for a meeting
2 that the Board had scheduled.

3 21. Ms. Morales testified that she prepares agendas for Respondent's
4 membership meeting based on the Board's instructions.

5 22. Mr. Latz testified that it is not the secretary's job to decide what will be on
6 the Board's agenda for member meetings. Rather, it is the whole Board's decision. Mr.
7 Latz testified that counsel has advised Respondent that its Board is not obliged to add
8 items to an agenda at the request of a member. Under Bylaw 2.2, the member has the
9 option of going directly to the members to schedule meetings to amend Bylaws.

10 23. Mr. Latz testified that Arizona statute requires regular meetings of
11 homeowners' associations to elect board members and to approve minutes. Otherwise,
12 after a developer has relinquished control of a homeowners' association to its members,
13 there is no real distinction between regular and special meetings of members.

14 24. Mr. Latz testified that none of Respondent's Bylaws require a Board to add
15 members' requests to meeting agendas or ballots. Mr. Latz testified that he told
16 Petitioner that Bylaw 2.2 allowed members to call meetings directly and pointed out that,
17 on January 4, 2019, Petitioner had stated that he was aware of this option.

18 25. Mr. Selna, Mr. Epstein, and Ms. Seidler all testified that they had consulted
19 with Respondent's attorneys and property management company and, based on the
20 advice they received, decided not to add Petitioner's proposed amendment Bylaw 3.13
21 to the agenda of any scheduled meeting or ballot for a meeting.

22 26. On April 17, 2019, Ms. Morales on behalf of Respondent sent a Notice of
23 Owners' Meeting to be held on June 4, 2019, at Fire Station #8, 9598 E. Cactus Rd.,
24 Scottsdale, to Respondent's members. The agenda for the meeting was (1) Election of
25 Directors, and (2) Approval of 2018 Annual Meeting Minutes.¹¹ Ms. Morales testified
26 that Respondent must bear the cost of notices to its members and ballots.

27 27. On April 17, 2019, Ms. Morales sent another letter to Respondent's
28 members, informing them that "[i]f you are interested in running for a seat on the Board
29

30 ¹¹ See Petitioner's Exhibit 2 at JW002 (eighth page).

of Directors, please submit the attached form including a candidate biography of **100 words or less** to the Association by May 3, 2019. . . .”¹²

28. On April 17, 2017, Petitioner submitted his proposed amendment Bylaw 3.13 to Ms. Morales by email. On or about May 2, 2019, Petitioner submitted a “Candidate Statement,” but not a biography.¹³

29. Ms. Morales testified that Petitioner attended a meeting of Respondent’s Board on May 14, 2019, at the fire station and that Petitioner threatened that, if the Board did not place his proposed amendment adding Bylaw 3.13 on the agenda for the next annual meeting, he would file a petition with the Department.

30. On June 3, 2019, Ms. Morales sent a Notice of Rescheduled Owners’ Meeting on June 20, 2019, at 6:00 p.m., at the fire station on Cactus Rd. The agenda for the meeting remained the same.¹⁴

31. Ms. Morales testified that Petitioner was not elected to Respondent’s Board at the June 20, 2019 annual meeting, although his name was on the ballot. Ms. Morales testified that after the annual meeting, Respondent’s members may meet informally.

32. Ms. Morales testified that, under Bylaw 2.2, members by call meetings by getting approval of one-fourth of Respondent’s members, but that Petitioner has not attempted to get the support of his neighbors to schedule a meeting at which his proposed amendment to add Bylaw 3.13 could be considered or voted on. Petitioner had not availed himself of this option.

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CONCLUSIONS OF LAW

1. A.R.S. § 32-2199(B) permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of Title 33, Chapter 16. This matter lies with the Department’s jurisdiction.

¹² Petitioner’s Exhibit 2 at JW003 (ninth page).

¹³ See Petitioner’s Exhibit 2 at JW004 – JW006 (tenth through twelfth pages).

¹⁴ See Petitioner’s Exhibit 2 at (approximately) page 15.

1 2. Petitioner bears the burden of proof to establish that Respondent violated
2 A.R.S. § 33-1804(B) and Bylaw 1.5 by a preponderance of the evidence.¹⁵ Respondent
3 bears the burden to establish affirmative defenses by the same evidentiary standard.¹⁶

4 3. "A preponderance of the evidence is such proof as convinces the trier of fact
5 that the contention is more probably true than not."¹⁷ A preponderance of the evidence is
6 "[t]he greater weight of the evidence, not necessarily established by the greater number of
7 witnesses testifying to a fact but by evidence that has the most convincing force; superior
8 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
9 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather
10 than the other."¹⁸

11 4. In Arizona, when construing statutes,

12 We look first to a statute's language as the best and most
13 reliable index of its meaning. If the statute's language is clear
14 and unambiguous, we give effect to that language and apply
15 it without using other means of statutory construction, unless
16 applying the literal language would lead to an absurd result.
17 Words should be given "their natural, obvious, and ordinary
18 meaning."¹⁹

19 Nothing in the language of A.R.S. § 33-1804(B), quoted above at Finding of Fact No. 7,
20 requires Respondent's Board to add an item to the agenda or to a ballot at the request
21 of a member. A.R.S. § 33-1804(B), like Bylaw 1.5, allows 25% of the members of a
22 homeowners' association to independently call a meeting of the members of the
23 association. Petitioner therefore did not establish that Respondent violated A.R.S. § 33-
24 1804(B) when Respondent's Board declined to add Petitioner's proposed amendment
25 Bylaw 3.13 to the agenda or ballot for the June 2019 annual meeting.

26 5. Similarly, in Arizona, if a restrictive covenant is unambiguous, it is enforced to
27 give effect to the intent of the parties.²⁰ "Restrictive covenants must be construed as a
28 whole and interpreted in view of their underlying purposes, giving effect to all provisions
29

30 ¹⁵ 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).

¹⁶ See A.A.C. R2-19-119(B)(2).

¹⁷ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

¹⁸ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

¹⁹ *Arpaio v. Steinle*, 201 Ariz. 353, 355 ¶ 5, 35 P.3d 114, 116 (App. 2001) (footnotes and citations omitted).

²⁰ See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

1 contained therein.”²¹ Bylaw 1.5 allows a bylaw amendment to be considered at a regular
2 or special meeting, but does not require Respondent’s Board to add such amendment
3 to the agenda or the ballot of an annual meeting at a member’s request. In fact, Bylaw
4 2.2 allows any member to call a meeting of Respondent’s members for the member’s
5 own purposes, with the support of his neighbors. Therefore, Petitioner did not establish
6 that Respondent violated Bylaw 1.5 when Respondent’s Board declined to add
7 Petitioner’s proposed amendment Bylaw 3.13 to the agenda or ballot for the June 2019
8 annual meeting.

9 6. Because Petitioner did not establish that Respondent violated any statute or
10 Bylaw charged in his petition, his petition must be dismissed.

11 7. With respect to Respondent’s request for attorney’s fees, in American
12 jurisprudence, attorney’s fees cannot be awarded without a statute specifically
13 authorizing the award. The legislature has not empowered the Department or OAH to
14 award attorney’s fees in administrative proceedings involving a member’s petition
15 against his homeowners’ association that the member has filed with the Department.²²

16 ORDER

17 IT IS ORDERED that Petitioners’ petition is denied because he has not
18 established that Respondent’s Board violated A.R.S. § 33-1804(B) or Bylaw 1.5 by
19 declining to add his proposed amendment Bylaw 3.13 to the agenda of any meeting
20 noticed by Respondent or any ballot prepared by Respondent.

21 *////*

22 NOTICE

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

28 ²¹ *Lookout Mountain Paradise Hills Homeowners’ Ass’n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. App.
1993) (quoted in *Powell*, 211 Ariz. at 557 ¶ 16, 125 P.3d at 377).

29 ²² *See Semple v. Tri-City Drywall, Inc.*, 172 Ariz. 608, 611-612, 838 P.2d 1369, 1372-73 (App. 1992)
30 (Prevailing party in administrative claim before Registrar of Contractors was not entitled to attorney’s fees
from its opponent under A.R.S. § 12-341.01(A) because administrative hearing is not an “action”).

Done this day, October 1, 2019.

/s/ Diane Mihalsky
Administrative Law Judge

Transmitted electronically to:

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