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ADMINISTRATIVE LAW JUDGE DECISION

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

3. Respondent filed a Motion to Dismiss based on Petitioner's failure to pay the appropriate filing fee for the alleged violations she submitted. Petitioner was ordered to clearly identify the two specific alleged violations she intended to pursue at hearing or pay the additional filing fee for other alleged violations.

1 4. Petitioner clarified her issues to be as follows:

2 Complaint #1 The Solera Homeowners' Association Board of Directors'
3 conducted non-privileged Association business in closed sessions (A)
4 without providing agendas (E); giving 48-hour notice (E); and allowing
5 members an opportunity to speak prior to taking action on key issues that
6 affected the entire association by using unanimous written consent (A) as
7 documented in Exhibits A and F.

8 Complaint #2 The Solera Homeowners' Association Board of Directors'
9 conducted privileged Association business under the guise of emergency
10 executive sessions (E), by not identifying the applicable exception to the
11 open meeting law (A); providing an agenda (E), 48-hour notice (E) and
12 minutes stating the reason necessitating the emergency, then submitting
13 the minutes at the next board meeting (E) as documented in Exhibit B.

14 5. On or about March 13, 2020, Respondent held an executive session. The
15 agenda for the meeting indicated the topics to be discussed were under the executive
16 session pursuant to A.R.S. § 33-1804(A)(1), (2), and (4).

17 6. On or about March 16, 2020, Respondent held an executive session. The
18 agenda for the meeting indicated the topics to be discussed were under the executive
19 session pursuant to A.R.S. § 33-1804(A)(1) and (2).

20 7. On or about March 19, 2020, Respondent held an executive session. The
21 agenda for the meeting indicated the topics to be discussed were under the executive
22 session pursuant to A.R.S. § 33-1804(A)(1).

23 8. On or about March 24, 2020, Respondent held an executive session. The
24 agenda for the meeting indicated the topics to be discussed were under the executive
25 session pursuant to A.R.S. § 33-1804(A)(4).

26 9. On or about April 6, 2020, Respondent held an executive session. The
27 agenda for the meeting indicated the topics to be discussed were under the executive
28 session pursuant to A.R.S. § 33-1804(A)(4).

29 10. On or about April 10, 2020, Respondent held an executive session. The
30 agenda for the meeting indicated the topics to be discussed were under the executive
31 session pursuant to A.R.S. § 33-1804(A)(4).

11. On or about May 4, 2020, Respondent held an executive session. The agenda for the meeting indicated the topics to be discussed were under the executive session pursuant to A.R.S. § 33-1804(A)(4).

12. On or about May 12, 2020, Respondent held an emergency executive session. The agenda for the meeting indicated the topics to be discussed were under the executive session pursuant to A.R.S. § 33-1804(A)(1), (2), and (4).

13. Minutes from the May 12, 2020 executive session were redacted as to the substance of the discussion.

14. On or about May 15, 2020, Respondent held an executive session. The agenda for the meeting indicated the topics to be discussed were under the executive session pursuant to A.R.S. § 33-1804(A)(1) and (2).

15. On or about May 27, 2020, Respondent held an executive session. The agenda for the meeting indicated the topics to be discussed were under the executive session pursuant to A.R.S. § 33-1804(A)(2) and (4).

16. On or about June 24, 2020, Respondent held an executive session. The agenda for the meeting indicated the topics to be discussed were under the executive session pursuant to A.R.S. § 33-1804(A)(2) and (3).

17. On or about August 5, 2020, Respondent held an executive session. The agenda for the meeting indicated the topics to be discussed were under the executive session pursuant to A.R.S. § 33-1804(A)(1), (2), and (3).

18. Minutes from the August 5, 2020 executive session indicated that the minutes of the March 13, March 16, March 19, March 24, April 6, April 10, May 4, May 12, May 15, May 27, and June 24, 2020 meetings were approved and submitted. The minutes were redacted as to the substance of the new discussions.

19. On or about August 5, 2020, Respondent held a Board of Directors open session meeting. The agenda for the meeting included "Ratification of Unanimous Written Consents during Covid 19 Shutdown."

20. The minutes of the August 5, 2020 Board of Directors open session meeting included the following: "DISCUSSION: Due to the COVID 19 shutdown, the need for the

Board to conduct business, and in compliance with ARS 10-3821, the Unanimous Written Consents are attached and here by ratified.”

21. The unanimous written consents were submitted during the hearing and included the following:

March 30, 2020, to approve the repair and replacement of the sidewalk and community center entrance;

March 30, 2020, to approve the repair and replacement of the cool decking surrounding both pools;

April 30, 2020, to approve Kirk Sandquist as a member to the Architectural Review Committee;

April 30, 2020, to approve Tom Dusbabek as a member to the Architectural Review Committee;

May 5, 2020, to approve the Gilbert Road retention basin project, the irrigation replacement along the Gilbert Road retention basin project, and to add 420 ton of granite along Gilbert Road;

May 8, 2020, to approve replacement of a Carrier 6-ton heat pump;

May 8, 2020, to approve replacement of two Carrier 5-ton Heat pumps;

May 27, 2020, to approve hiring Ken Eller to draft architectural drawings;

June 4, 2020, to approve a change to the Design Guidelines at the request of the Architectural Review Committee; and

July 1, 2020, to approve the 2020 summer hardwood pruning and removal of trees.

22. On or about August 5, 2020, Gail Ryan, the President of Respondent's Board of Directors resigned her position due to personal health reasons.

23. At hearing, Respondent argued that, due to the COVID 19 pandemic, the Board of Directors determined it was unable to meet in person to protect the members and the directors. Respondent also asserted that the unanimous written consents were authorized under A.R.S. § 10-3821. Respondent acknowledged that it did not use unanimous written consents prior to the pandemic and related that it did not intend to keep using them in the future.

CONCLUSIONS OF LAW

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

1 2. In this proceeding, Petitioner bear the burden of proving by a
2 preponderance of the evidence that Respondent violated A.R.S. § 33-1804. A.A.C. R2-
3 19-119.

4 3. A preponderance of the evidence is “[e]vidence which is of greater weight or
5 more convincing than the evidence which is offered in opposition to it; that is, evidence which
6 as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW
7 DICTIONARY 1182 (6th ed. 1990).

8 4. A.R.S. § 33-1804 provides, in relevant part, as follows:

9 A. Notwithstanding any provision in the declaration, bylaws or other
10 documents to the contrary, all meetings of the members’ association and
11 the board of directors, and any regularly scheduled committee meetings,
12 are open to all members of the association or any person designated by a
13 member in writing as the member’s representative and all members or
14 designated representatives so desiring shall be permitted to attend and
speak at an appropriate time during the deliberations and proceedings. . . .
Any portion of a meeting may be closed only if that closed portion of the
meeting is limited to consideration of one or more of the following:

15 1. Legal advice from an attorney for the board or the association. On
16 final resolution of any matter for which the board received legal
17 advice or that concerned pending or contemplated litigation, the
18 board may disclose information about that matter in an open meeting
except for matters that are required to remain confidential by the
terms of a settlement agreement or judgment.

19 2. Pending or contemplated litigation.

20 3. Personal, health or financial information about an individual
21 member of the association, an individual employee of the association
22 or an individual employee of a contractor for the association,
23 including records of the association directly related to the personal,
health or financial information about an individual member of the
association, an individual employee of the association or an
individual employee of a contractor for the association.

24 4. Matters relating to the job performance of, compensation of,
25 health records of or specific complaints against an individual
26 employee of the association or an individual employee of a contractor
of the association who works under the direction of the association.

27

28 D. Notwithstanding any provision in the declaration, bylaws or other
29 community documents, for meetings of the board of directors that are held
30 after the termination of declarant control of the association, notice to
members of meetings of the board of directors shall be given at least forty-

1 eight hours in advance of the meeting by newsletter, conspicuous posting or
2 any other reasonable means as determined by the board of directors. . . .
3 Notice to members of meetings of the board of directors is not required if
4 emergency circumstances require action by the board before notice can be
5 given. . . .

6 F. It is the policy of this state as reflected in this section that all meetings of
7 a planned community, whether meetings of the members' association or
8 meetings of the board of directors of the association, be conducted openly
9 and that notices and agendas be provided for those meetings that contain
10 the information that is reasonably necessary to inform the members of the
11 matters to be discussed or decided and to ensure that members have the
12 ability to speak after discussion of agenda items, but before a vote of the
13 board of directors or members is taken. Toward this end, any person or
14 entity that is charged with the interpretation of these provisions, including
15 members of the board of directors and any community manager, shall take
16 into account this declaration of policy and shall construe any provision of
17 this section in favor of open meetings.

18 5. A.R.S. § 10-3821 provides, in pertinent part, as follows:

19 A. Unless the articles of incorporation or bylaws provide otherwise, action
20 required or permitted by chapters 24 through 40 of this title to be taken at a
21 directors' meeting may be taken without a meeting if the action is taken by
22 all of the directors. The action must be evidenced by one or more written
23 consents describing the action taken, signed by each director and included
24 in the minutes filed with the corporate records reflecting the action taken.

25 6. When construing a statute, the primary goal is to ascertain the legislature's
26 intent. *State ex rel. Thomas v. Contes*, 216 Ariz. 525, 527, 169 P.3d 115, 117 (App.
27 2007). This is accomplished by first looking to the text of the statute. *Id.* If the language is
28 clear, its plain meaning is ascribed, unless it would lead to absurd results. *Id.*; *Marsoner*
29 *v. Pima County*, 166 Ariz. 486, 488, 803 P.2d 897, 899 (1991). If ambiguity exists,
30 secondary principles of statutory construction are used to determine the intent. *Contes*,
216 Ariz. at 527.

Non-privileged Association Business Conducted in Closed Session

7. While A.R.S. § 10-3821 may allow the board of a non-profit corporation to
take actions without a meeting by unanimous consent, A.R.S. § 33-1804 requires that all
meetings of the board of directors of a homeowners association must be open to the
members.

1 8. Respondent improperly conducted association business in closed sessions
2 via conference calls rather than in meetings open to the members.

3 9. Accordingly, Petitioner established by a preponderance of the evidence that
4 Respondent committed the alleged violation set forth as Complaint #1.

5 10. Consideration is given to the fact that Respondent was faced with an
6 unprecedented global pandemic while balancing the need to comply with the applicable
7 statutes and conduct association business. Therefore, the Administrative Law Judge
8 finds no civil penalty is appropriate given the circumstances.

9 Association Business Conducted in an Emergency Executive Session

10 11. Respondent represented that all of the executive sessions addressed only
11 that issues that fell under the exceptions listed in A.R.S. § 33-1804(A). Further,
12 Respondent asserted that the emergency executive session held on May 12, 2020,
13 prevented the 48 hour notice required by the statute.

14 12. Nothing in the record suggested the Board discussed other issues that did
15 not fall under the exceptions listed and/or that the May 12, 2020 executive session was
16 not an emergency.

17 13. Accordingly, Petitioner failed to establish by a preponderance of the
18 evidence that Respondent committed the alleged violation set forth as Complaint #2.

19 **ORDER**

20 **IT IS ORDERED** that Petitioner's petition is affirmed in part and denied in part.
21 Respondent is ordered to

22 **IT IS FURTHER ORDERED** that Respondent reimburse Petitioner her \$500.00
23 filing fee for the issue on which she prevailed.

24 **IT IS FURTHER ORDERED** Respondent is directed to comply with the
25 requirements of A.R.S. § 33-1804 going forward.

26 **NOTICE**

27 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties**
28 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04.**
29 **Pursuant to A.R.S. § 41-1092.09, a request for rehearing in this matter**
30

1 **must be filed with the Commissioner of the Department of Real Estate**
2 **within 30 days of the service of this Order upon the parties.**

3
4 Done this day, November 18, 2020.

5
6 /s/ Tammy L. Eigenheer
7 Administrative Law Judge
8

9 Transmitted by either mail, e-mail, or facsimile November 18, 2020 to:

10 Judy Lowe, Commissioner
11 Arizona Department of Real Estate
12 100 N. 15th Avenue, Suite 201
13 Phoenix, Arizona 85007

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