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No. 21F-H2121033-REL

ADMINISTRATIVE LAW JUDGE DECISION

Respondent

HEARING: March 2, 2021

APPEARANCES: Petitioners Carlos J. Sanchez and Marinda K. Minch appeared on their own behalf. Ashley Moscarello, Esq. represented Respondent Tempe Villages Homeowners Association, Inc. Bradley Hudson and Shawn Nurse appeared as witnesses for Respondent Tempe Villages Homeowners Association, Inc.

ADMINISTRATIVE LAW JUDGE: Sondra J. Vanella

FINDINGS OF FACT

1. On or about January 11, 2021, Carlos J. Sanchez and Marinda K. Minch (“Petitioners”) filed a Homeowners Association (HOA) Dispute Process Petition (“Petition”) with the Arizona Department of Real Estate (“Department”) alleging a violation of community documents by Tempe Villages Homeowners Association, Inc. (“Respondent”). Petitioners indicated a single issue would be presented, paid the appropriate \$500.00 filing fee, and asserted a violation of the Bylaws “Article 4 Section 1.”

2. On or about February 1, 2021, the Department issued a Notice of Hearing in which it set forth the issue for hearing as follows:

The dispute between Petitioner and Respondent arises from community document Bylaws. Petitioner, “. . . assert[s] that Tempe Villages Homeowners Association is in violation of Article 4 Section 1 of the community By-Laws as it states, ‘The affairs of this Association shall be managed by a Board of six [7 updated 11-16-1983] directors, who need not be members of the Association.’”

1 3. At hearing, Petitioner Marinda Minch testified on her own behalf. Petitioner
2 Carlos Sanchez did not testify. Respondent presented the testimony of Bradley Hudson,
3 President of the Board, and Shawn Nurse, Community Manager.

4 4. Ms. Minch asserted at hearing that Respondent was in violation of the
5 Bylaws because it left a Board seat open for a period of time and was “actively trying to
6 keep her out of the Board.”

7 5. Bradley Hudson, President of Respondent’s Board, testified that he was on
8 the Board during the period of time at issue. Mr. Hudson testified regarding the Bylaws
9 which were amended in 1983. Article IV of the Bylaws sets forth the following in pertinent
10 part:¹

11 Board of Directors: Selection: Term of Office.

12 Section 1. Number. The affairs of this Association shall be managed by a
13 Board of six ~~(6)~~ 7 11-16-1983 directors, who need not be members of the
14 Association.

15 Section 2. Term of Office. At the first annual meeting the members shall
16 elect two directors for a term of one year, two directors for a term of two
17 years and two directors for a term of three years; and at each annual
18 meeting thereafter the members shall elect two directors for a term of three
19 years.

20 Section 3. Removal. Any director may be removed from the Board, with or
21 without cause, by a majority vote of the members of the Association. In the
22 event of death, resignation or removal of a director, his successor shall be
23 selected by the remaining members of the Board and shall serve for the
24 unexpired term of his predecessor.

25 All errors in original.

26 6. Mr. Hudson testified that on August 11, 2020, one of the Board members
27 resigned, leaving six members on the Board. The annual meeting was scheduled for
28 October 14, 2020, at which two Board member positions were to be filled based upon the
29 staggered terms of the Board members pursuant to Article IV, Section 2. Because there
30 were two open positions for election, the Board issued a ballot for the October 14, 2020
election. The meeting was held virtually via Zoom and the ballots were to be mailed in
prior to the meeting. The ballot set forth the following pertinent information:²

¹ See Respondent’s Exhibits A and B.

² See Respondent’s Exhibit C.

OFFICIAL SECRET BALLOT

The Board of Directors has two (2) positions available. Please select up to two (2) candidates below. Do not vote for more than two (2) candidates or this ballot will be voided and used for quorum purposes only. This ballot is valid for this election of the Board of Directors, establishing quorum, and is irrevocable once submitted. **In order to be considered eligible to vote, Owners must be current in all assessments due to the Association by September 30, 2020.**

Number of Members/Lots in Community: 93
Quorum Requirements: 10% of Eligible

....

1. ☐ ☐ I vote in favor of William "Bill" Skanadore- Incumbent
2. ☐ ☐ I vote in favor of Will Terrick- Incumbent
3. ☐ ☐ I vote in favor of John Neelsen
4. ☐ ☐ I vote in favor of Carlos Sanchez
5. ☐ ☐ I vote in favor of Marinda Minch

....

Once this ballot is completed, please return it to the Association in the enclosed pre-addressed, postage paid envelope, email or fax. Ballots must be received by Vision Community Management **no later than 12:00 PM on Wednesday, October 14, 2020**. This ballot is valid only for the Annual Membership Meeting scheduled on Wednesday, October 14, 2020 or any lawful continuations thereof. Once cast, this ballot may not be revoked. This ballot may be cast only by the member to whom it is issued.

Emphasis in original.

Attached to the ballot were biographies of the candidates.³

7. Mr. Hudson testified that he attended the annual meeting and that a quorum was met. Mr. Hudson further testified that the two Board member positions that were up for election were filled with candidate numbers 1 and 2, Bill and Will. Therefore, after the election, there were six members on the Board. The vacant position created by the

³ *Id.*

1 August 2020 resignation remained. Mr. Hudson testified that the Board was not limited to
2 the people listed on the ballot to fill the vacancy pursuant to Article IV Section 3, which
3 states, “[i]n the event of . . . resignation . . . of a director, his successor *shall be selected*
4 *by the remaining members of the Board* and shall serve for the unexpired term of his
5 predecessor.”⁴ Mr. Hudson explained that pursuant to this section of the Bylaws, unlike
6 the two open seats on the Board to be decided by election, the vacancy resulting from the
7 resignation was to be chosen by the Board members. Mr. Hudson testified that the Board
8 decided that the new Board should decide who should fill the vacancy, rather than the old
9 Board.

10 8. At the November 11, 2020 virtual meeting, the open Board seat was
11 discussed. The meeting minutes reflect the following:⁵

12 **Open Board Seat:** A **motion** to appoint Marinda Minch for the
13 remaining term of Tania Almonte was position was made by
14 Wendelyn Neal, seconded by Joel Krick and opened for discussion.
15 Kathy Hudson, Bradley Hudson, Will Terrick and Bill Skanadore
16 opposed. With no further discussion, the motion carried 2-4. The
17 motion did not pass.

18 A **motion** to appoint Christiane Pieraggi for the remaining term of
19 Tania Almonte position was made by Bill Skanadore, seconded by
20 Will Terrick and opened for discussion. Joel Krick and Wendelyn
21 Neal abstained. With no further discussion, the motion carried 4-2.

22 All errors in original. Emphasis in original.

23 9. Mr. Hudson testified that a Motion to appoint Ms. Minch was made, the
24 Board held a vote and the motion did not pass. The Board voted to appoint another
25 individual to the Board. Mr. Hudson testified that all seven seats on the Board have been
26 filled since then. Mr. Hudson further testified that the Bylaws do not contain a provision
27 providing a timeframe in which a vacancy on the Board must be filled.

28 10. Community Manager, Shawn Nurse, testified that due to COVID 19, he
29 opened the received ballots during the virtual annual meeting. Mr. Nurse testified that he
30 did so while on camera in order for those attending the meeting to be able to see him open

⁴ See Respondent's Exhibit A. Emphasis added.

⁵ See Respondent's Exhibit G.

1 the ballots, as he held them to the camera so that those attending could actually see the
2 ballots, and his assistant, Ruby, aided in counting the votes. The tally sheet for those
3 votes was submitted at Exhibit E. Mr. Nurse explained that the term for the Board member
4 who resigned does not expire until 2022, and as such was not eligible for a member vote.
5 Mr. Nurse further testified that he does not have the authority to appoint or remove
6 members of the Board.

7 11. Ms. Minch testified that the Board dislikes her for personal reasons and that
8 the Board did not fill the vacant seat until November 2020, because she demanded they
9 do so. Ms. Minch testified that she wanted the vote to occur during a meeting because
10 she "did not want it to be a private vote." Ms. Minch testified that she emailed Mr. Nurse on
11 August 20, 2020, advising she wanted to fill the vacant Board position.⁶ Mr. Nurse
12 responded that he had no authority to appoint a Board member, and that only the Board
13 could make such a decision.⁷ Ms. Minch testified that she petitioned the Board three times
14 for appointment. Ms. Minch acknowledged that she was considered for the vacancy in
15 November 2020, and that there is no timeframe specified in the Bylaws within which to fill
16 a Board vacancy due to a resignation.

17 **CONCLUSIONS OF LAW**

18 1. Arizona statute permits an owner or a planned community organization to
19 file a petition with the Department for a hearing concerning violations of planned
20 community documents or violations of statutes that regulate planned communities.
21 A.R.S. § 32-2199. That statute provides that such petitions will be heard before the Office
22 of Administrative Hearings.

23 2. Petitioner bears the burden of proof to establish that Respondent committed
24 the alleged violation by a preponderance of the evidence.⁸ Respondent bears the burden to
25 establish affirmative defenses by the same evidentiary standard.⁹

27 ⁶ See Petitioners' Exhibit 1.

28 ⁷ *Id.*

29 ⁸ 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 ⁹ See A.A.C. R2-19-119(B)(2).

1 3. “A preponderance of the evidence is such proof as convinces the trier of fact
2 that the contention is more probably true than not.”¹⁰ A preponderance of the evidence is
3 “[t]he greater weight of the evidence, not necessarily established by the greater number of
4 witnesses testifying to a fact but by evidence that has the most convincing force; superior
5 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
6 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
7 the other.”¹¹

8 4. One cannot read Article IV Section 1 of the Bylaws without taking into
9 consideration the provisions of Sections 2 and 3. Section 2 provides for staggered terms
10 for Board members and Section 3 provides that upon resignation, a successor director
11 shall be chosen by the remaining members of the Board. The Bylaws do not contain a
12 timeframe in which the Board must appoint a successor director after the resignation of a
13 director.

14 5. Petitioners failed to prove by a preponderance of the evidence that
15 Respondent violated the Bylaws as alleged in the Petition. At the October 2020 annual
16 meeting, Respondent held the election for the two expiring Board member positions as
17 required, and Petitioners names were on the ballot. Petitioners were not elected. At the
18 November 2020 meeting, the Board voted to fill the vacancy created by the August 2020
19 resignation of a Board member, pursuant to the terms of the Bylaws. Thus, Petitioners
20 failed to sustain their burden to establish a violation of Article IV, Section 1.

21 ORDER

22 IT IS ORDERED that Petitioners’ Petition is dismissed.

23 NOTICE

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

29 ¹⁰ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

30 ¹¹ BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

1
2 Done this day, March 9, 2021.
3

4 /s/ Sondra J. Vanella
5 Administrative Law Judge
6

7 Transmitted electronically to:

8 Judy Lowe, Commissioner
9 Arizona Department of Real Estate

10 Transmitted US Mail to:

11 Carlos J Sanchez & Marinda K Minch
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