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ADMINISTRATIVE LAW JUDGE DECISION

ADMINISTRATIVE LAW JUDGE: Thomas Shedden

1 8. Mr. Borruso's revised issue statement actually identified six or seven
2 issues.¹ At the hearing, Mr. Borruso further refined his allegations to (1) at a special
3 meeting on May 27, 2021 the Board denied Association members a right to speak at an
4 appropriate time during the deliberations and proceedings in violation of section 33-
5 1804(A); and (2) and (3) at an unknown date the Board held a meeting (or meetings) to
6 write and approve the required qualifications for an Operations Manager in violation of
7 sections 33-1804(A) and (C).

8 The May 27, 2021 Meeting

9 9. Mr. Borruso and other Association members instituted a recall of then
10 president Joyce Haynie.

11 10. Through an email Notice dated May 25, 2021, the Board set two special
12 meetings to ensure the Owners understood the recall petition and the Board's position
13 on the matter. The Agenda for both meetings reads: Welcome, Pledge, Ground Rules,
14 Petition Statement, Board Statements, Adjournment, Open Session Q & A.

15 11. The two meetings occurred on May 27 and 28, 2021. Only the May 27th
16 meeting is at issue.

17 12. Mr. Borruso asserts that the Board actually conducted two meetings on
18 May 27th, a meeting at which the members were not allowed to speak, followed by a
19 second meeting at which the members were allowed to speak. He argues that the
20 Board was required to allow the members to speak during the first meeting and that its
21 failure to do so was a violation of section 33-1804(A).

22 13. In support of his position, Mr. Borruso points to the fact that the Agenda
23 calls for "Adjournment" before the "Open Session Q & A," which was the second
24 meeting in his opinion.

25 14. The Association takes the position that there was only one meeting on
26 May 27th and that it was not a violation of section 33-1804(A) to limit the members to
27 comments after the Board provided its statements.

28 ¹ That the Board violated section 33-1804(A) on May 27, 2021, that the Board violated sections 33-
29 1804(A), (C) and (D) on a date or dates unknown, and that on May 13, 2021 the Board violated sections
30 33-1804(C) and (D).

1 15. On May 27th, Board President Haynie convened the meeting, but because
2 the meeting was to address the petition to recall her, Kim Shallue presided. The
3 meeting was convened at about 6:30 p.m. and concluded at about 9:30 p.m.

4 16. As conducted by the Board, the meeting was "closed" until the Open
5 Session Q & A, because until that time, members were not allowed to comment about
6 the substance of the recall petition.

7 17. In the initial or "closed" part of the meeting, the Board had the recall
8 petition read and then Board members put statements in the record.

9 18. Association members were present during the closed part of the meeting.

10 19. Mr. Borruso and perhaps other Association members raised several points
11 of order during the closed part of the meeting.

12 20. Mr. Borruso testified that in responding to the points of order, the Board
13 never said the meeting was closed, but rather only that it was not the appropriate time
14 for the members to speak.

15 21. After the Board members concluded their remarks, Ms. Shallue declared
16 that the special meeting was now closed and that the Board would open the Open
17 Session, which meeting would be open for members to comment.

18 22. During the Open Session Q & A, Mr. Borruso spoke at least twice and
19 about fifteen other members also spoke, some more than once.

20 23. Mr. Thurn attended the May 27th meeting through Zoom.

21 24. Prior to testifying in this matter, Mr. Thurn watched the video of the
22 meeting and provided the following observations: during the initial part if the meeting,
23 Board members spoke for about an hour and seven minutes; during the Open Session
24 Q & A, members spoke for about an hour and thirty minutes; sixteen members spoke,
25 some of them more than once; and Mr. Borruso spoke first and last for about twelve
26 minutes total.

27 25. Mr. Thurn testified as to his opinion that closed meeting refers to an
28 executive session and to the effect that the Board was using the terms open and closed
29 meetings inartfully.
30

1 26. Mr. Borruso points out that many members leave when the first or initial
2 meeting is closed. Mr. Thurn agrees, but notes that members also may leave while
3 business is being conducted, and that the Board always stays until all comments have
4 been taken or all members given the chance to speak.

5 27. Mr. Borruso was of the mind that the members should have been allowed
6 to provide their opinions prior to the Board members, and he testified that when he
7 raised the issue with the Board in a point of order, the Board would not allow
8 substantive comment because the meeting was closed.

9 28. The Board did not take any votes at the May 27th meeting.

10 The Operations Manager Issue

11 29. At some point, Mr. Borruso learned that the Board had posted on Indeed a
12 job opening for an Operations Manager.

13 30. At a Board meeting on May 6, 2021, Mr. Borruso asked Ms. Haynie, who
14 was still president, if the Board had written and approved the job description or
15 qualifications at issue, to which she replied "yes." Because the Board could only do so
16 by taking a vote, Mr. Borruso concluded that the Board must have held a meeting or
17 meetings that had not been properly noticed in violation of sections 33-1804(A) and (C).

18 31. Mr. Borruso acknowledged that his only evidence that such a meeting or
19 meetings had occurred was that Ms. Haynie said the Board had written and approved
20 the job description.

21 32. Mr. Borruso had looked at all the Board's minutes, but there is no record of
22 such a vote.

23 33. Mr. Borruso's requests to the Board for minutes, emails or other
24 information about these purported meetings were unsuccessful or unfulfilled, with staff
25 informing him that it had no such records.

26 34. Messrs. Thurn and Fretwell both testified that Ms. Haynie was wrong when
27 she agreed that the Board had written and approved the job description.

28 35. Mr. Fretwell acknowledged that he did not dispute what Ms. Haynie said
29 at the May 6th meeting, but nevertheless, the Board had not met to discuss the job
30

description. He added that the job description that was posted was very similar to one that previously existed. He was shocked that the job description was posted to Indeed.

36. Mr. Thurn testified that Ms. Haynie had prepared and posted the job description without the Board's approval and that what she said at the May 6th meeting was not correct.

CONCLUSIONS OF LAW

1. In his petition, Mr. Borruso alleges that the Association has violated ARIZ. REV. STAT. section 33-1804. Consequently, the Department of Real Estate has authority over this matter. ARIZ. REV. STAT. Title 32, Ch. 20, Art. 11.

2. Mr. Borruso bears the burden of proof to show that the alleged violation occurred. The standard of proof on all issues in this matter is that of a preponderance of the evidence. ARIZ. ADMIN. CODE § R2-19-119.

3. A preponderance of the evidence is:

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

4. "The administrative law judge may order any party to abide by the statute, condominium documents, community documents or contract provision at issue and may levy a civil penalty on the basis of each violation.... If the petitioner prevails, the administrative law judge shall order the respondent to pay to the petitioner the filing fee required by section 32-2199.01." ARIZ. REV. STAT. § 32-2199.02(A).

5. Statutes should be interpreted to provide a fair and sensible result. *Gutierrez v. Industrial Commission of Arizona*, 226 Ariz. 395, 249 P.3d 1095 (2011) (citation omitted); *State v. McFall*, 103 Ariz. 234, 238, 439 P.2d 805, 809 (1968) ("Courts will not place an absurd and unreasonable construction on statutes.").

The meeting of May 27th

6. Ariz. REV. STAT. section 33-1804(A) provides in part that:

1 [M]embers or designated representatives so desiring shall
2 be permitted to attend and speak at an appropriate time
3 during the deliberations and proceedings. The board may
4 place reasonable time restrictions on those persons
5 speaking during the meeting but shall permit a member or
6 member's designated representative to speak once after the
7 board has discussed a specific agenda item but before the
8 board takes formal action on that item in addition to any
9 other opportunities to speak.

10 7. ARIZ. REV. STAT. sections 33-1804(A) and (C) show that a "closed"
11 meeting is one that the Association members may not attend, and is what is typically
12 referred to as an executive session.

13 8. On May 27, 2021, the Board did not conduct any business in executive
14 session and members were allowed to attend the entire meeting. Consequently,
15 although the Board referred to the initial part of the meeting as being "closed" because it
16 would not take members' comments in that portion of the meeting, it was using that
17 word in a different sense than it is used in section 33-1804.

18 9. Although the Board was not precise in how it identified the two portions of
19 the meeting on May 27th, the evidence shows that there was a single meeting with the
20 members being allowed to speak after the Board had made its presentation. Under
21 these facts and circumstances, Mr. Borruso has not proven that the Association violated
22 section 33-1804(A) on May 27, 2021.

23 The Job Qualifications

24 10. Mr. Borruso did not show by a preponderance of the evidence that there
25 was a meeting at which the Board discussed approved the job description at issue.

26 11. Although Ms. Haynie did answer "yes" when asked, Messrs. Thurn and
27 Fretwell provided credible testimony that she was wrong. That there was no such
28 meeting explains why Mr. Borruso could locate any reference to a meeting in his review
29 of the minutes.

30 12. Consequently, the preponderance of the evidence shows that there is no
violation of sections 33-1804(A) and (C).

13. Mr. Borruso's petition should be dismissed.

ORDER

IT IS ORDERED that Ronald Borruso's petition is dismissed.

NOTICE

Pursuant to ARIZ. REV. STAT. section 32-2199.02(B), this Order is binding on the parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. section 32-2199.04. Pursuant to ARIZ. REV. STAT. section 41-1092.09, a request for rehearing in this matter must be filed with the Commissioner of the Department of Real Estate within 30 days of the service of this Order upon the parties.

Done this day, September 21, 2021.

/s/ Thomas Shedden

Thomas Shedden

Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile September 21, 2021 to:

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