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ADMINISTRATIVE LAW JUDGE DECISION

ADMINISTRATIVE LAW JUDGE: Thomas Shedden

1 7. After the original hearing, through an Administrative Law Judge Decision
2 dated July 28, 2021, the undersigned concluded that Mr. Burnes had not proven that
3 Respondent violated section 33-1804 because Respondent did not conduct a meeting
4 on May 3, 2020, but rather took action without a meeting as allowed by section 10-3821.

5 8. On or about September 2, 2021, Mr. Burnes filed with the Department his
6 Rehearing Request.

7 9. In his request, Mr. Burnes alleged that the ALJ Decision's findings of fact
8 were not supported by the evidence or were contrary to law. Mr. Burnes attached to his
9 request a twenty-four page narrative setting out a number of alleged deficiencies.

10 10. On or about September 14, 2021, Respondent filed with the Department a
11 Response to Mr. Burnes's request for rehearing, asserting that the ALJ Decision was
12 not contrary to law and that Mr. Burnes's request should be denied.

13 11. The Department granted Mr. Burnes's request and issued its Notice of
14 Rehearing.

15 12. Because Mr. Burnes's rehearing request raises only legal issues, the
16 undersigned issued an Order dated October 21, 2021, through which the pending
17 hearing date was vacated and deadlines were set to allow Respondent to supplement
18 its response to Mr. Burnes's rehearing request and to allow Mr. Burnes to file a reply
19 brief. Neither party filed any supplemental information.

20 13. Mr. Burnes's rehearing request is not a model of clarity, he relies on
21 assertions without adequate citation to testimony or other evidence, and he erroneously
22 concludes that section 10-3821 is a "document" within the meaning of section 33-1804.
23 Much, if not all, of Mr. Burnes's request for rehearing is subject to objection because its
24 information and argument that could have been presented at the original hearing.
25 Nevertheless, the ALJ addresses the following issues raised by Mr. Burnes:

26 (1) The ALJ's jurisdiction is limited to Title 33, Chapter 16, which does not include
27 ARIZ. REV. STAT. section 10-3821.

28 (2) Section 10-3821 applies only to actions found in Title 10, Chapters 24 through
29 40, which do not include section 33-1804, and the actions Respondent took by
30

consent are not found in those chapters. Therefore, section 10-3821 does not apply.

(3). Section 10-3701(F) shows that if Title 10, Chapter 30 is inconsistent with Title 33, Chapter 16, planned communities are required to follow T 33, Ch. 16.

(4) Section 33-1804 should be followed because it is a statute specific to planned communities, whereas section 10-3821 applies to all non-profit corporations and 33-1804(F) shows the policy and legislative intent of favoring open meetings.

(5) Finding of Fact 15 is contrary to law because section 33-1804 shows that it applies regardless of what an association's bylaws might show, and the ALJ should not have used this finding to support Respondent's use of section 10-3821 as a defense.

(6) A meeting did take place on May 3, 2021.

Pertinent facts from the Original Hearing

14. In April 2020, Mr. Burnes and his wife raised with the Board two issues or complaints related to lot 7 that abuts the Burnes's lot: whether lot 7 was entitled to a waiver of the construction bond or deposit and a concern regarding the placement of the house on lot 7.

15. After Mr. Burnes raised the issues, the Board conducted research, and Mr. Burnes, the Board members and Jamie Argueta exchanged emails about the issues.

16. On April 19 and 21, 2020, the Board members and Mr. and Ms. Burnes met and discussed the issues. Exhibit B is minutes from those meetings.

17. Ms. Martinez, Board member Mr. Madill, and perhaps Mr. Burnes, also had a discussion or two with a couple of other HOA members, but Ms. Martinez characterized this as neighbors talking and not a meeting. The dates of these discussions is not in the record.

18. Ms. Martinez drafted the two consent forms at issue without input from others and on May 3, 2020, she brought the forms and related documents to each of the other two Board member's homes, and she asked each to read the information and sign if they felt it appropriate. Each Board member signed each consent form.

19. The Association's Bylaws section 3.5 "Action Without a Meeting" provides the directors with "the right to take any action in the absence of a meeting, which they could take at a meeting by obtaining the written consent of all the directors."

CONCLUSIONS OF LAW

1. Mr. Burnes alleges that Respondent 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. In the original hearing, Mr. Burnes had the burden of proof to show that the alleged violation occurred. In this rehearing, Mr. Burnes bears the burden to show that the ALJ Decision's conclusion that Mr. Burnes had not proven that the alleged violation occurred was in error.

3. The standard of proof on all issues in this matter is that of a preponderance of the evidence. ARIZ. ADMIN. CODE § R2-19-119.

4. 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).

5. ARIZ. REV. STAT. section 32-2199 provides in part:

Pursuant to title 41, chapter 6, article 10, an administrative law judge shall adjudicate complaints regarding and ensure compliance with: *** Title 33, chapter 16 and planned community documents.

6. ARIZ. REV. STAT. section 33-1804 provides in part:

A. Notwithstanding any provision in the declaration, bylaws or other documents to the contrary, all meetings of the members' association and the board of directors, and any regularly scheduled committee meetings, are open to all members of the association or any person designated by a member in writing as the member's representative and all members or designated representatives so desiring shall be permitted to

1 attend and speak at an appropriate time during the
2 deliberations and proceedings....

3 ***

4 E. Notwithstanding any provision in the declaration, bylaws or
5 other community documents, for meetings of the board of
6 directors that are held after the termination of declarant
7 control of the association, all of the following apply:

8 ***

9 4. Any quorum of the board of directors that meets informally
10 to discuss association business ... shall comply with the open
11 meeting and notice provisions of this section without regard to
12 whether the board votes or takes any action on any matter at
13 that informal meeting.

14 F. It is the policy of this state as reflected in this section that all
15 meetings of a planned community ... be conducted ... and to
16 ensure that members have the ability to speak after
17 discussion of agenda items, but before a vote of the board of
18 directors or members is taken. Toward this end, any person or
19 entity that is charged with the interpretation of these
20 provisions ... shall construe any provision of this section in
21 favor of open meetings.

22 7. ARIZ. REV. STAT. section 10-3821 provides in pertinent part:

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

8. ARIZ. REV. STAT. section 10-3071 provides in part:

A. Unless otherwise provided in the articles of incorporation or
bylaws, a corporation with members shall hold a membership
meeting annually at a time stated in or fixed in accordance
with the bylaws.

1 F. Notwithstanding this chapter [i.e., T. 10, Ch. 30], a
2 condominium association shall comply with title 33, chapter 9
3 and a planned community association shall comply with title
4 33, chapter 16 to the extent that this chapter is inconsistent
5 with title 33, chapters 9 and 16.

6 9. Mr. Burnes's argues that section 10-3821 is a "document" within the
7 meaning of section 33-1804, and concludes that 33-1804 precludes Respondent's
8 reliance on 10-3821. This argument fails because if a statute were a document, the
9 legislature would not have used both words in 33-1804. See e.g., *Deer Valley, v.*
10 *Houser*, 214 Ariz. 293, 152 P.3d 490 (2007)(each word in a statute must be given
11 meaning).

12 10. (1) Mr. Burnes argues that the ALJ has no jurisdiction to consider section
13 10-3821 because it is not found in Title 33, Chapters 9 or 16. But section 32-2199
14 requires the ALJ to "adjudicate complaints" regarding Title 33, Chapter 16, and
15 jurisdiction is proper because Mr. Burnes alleged that Respondent violated section 33-
16 1804, which is in T. 33, Ch. 16. Nothing in the applicable statutes prohibits
17 Respondents from raising, or the ALJ considering, defenses from outside T. 33, Chs. 9
18 or 16.

19 11. (2) Mr. Burnes argues that (1) section 10-3821 does not apply, because it
20 is limited to actions found in Title 10, Chapters 24 through 40, which do not include
21 section 33-1804, and (2) the actions Respondent took by consent are not found in those
22 chapters. As Mr. Burnes acknowledges in his request for rehearing however, voting is
23 among the actions found in T 10, Chs. 24 – 40, and voting is the action that was taken
24 by unanimous consent.

25 12. (3) Mr. Burnes argues to the effect that the ALJ Decision is in error
26 because section 10-3701(F) shows that if there is a conflict between Title 10, Chapter
27 30, and Title 33, Chapter 16, the latter controls. Mr. Burnes's analysis is flawed because
28 section 10-3701, dealing with membership meetings, is found in Title 10, Chapter 30,
29 whereas as section 10-3821, dealing with board meetings, is found in Title 10, Chapter
30 31 and has no provision similar to that found in 10-3701(F).

13. That the legislature specifically found that membership meetings had to comply with Title 33, Chapter 16 in cases of conflict, but did not include any similar provision for board meetings indicates a legislative intent to allow boards latitude to act by consent. *See City of Phoenix v. Orbitz Worldwide, Inc.* 247 Ariz. 234 (2019).

14. (4) Mr. Burnes argues that because section 33-1804 is a statute specific to planned communities, it controls over the more general statute, section 10-3821. But this principle of statutory construction only applies if the statutes are in conflict and cannot each be given effect. In this case, both sections 10-3821 and 33-1804 can be given effect in that Respondent may take action without a meeting as allowed by section 10-3821, but if a meeting is held, Respondent must follow the requirements of section 33-1804.

20. (5) Mr. Burnes argues that (1) Finding of Fact 15 is contrary to law because section 33-1804 shows that it applies regardless of what an association's bylaws might show, and (2) the ALJ should not have used this finding to support Respondent's use of section 10-3821 as a defense.

15. Mr. Burnes is correct that the bylaws do not trump section 33-1804, but he overlooks the fact that section 10-3821 is not applicable if Respondent's bylaws prohibit action by consent. Because Respondent's bylaws allow for action by consent, the exception in section 10-3821 (disallowing action by consent if prohibited by the bylaws) is not applicable to Respondent.

16. (6) Mr. Burnes asserts that a meeting or meetings did occur on May 3, 2020, but there are several flaws in his position and he has not proven that a meeting did occur.

17. Mr. Burnes asserts that Ms. Martinez and the other directors were discussing and transacting business on May 3rd, but he does not cite evidence from the record to prove that any discussion actually occurred on May 3rd; he conflates meetings that did occur with the events of May 3rd; he relies on the fact that the issues decided by unanimous consent had been discussed at other meetings and Ms. Martinez drew on this experience in drafting the consent forms, but does not provide legal authority showing that these fact are pertinent to whether a meeting occurred; and he relies on

1 numerous dictionary and other definitions of terms that were not referenced in the
2 original hearing.¹

3 Conclusion

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

9 19. Mr. Burnes has not proven that Respondent committed the alleged
10 violation of ARIZ. REV. STAT. section 33-1804 because Respondent did not conduct a
11 meeting on May 3, 2020, but rather took action without a meeting as allowed by section
12 10-3821.

13 20. Consequently, Mr. Burnes's petition should be dismissed and Respondent
14 be deemed the prevailing party in this matter.

15 ORDER

16 **IT IS ORDERED** that Petitioner Clifford (Norm) Burnes's petition is dismissed.

17 NOTICE

18 **This Administrative Law Judge Order, having been issued as a result of a**
19 **rehearing, is binding on the parties. ARIZ. REV. STAT. § 32-2199.02(B). A party**
20 **wishing to appeal this order must seek judicial review as prescribed by ARIZ. REV.**
21 **STAT. § 41-1092.08(H) and Title 12, Chapter 7, Article 6. Any such appeal must be**
22 **filed with the Superior Court within thirty-five (35) days from the date when a copy**
23 **of this Order was served upon the parties. ARIZ. REV. STAT. § 12-904(A).**

24 Done this day, January 3, 2022.

25
26 /s/ Thomas Shedden
27 Thomas Shedden
28

29 ¹ Relying on some of these definitions, Mr. Burnes reaches the cryptic conclusion that oral communication
30 is not necessary for verbal communication.

Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile January 3, 2022 to:

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By Miranda A.