

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Dean A Yelenik,
4 Petitioner,

No. 22F-H2221021-REL

5 vs.

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 Meridian Condominiums Homeowners
7 Association,
8 Respondent.

9 **HEARING:** February 01, 2022 at 1:00 PM.

10 **APPEARANCES:** Arthur Dean Yelenik (“Petitioner”) appeared on his own behalf.
11 Eadie Rudder, Esq. and Nick Elcher, Esq. appeared on behalf of Meridian Condominiums
12 Homeowners Association (“Association” and “Respondent”) with Margo McInnis as a
13 witness.

14 **ADMINISTRATIVE LAW JUDGE:** Jenna Clark.

15
16 After review of the hearing record in this matter, the undersigned Administrative
17 Law Judge makes the following Findings of Fact and Conclusions of Law, and issues this
18 ORDER to the Commissioner of the Arizona Department of Real Estate (“Department”).

19 **FINDINGS OF FACT**

20 **BACKGROUND AND PROCEDURE**

21 1. The Department is authorized by statute to receive and to decide petitions
22 for hearings from members of homeowners’ associations and from homeowners’
23 associations in Arizona.

24 2. On November 09, 2021, Petitioner filed a single-issue petition with the
25 Department which alleged that “In late 2020 [the Association] filled a board vacancy,” in
26 violation of ARIZ. REV. STAT. §§ 33-1243(B) and Community Bylaws 3.1 and 3.6.¹ The
27 petition, which is paraphrased for brevity here, states in pertinent parts that “In September
28 2020 Board Member Gallu resigned from the Board. At the October 2020 Board meeting

29 ¹ See Department’s electronic file at H022-21021_Petition.pdf; see also Department’s electronic file at
30 H022-21021_Payment.pdf.

1 the Board filled the vacancy by appointing existing Board member Robley to fill the 'Gallu
2 seat.' Robley resigned from her seat that was expiring in January 2021 to be appointed to
3 the 'Gallu seat' that would not expire until January 2023. The appointment process was
4 flawed in both diligence and transparency. Petitioner also asserted therein that Robley
5 "avoided facing re-election by homeowners at the end of her elected term as
6 contemplated in the Bylaws. Her term of office was extended by two years solely by Board
7 action."

- 8 a. In the petition, Petitioner indicated that he desired the following relief: an
9 Order for Respondent to abide by the referenced statute, and an Order for
10 Respondent to abide by the referenced Bylaws. Although Petitioner did not
11 request an assessment of a civil penalty against Respondent, he did note
12 that his petition was filed "to compel [Respondent] to cure the violations of
13 Bylaws Sections 3.1 and 3.6 and A.R.S. 33-1243(B)."

14 3. On September 10, 2021, the Department issued notice of the underlying
15 petition to Respondent.²

16 4. On November 15, 2021, Respondent returned its ANSWER to the
17 Department whereby it denied the merits of Petitioner's allegation(s).³

18 5. Per the NOTICE OF HEARING, the Department referred this matter to the
19 Office of Administrative Hearings ("OAH"), an independent state agency, for an
20 evidentiary hearing on February 01, 2022, regarding the following issue:

21 **Whether Meridian Condominiums Homeowners Association violated**
22 **violation of ARIZ. REV. STAT. §§ 33-1243(B) and Community Bylaws 3.1**
23 **and 3.6.**⁴

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27 ² See Department's electronic file at H022-21021_Notice_Petition.pdf.

28 ³ See Department's electronic file at H022-21021_Responde_Petition.pdf. For an unknown reason the
29 document is dated December 06, 2021.

30 ⁴ See Department's electronic file at H022-21021_Notice_Hearing.pdf; see also Department's electronic file
at H022-21021_HearingScheduled.pdf.

THE PARTIES AND GOVERNING DOCUMENTS

6. Respondent is a condominium community association whose members own properties in the Meridian Condominium residential real estate development located in Phoenix, Arizona. Membership for the Association is comprised of Meridian Condominium owners.

7. Petitioner is a Meridian Condominium owner and a member of the Association.

8. The Association is governed by its Covenants, Conditions, and Restrictions ("CC&Rs") and Bylaws, and overseen by a Board of Directors ("the Board"). The CC&Rs empower the Association to control certain aspects of property use within the development. When a party buys a residential unit in the development, the party receives copies of the CC&Rs and Bylaws and agrees to be bound by their terms. Thus, the CC&Rs form an enforceable contract between the Association and each property owner, and the Bylaws outline how the Association is permitted to operate.

9. Bylaws Article III, Board of Directors, Section 3.1 states, in pertinent part, "The affairs of this Association shall be initially managed by a board of three (3) directors. The number of directors may be changed from time to time by the Board of Directors but the number of directors may not be less than three (3) or more than seven (7) and must always be an odd number."⁵ Additionally, it notes "Upon the termination of the Period of Declarant Control, the Unit Owners shall elect the Board of Directors which must consist of at least three (3) members, all of whom must be Unit Owners."⁶

10. Bylaws Article III, Board of Directors, Section 3.6 states, in pertinent part, "... all vacancies in the Board of Directors shall be filled by a vote of majority of the remaining directors though less than a quorum or by a sole remaining director. Any person so elected shall serve the unexpired portion of the prior director's term. Any newly created directorship shall be deemed a vacancy. Any person elected to fill such a vacancy shall serve until the next annual meeting of the members."⁷

⁵ See Department's electronic file at H022-21021_Bylaws.pdf.

⁶ *Id.*

⁷ *Id.*

HEARING EVIDENCE

11. Petitioner testified on his own behalf and submitted Exhibit 5. Respondent called Margo McInnis as a witness and submitted Exhibits 1-18. The Department's electronic file, NOTICE OF HEARING, and Respondent's PREHEARING MEMORANDUM were also admitted into the record. The substantive evidence of record is as follows:

- a. Petitioner is a 19 year member of the Association. He previously served on the Board from November 2009 through April 2009.
- b. The Association's Bylaws were last amended in 2005.⁸
- c. On September 30, 2020, Board President Chris Gallu tendered his resignation during a community meeting. The Association announced it would hold a vote January 19, 2021, to appoint his predecessor during its annual meeting.
- d. In October 2020, however, during a Board meeting the Board decided to appoint Board Member Joan Robley as Mr. Gallu's replacement in lieu of a vote by its members.⁹ Additionally, the Board elected to wait until its annual meeting to permit members to elect a new Director for the Board.
 - i. At that time, Ms. Robley had served on the Board continuously for 15 years. Ms. Robley was selected, in large part, because of her experience over all of the other junior members on the Board, and because the Association did not want to attempt to persuade another member to serve for three months or search for anyone else to do so.
- e. During an executive meeting on November 17, 2020, the last meeting of the year, Ms. Robley resigned her term during the meeting, and was immediately thereafter appointed by the Board to fill Mr. Gallu's seat.
 - i. At that time, Ms. Robley had three months remaining on her term of service. Mr. Gallu had 2 years and three months remaining on his term of service at the time of his resignation.

⁸ See Respondent Exhibit 5.

⁹ See Petitioner Exhibit 5.

1 f. Since January 19, 2021, the Association's Board has been operating with 5
2 members.

3 i. The Board operated with only 4 Board members for approximately 3
4 months.

5 g. Petitioner challenged the Board's decision to appoint Ms. Robley to Mr.
6 Gallu's seat on February 09, 2021, February 24, 2021, March 11, 2021,
7 April 04, 2021, June 22, 21, September 06, 21, October 06, 2021, and
8 October 29, 2021.¹⁰

9 i. Respondent provided responses to Petitioner on February 22, 2021,
10 March 36, 2021, July 2021, and October 19, 2021.

11 12. In closing, Petitioner argued that Respondent's act of appointing Ms. Robley
12 to Mr. Gallu's seat amounted to holding a regular election sans notice, and was an abuse
13 of the Board's authority. Petitioner opined that the Board's behavior was a "power grab"
14 that left its members without recourse and set a precedent for future acceptable conduct;
15 as Board members could effectively swap terms at their own discretion. Petitioner opined,
16 based on the "plain language" of the related statute and regulations, that a resulting
17 decision in his favor should be issued by the undersigned.

18 13. In closing, Respondent argued that it made more sense for the Association
19 to solicit nominations and candidates to run for election at the 2021 annual meeting, than
20 appoint an inexperienced member to serve on the Board for 3 months. Respondent
21 opined that there was no statutory timeframe in which it was required to fill a Board
22 vacancy, and argued that the choice to appoint Ms. Robley over inexperienced members
23 was the appropriate call for its members.

24 **CONCLUSIONS OF LAW**

25 1. This matter lies within the Department's jurisdiction pursuant to ARIZ. REV.
26 STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a
27 condominium and/or planned community association. The owner or association may
28 petition the department for a hearing concerning violations of community documents or

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¹⁰ See Respondent Exhibits 10-18.

1 violations of the statutes that regulate condominium communities as long as the petitioner
2 has filed a petition with the department and paid a filing fee as outlined in ARIZ. REV. STAT.
3 § 32-2199.05.

4 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
5 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested
6 case at bar. OAH has the authority to interpret the contract between the parties.¹¹

7 3. In this proceeding, Petitioner bears the burden of proving by a
8 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1243.¹²

9 4. “A preponderance of the evidence is such proof as convinces the trier of fact
10 that the contention is more probably true than not.”¹³ A preponderance of the evidence is
11 “[t]he greater weight of the evidence, not necessarily established by the greater number of
12 witnesses testifying to a fact but by evidence that has the most convincing force; superior
13 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
14 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
15 the other.”¹⁴

16 5. Condominium Associations are regulated by ARIZ. REV. STAT. Title 33,
17 Chapter 9, Article 3.

18 6. ARIZ. REV. STAT. §§ 33-1243(B) provides, in pertinent part, that “[T]he board
19 of directors shall not act on behalf of the association to ... elect members of the board of
20 directors.” The statute does note, however, that the board of directors may “fill vacancies
21 in its membership for the unexpired portion of any term.”

22 7. Because Petitioner only paid for the adjudication of one (1) issue, this
23 Tribunal may only determine whether Respondent committed a violation of ARIZ. REV.
24 STAT. §§ 33-1243(B) and/or Community Bylaws 3.1 and 3.6 based on the same event or
25 series of alleged conduct.
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27

28 ¹¹ See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

29 ¹² See ARIZ. ADMIN. CODE R2-19-119.

30 ¹³ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

¹⁴ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

8. The crux of Petitioner's inquiry is this: May a Board Member resign and be appointed to fill a Board vacancy the same day, effectively elongating that Board Member's service term?

9. Here, none of the material facts are in dispute. The sole determination to be addressed is whether the Board acted within their lawful authority. This Tribunal finds that it did.

10. Petitioner testified that Ms. Robley was elected by all voting members of the Board to fill Mr. Gulla's vacant seat, to serve the remainder of his unexpired term, after she resigned from her own position on the Board. Neither Bylaws Section 3.6 nor ARIZ. REV. STAT. §§ 33-1243(B) implicitly or explicitly prohibit what occurred. Additionally, Petitioner did not establish by a preponderance of the evidence that there were less than 3 members on the Board after Mr. Gulla resigned, in violation of Bylaws Section 3.1.

11. Just because the Association could have made any number of different determinations after Mr. Gallu resigned, does not mean that its questionable choice to appoint Ms. Robley to his seat was unlawful. Once Ms. Robley resigned her seat; which is not akin to being removed, she became an eligible candidate like the other remaining Board Members. There is no presumption of “new blood” as Petitioner argued. The sole requisite to fill the vacancy was that the choice be limited to unit owners, which Ms. Robley is.

12. Therefore, based on the relevant and credible evidence of record, the undersigned Administrative Law Judge concludes that because Petitioner did not sustain his burden of proof by a preponderance of the evidence that the Association violated ARIZ. REV. STAT. §§ 33-1243(B), and Bylaws Section 3.1 and 3.6, his petition must be denied.

ORDER

Based on the foregoing,

IT IS ORDERED that Petitioner's petition be denied.

In the event of certification of the Administrative Law Judge Decision by the Director of the Office of Administrative Hearings, the effective date of the Order will be five days from the date of that certification.

NOTICE

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

Done this day, February 18, 2022.

Office of Administrative Hearings

/s/ Jenna Clark
Administrative Law Judge

Transmitted electronically to:

Louis Dettorre, Commissioner
c/o Dan Gardner, HOA Coordinator
Arizona Department of Real Estate
dgardner@azre.gov

Nick Eicher, Esq.
Carpenter, Hazlewood, Delgado & Bolen LLP, Counsel for Respondent
Nick.Eicher@carpenterhazlewood.com
minuteentries@carpenterhazlewood.com

Dean A. Yelenik, Petitioner
deanyel@msn.com