

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 ALLEN R. TOBIN,
4 Petitioner,

5 vs.

6 SUNLAND VILLAGE COMMUNITY
7 ASSOCIATION,
8 Respondent.

9 And

10 SUNLAND VILLAGE COMMUNITY
11 ASSOCIATION,
12 Petitioner,

13 vs.

14 ALLEN R. TOBIN,
15 Respondent,

16 And

17 ALLEN R. TOBIN,
18 Petitioner,

19 vs.

20 SUNLAND VILLAGE COMMUNITY
21 ASSOCIATION,
22 Respondent.

No. 11F-H1112006-BFS

No. 11F-H1112010-BFS

No. 12F-H121001-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

23 **HEARING:** February 28, and April 23, 2012, at 8:00 a.m.

24 **APPEARANCES:** Allen R. Tobin appeared on his own behalf. Sunland Village
25 Community Association ("Sunland") appeared through its attorneys, Jason E. Smith,
26 Esq., and Lindsey O'Conner, Esq. of Carpenter, Hazlewood, Delgado & Wood, PLC.
27 These three matters were consolidated for hearing because the parties were the same
28 and involved similar issues of fact and law.

29 **ADMINISTRATIVE LAW JUDGE:** M. Douglas

30 Evidence and testimony were presented and the following Findings of Fact,
Conclusions of Law and Recommended Orders are made:

FINDINGS OF FACT

1. The Department of Fire, Building and Life Safety (the "Department") is authorized by statute to receive Petitions for Hearings from members of homeowners' associations and from homeowners' associations in Arizona.
2. Sunland Village Community Association ("Sunland") is an age restricted, planned community of homeowners located in Mesa, Arizona.
3. Allen R. Tobin ("Mr. Tobin") owns a residence in Sunland Village Community Association and served as a member of the Board of Directors for Sunland Village Community Association from January, 2009 through all times pertinent herein.
4. Pursuant to Article III, Section 1 of its Bylaws, the Board of Directors for Sunland (the "Board") is supposed to consist of seven (7) Board members with four (4) of the Board members serving as president, vice-president, secretary, and treasurer.
5. There was no dispute that one of the Board members resigned leaving the remaining six members of the Board evenly divided with Mr. Tobin and two supporting Board members on one side of the Board, and the remaining three Board members on the other side of the Board. Neither group of Board members was able to form a quorum of Board members.
6. On or about October 28, 2011, Mr. Tobin filed a Petition with the Department against Sunland alleging, in pertinent part, as follows:

A minority of the Board of Directors conducted a pseudo meeting to address a homeowner's complaint on February 11, 2011. The meeting violated the Bylaws of the Sunland Village Community Association as follows: 1. A valid meeting requires a quorum of the Board of Directors to conduct any business for the association. A quorum of the six (6) then servicing Board members is four (4). The pseudo meeting was conducted by three (3) Board members only in violation of Article V, Section 7, on page 46 and the SVCA Bylaws. 2. The Vice-President declared the actions taken at the annual meeting were null and void. Only a quorum of the Board can make decisions for the association. The subsequent filing of "Notice of Bylaw Change" with the Superior Court of Maricopa County is invalid and represents an attempt by a minority of the Board of directors to modify the Bylaws of the SVCA.¹

7. On or about November 29, 2011, Sunland filed a Petition with the Department against Mr. Tobin, which alleges, in pertinent part, as follows:

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1 Tobin made motions from the floor of the annual meeting of the
2 Sunland Village Community Association. The motions were to amend
3 the bylaws of the Association. Because the motions were made for the
4 first time at the meeting, members not present at the meeting were not
5 provided the opportunity to debate or vote on the motions. The
6 Association's Bylaws at Article XII, Section 2 require that notice of any
7 proposed amendment of the Bylaws be given to the members as
8 provided in Article IX, Section 5 of the Bylaws. This section requires
9 notice to be given at least ten days prior to the meeting by mail. This
10 was not done. The motions were improper and, as two of the three
11 motions were approved by the members present at the meeting, they
12 are invalid and of no effect. By making these motions to amend the
13 Bylaws at the annual meeting, Tobin violated the noticed sections of the
14 Association's Bylaws.²

- 15 8. On or about December 22, 2011, Mr. Tobin filed a second Petition with the
16 Department against Sunland alleging, in pertinent part, as follows:

17 Without the approval of the Board of Directors, legal fees of over
18 \$20,000 of Association funds were expended for the agendas and
19 personal legal consultations of several Board members. Only the
20 majority of the full Board of Directors can legally obligate the
21 Association. During February 2011, the Association's manager,
22 Gordon Clark, and Board members Richard Gaffney, Kitty Lovitt, and
23 Jack Cummins (a minority of the Board of Directors) met secretly
24 with and paid attorney Scott Carpenter from Association funds for
25 contacts and meetings without knowledge of the remaining three Board
26 members. During April 2011, additional contacts by the same
27 individuals with the same law firm continued without knowledge of the
28 remaining Board members. An addition [sic] contact included a
29 personal consultation with Richard Gaffney at the Association's
30 expense. Significant other legal expenses have been generated during
the calendar year 2011 without Board approval as required by
Association Bylaws.³

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- 31 9. Mr. Tobin testified that during the January 12, 2011, annual meeting of Sunland, he
32 presented three resolutions during the Annual meeting. The first resolution was to
33 amend Article II, Section 3 of the Bylaws (placing a two-year separation for service
34 for all past Directors of the Board who have completed over half of a term). The

² Docket No. 11F-H1112010-BFS

³ Docket No. H121001-BFS

1 second resolution was to amend Article II, Section 2 (providing that the President of
2 the Board shall not vote except to break a tie or when passage of the issue being
3 considered requires an affirmative vote of more than a majority of those present).
4 The third resolution was to amend Article II, Section 5 (providing residency
5 requirements for members of the Board).

6 10. Mr. Tobin admitted that he provided no formal written notice of the proposed
7 resolutions to the members of Sunland prior to the annual meeting as required by
8 the Article 12, Section 2 of Sunland's Bylaws.

9 11. Mr. Tobin admitted that Article XII, Section 2 of the Bylaws requires that written
10 notice of the proposed resolutions be provided to all members of Sunland prior to the
11 presentation of the motions.

12 12. Mr. Tobin asserted that the moderator of the Annual Meeting was responsible for the
13 admitted violations of the Sunland's Bylaws because the moderator of the Annual
14 meeting allowed Mr. Tobin to present his motions to amend the bylaws of the
15 Association from the floor without prior notice.

16 13. Mr. Tobin testified that since his motions were accepted from the floor and voted on
17 by the members who were present at the Annual meeting, any irregularities involved
18 in his failure to provide advance written notice of his motions to amend Sunland's
19 Bylaws were waived by the Sunland. He asserted that no objection was made at the
20 meeting and that no written objection was delivered to the president or secretary of
21 the Association within 30 days after the meeting.

22 14. On January 12, 2011, a member of Sunland, identified as Erwin Paulson, filed a
23 written objection with the Board to Mr. Tobin's presentation of amendments to the
24 Bylaws without providing advance written notice of the proposed amendments prior
25 to the annual meeting (Exhibit No. R-6).

26 15. During a special Board meeting on January 17, 2011, a Board member moved to
27 add an item regarding Mr. Paulson's complaint letter about the voting that had
28 occurred at the annual meeting to the agenda of the special Board meeting.

29 16. There was no dispute that the Board member's motion failed to obtain the necessary
30 support of a majority of the Board.

1 17. The Board then set an emergency meeting on February 11, 2011, to consider the
2 complaint filed by Erwin Paulson.

3 18. Three Board members were present at the February 11, 2011 meeting. The three
4 Board members who were present were identified as Cummins, Gaffney and Lovitt.

5 19. Three Board members were not present at the February 11, 2011 meeting. The
6 three Board members who were not present were identified as Tobin, Verworst, and
7 Wagner.

8 20. Mr. Tobin testified that he had informed the other members of the Board that he
9 would be unavailable to attend the February 11, 2011 meeting.

10 21. The minutes of the February 11, 2011 meeting (Exhibit C-3) provide, in pertinent
11 part, as follows:

12 Vice President Lovitt announced that in light of our current documents,
13 the action taken to amend three bylaws at the annual meeting was not
14 in compliance with our documents as previously stated, and therefore
15 declared the amendments to be null and void. Direction was then given
16 to file these findings with the Office of Official Records of Maricopa
17 County.

18 22. Article V, Section 7 of the Bylaws provides that an affirmative vote of a majority of
19 the quorum present shall be sufficient to take any lawful action unless a larger
20 number is required on the matter by law, the Articles, the Bylaws, or the CCR&Rs.

21 23. There was not a quorum of Board members present for the February 11, 2011
22 meeting.

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24 24. Mr. Tobin asserted that Sunland's manager, Gordon Clark, and three members of
25 the Board met with an attorney, and paid the attorney using money from Sunland.

26 25. There was no dispute that on or about February 28, 2011, the law firm of Carpenter,
27 Hazlewood, Delgado & Wood, PLC, issued an invoice (Exhibit C-1, 12F-H1212001-
28 BFS) to Sunland in the amount of \$640.00 for consultations which had occurred on
29 or about January 6, 2011, and January 20, 2011.

30 26. Mr. Tobin testified that the meetings with the law firm were conducted without his
knowledge, and without the knowledge of two other members of the Board and that

1 no approval by the Board was given for any meetings with attorneys or for the
2 expenditure of any legal fees by the Board in January 2011.

3 27. Linda Wagner testified that she was a member of the Board during February 2011,
4 and that she was not informed of the fact that three other members of the Board
5 were meeting with legal counsel at Sunland's expense.

6 28. Mr. Tobin and Linda Wagner filed a civil action naming Sunland and Richard
7 Gaffney, Penny Gaffney, Gordon Clark and Marriane Clark, Kathrine J. Lovitt and
8 Robert Lovitt, and Jack Cummins and Karin Cummins in April 2011, approximately
9 twelve (12) days before a scheduled recall election for all of the members of the
10 Board was to be held at Sunland.

11 29. Gordon Clark testified that he was a full time employee-manager of Sunland. He
12 stated that he believed that, as the full time manager of Sunland, he had authority to
13 seek legal advice on behalf of Sunland without the specific authorization of the
14 Board. He stated that he was concerned about the civil action filed by Mr. Tobin and
15 the possible effect of the recall election on Sunland.

16 30. Gordon Clark testified that the issue of Board authorization for his ability to contact
17 legal representation for Sunland had gone both ways over the seven years of his
18 employment. Although initially, he was not authorized to contact a lawyer without
19 specific Board approval, in later years the Board had given him oral authority to do
20 so without specific Board approval. He admitted that there was nothing in the
21 minutes of the Board reflecting such authorization.

22 **CONCLUSIONS OF LAW**

23 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to file a
24 petition with the Department for a hearing concerning violations of planned
25 community documents or violations of statutes that regulate planned communities.
26 That statute provides that such petitions will be heard before the Office of
27 Administrative Hearings.

28 2. A.R.S. § 41-2198.02(A) provides that the Administrative Law Judge may order any
29 party to abide by the statute, condominium documents, community documents or
30 contract provision at issue and may levy a civil penalty on the basis of each violation.

- 1 3. A.R.S. § 41-2198.02(B) provides that if the petitioner prevails, the Administrative
2 Law Judge shall order the respondent to pay to the petitioner the filing fee required
3 by section 41-2198.01.
- 4 4. The burden of proof at an administrative hearing falls to the party asserting a
5 claim, right, or entitlement and the standard of proof on all issue in this matter
6 is by a preponderance of the evidence. See A.A.C. R2-19-119.
- 7 5. Proof by “preponderance of the evidence” means that it is sufficient to persuade the
8 finder of fact that the proposition is “more likely true than not.” *In re Arnold and*
9 *Baker Farms*, 177 B.R. 648, 654 (9th Cir. BAP (Ariz.) 1994). It “is evidence which is
10 of greater weight or more convincing than the evidence which is offered in opposition
11 to it; that is, evidence which as a whole shows that the fact sought to be proved is
12 more probable than not.” *Black’s Law Dictionary* at 1182 (6th ed. 1990).
- 13 6. The hearing record demonstrates that during the annual meeting Sunland on January
14 12, 2011, Mr. Tobin presented motions to amend the Bylaws of Sunland from the floor
15 without providing advance written notice of the proposed amendments as required by
16 Article XII, Section 2 of Sunland’s Bylaws.
- 17 7. Article XII, Section 2 of Sunland’s Bylaws provides as follows:
18 These Bylaws may be amended, revoked, or restated at any regular or
19 special voting date by a majority vote of the Voting Members of the
20 Association who actually cast ballots, but only after notice of the
21 proposed amendment(s) is given in the same manner as a notice of the
22 annual meeting of the Voting Members.⁴
- 23 8. The hearing record demonstrates that Mr. Tobin was a serving Board member on
24 January 12, 2011, and was aware that Sunland’s Bylaws required advance written
25 notice of proposed Bylaw amendments be provided in the same manner as a notice of
26 the annual meeting of the Voting Members. Mr. Tobin was aware that the required
27 written notice had not been provided in accordance with the applicable Bylaws when
28 he made his presentation from the floor. Therefore, the Administrative Law Judge
29

30 ⁴ Article IX Section 5 of Sunland’s Bylaws requires at least 10 days advance written notice of the annual meeting of the voting members.

concludes that Mr. Tobin violated the provisions of Article XII, Section 2, of Sunland's Bylaws.

9. Article V Section 7 of Sunland's Bylaws provides, in pertinent part, as follows;

A majority of the directors then serving, (not including any vacancies) shall constitute a quorum of the Board. The affirmative vote of a majority of the quorum present shall be sufficient to take any lawful action unless a larger number is required on the matter by law, the Articles, the Bylaws or the CCR&Rs.

10. The hearing record demonstrates that on February 11, 2011, three members of Sunland's Board of Directors conducted a meeting of the Board of Directors and declared that the actions taken to amend the bylaws at the January 12, 2011 annual meeting were null and void and directed the filing of a Notice of Bylaw Change. There was no dispute that three members of the Board of Directors present for the February 11, 2011 meeting did not constitute a quorum of the Board of Directors as required by Article V, Section 7, of Sunland's Bylaws. Therefore, the Administrative Law Judge concludes that Sunland violated the provisions of Article V, Section 7, of Sunland's Bylaws.

11. Article VI (D)(7) of Sunland's Policy Manual provides as follows:

All contact with the SVCA's law firm will be at the direction of the Board. The Board may select representative(s) from the Board to contact the law firm but each individual contact will be reported to the Board. Any contact with the law firm will be documented and provided at least monthly to all Board members along with copies of associated detailed billings.

12. The hearing record demonstrates that Sunland's manager and three members of the Board of Directors met with an attorney and incurred legal expenses for Sunland without the direction, or knowledge, of a quorum of the Board of Directors. No documentation of the meeting, including copies of detailed costs of the meeting, was provided to all Board members as required by Article VI (D)(7) of Sunland's Policy Manual. In April 2011, Sunland's manager authorized a law firm to represent Sunland in a lawsuit without the direction, or consent, of the Board of Directors, as required by Article VI (D)(7) of Sunland's Policy Manual. Therefore, the

Administrative Law Judge concludes that Sunland violated the provisions of Article VI (D)(7) of Sunland's Policy Manual.

RECOMMENDED ORDERS

DOCKET NO. 11F-H1112006-BFS

In view of the foregoing, it is ORDERED that Alan R. Tobin be deemed the prevailing party in this matter.

It is further ORDERED that Sunland comply with the applicable provisions of Article V, Section 7, of Sunland's Bylaws in the future.

It is further ORDERED that Sunland pay Alan R. Tobin his filing fee of \$550.00 paid to the Department in this matter within thirty (30) days of this Order.

It is further ORDERED that Sunland pay a civil penalty in the amount of \$200.00 to the Department within thirty (30) days of the date of this Order.

DOCKET NO. 11F-H1112010-BFS

In view of the foregoing, it is ORDERED that Sunland be deemed the prevailing party in this matter.

It is further ORDERED that Alan R. Tobin pay Sunland its filing fee of \$550.00 paid to the Department in this matter within thirty (30) days of this Order.

It is further ORDERED that Alan R. Tobin pay a civil penalty in the amount of \$200.00 to the Department in this matter within thirty (30) days of the date of this Order.

DOCKET NO. 12F-H121001-BFS

In view of the foregoing, it is ORDERED that Alan R. Tobin be deemed the prevailing party in this matter.

It is further ORDERED that Sunland comply with the applicable provisions of Article VI (D)(7) of Sunland's Policy Manual in the future.

It is further ORDERED that Sunland pay Alan R. Tobin his filing fee of \$550.00 paid to the Department in this matter within thirty (30) days of this Order.

It is further ORDERED that Sunland pay a civil penalty in the amount of \$200.00 to the Department within thirty (30) days of the date of this Order.

1 In the event of certification of the Administrative Law Judge Decision by the
2 Director of the Office of Administrative Hearings, the effective date of these Orders
3 will be five (5) days from the date of that certification.

4 Done this day, April 30, 2012.

5
6 /s/ M. Douglas
7 Administrative Law Judge

8 Transmitted electronically to:

9 Gene Palma, Director
10 Department of Fire Building and Life Safety
11 Iding and Life Safety
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