

1 **Final agency action regarding decision below:**

2  
3 **ALJCERT ALJ decision certified as final 6/18/12: Mailed to all parties./rjr**

4  
5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6  
7 ALLEN R. TOBIN,  
8 Petitioner,

9 vs.

10 SUNLAND VILLAGE COMMUNITY  
11 ASSOCIATION,  
12 Respondent.

13 And

14 SUNLAND VILLAGE COMMUNITY  
15 ASSOCIATION,  
16 Petitioner,

17 vs.

18 ALLEN R. TOBIN,  
19 Respondent,

20 And

21 ALLEN R. TOBIN,  
22 Petitioner,

23 vs.

24 SUNLAND VILLAGE COMMUNITY  
25 ASSOCIATION,  
26 Respondent.

**No. 11F-H1112006-BFS**

**No. 11F-H1112010-BFS**

**No. 12F-H121001-BFS**

**ADMINISTRATIVE  
LAW JUDGE DECISION**

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

28 **APPEARANCES:** Allen R. Tobin appeared on his own behalf. Sunland Village  
29 Community Association ("Sunland") appeared through its attorneys, Jason E. Smith,  
30 Esq., and Lindsey O'Conner, Esq. of Carpenter, Hazlewood, Delgado & Wood, PLC.

These three matters were consolidated for hearing because the parties were the same  
and involved similar issues of fact and law.

**ADMINISTRATIVE LAW JUDGE:** M. Douglas

1  
2 Evidence and testimony were presented and the following Findings of Fact,  
3 Conclusions of Law and Recommended Orders are made:

4 **FINDINGS OF FACT**

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

23 A minority of the Board of Directors conducted a pseudo meeting to  
24 address a homeowner's complaint on February 11, 2011. The meeting  
25 violated the Bylaws of the Sunland Village Community Association as  
26 follows: 1. A valid meeting requires a quorum of the Board of Directors  
27 to conduct any business for the association. A quorum of the six (6)  
28 then servicing Board members is four (4). The pseudo meeting was  
29 conducted by three (3) Board members only in violation of Article V,  
30 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

1 Court of Maricopa County is invalid and represents an attempt by a  
2 minority of the Board of directors to modify the Bylaws of the SVCA.<sup>1</sup>

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

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

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

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

**Docket Nos. 11F-H1112006-BFS and 11F-H1112010-BFS**

<sup>1</sup> Docket No. 11F-H1112006-BFS

<sup>2</sup> Docket No. 11F-H1112010-BFS

<sup>3</sup> Docket No. H121001-BFS

1 9. Mr. Tobin testified that during the January 12, 2011, annual meeting of Sunland, he  
2 presented three resolutions during the Annual meeting. The first resolution was to  
3 amend Article II, Section 3 of the Bylaws (placing a two-year separation for service  
4 for all past Directors of the Board who have completed over half of a term). The  
5 second resolution was to amend Article II, Section 2 (providing that the President of  
6 the Board shall not vote except to break a tie or when passage of the issue being  
7 considered requires an affirmative vote of more than a majority of those present).  
8 The third resolution was to amend Article II, Section 5 (providing residency  
9 requirements for members of the Board).

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

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

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

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

26 14. On January 12, 2011, a member of Sunland, identified as Erwin Paulson, filed a  
27 written objection with the Board to Mr. Tobin's presentation of amendments to the  
28 Bylaws without providing advance written notice of the proposed amendments prior  
29 to the annual meeting (Exhibit No. R-6).  
30

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

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

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

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

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

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

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

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

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

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

28 **Docket No. 12F-H121001-BFS**

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

25. There was no dispute that on or about February 28, 2011, the law firm of Carpenter,  
Hazlewood, Delgado & Wood, PLC, issued an invoice (Exhibit C-1, 12F-H1212001-

1 BFS) to Sunland in the amount of \$640.00 for consultations which had occurred on  
2 or about January 6, 2011, and January 20, 2011.

3 26. Mr. Tobin testified that the meetings with the law firm were conducted without his  
4 knowledge, and without the knowledge of two other members of the Board and that  
5 no approval by the Board was given for any meetings with attorneys or for the  
6 expenditure of any legal fees by the Board in January 2011.

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

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

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

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

26 **CONCLUSIONS OF LAW**

27 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to file a  
28 petition with the Department for a hearing concerning violations of planned  
29 community documents or violations of statutes that regulate planned communities.  
30

1 That statute provides that such petitions will be heard before the Office of  
2 Administrative Hearings.

- 3 2. A.R.S. § 41-2198.02(A) provides that the Administrative Law Judge may order any  
4 party to abide by the statute, condominium documents, community documents or  
5 contract provision at issue and may levy a civil penalty on the basis of each violation.  
6 3. A.R.S. § 41-2198.02(B) provides that if the petitioner prevails, the Administrative  
7 Law Judge shall order the respondent to pay to the petitioner the filing fee required  
8 by section 41-2198.01.  
9 4. The burden of proof at an administrative hearing falls to the party asserting a  
10 claim, right, or entitlement and the standard of proof on all issue in this matter  
11 is by a preponderance of the evidence. See A.A.C. R2-19-119.  
12 5. Proof by “preponderance of the evidence” means that it is sufficient to persuade the  
13 finder of fact that the proposition is “more likely true than not.” *In re Arnold and*  
14 *Baker Farms*, 177 B.R. 648, 654 (9<sup>th</sup> Cir. BAP (Ariz.) 1994). It “is evidence which is  
15 of greater weight or more convincing than the evidence which is offered in opposition  
16 to it; that is, evidence which as a whole shows that the fact sought to be proved is  
17 more probable than not.” *Black’s Law Dictionary* at 1182 (6<sup>th</sup> ed. 1990).  
18 6. The hearing record demonstrates that during the annual meeting Sunland on January  
19 12, 2011, Mr. Tobin presented motions to amend the Bylaws of Sunland from the floor  
20 without providing advance written notice of the proposed amendments as required by  
21 Article XII, Section 2 of Sunland’s Bylaws.  
22 7. Article XII, Section 2 of Sunland’s Bylaws provides as follows:

23 These Bylaws may be amended, revoked, or restated at any regular or  
24 special voting date by a majority vote of the Voting Members of the  
25 Association who actually cast ballots, but only after notice of the  
26 proposed amendment(s) is given in the same manner as a notice of the  
annual meeting of the Voting Members.<sup>4</sup>

- 27 8. The hearing record demonstrates that Mr. Tobin was a serving Board member on  
28 January 12, 2011, and was aware that Sunland’s Bylaws required advance written  
29

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

1 notice of proposed Bylaw amendments be provided in the same manner as a notice of  
2 the annual meeting of the Voting Members. Mr. Tobin was aware that the required  
3 written notice had not been provided in accordance with the applicable Bylaws when  
4 he made his presentation from the floor. Therefore, the Administrative Law Judge  
5 concludes that Mr. Tobin violated the provisions of Article XII, Section 2, of Sunland's  
6 Bylaws.

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

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

13 10. The hearing record demonstrates that on February 11, 2011, three members of  
14 Sunland's Board of Directors conducted a meeting of the Board of Directors and  
15 declared that the actions taken to amend the bylaws at the January 12, 2011 annual  
16 meeting were null and void and directed the filing of a Notice of Bylaw Change. There  
17 was no dispute that three members of the Board of Directors present for the February  
18 11, 2011 meeting did not constitute a quorum of the Board of Directors as required by  
19 Article V, Section 7, of Sunland's Bylaws. Therefore, the Administrative Law Judge  
20 concludes that Sunland violated the provisions of Article V, Section 7, of Sunland's  
21 Bylaws.

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

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

29 12. The hearing record demonstrates that Sunland's manager and three members of the  
30 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

1 Manual. In April 2011, Sunland's manager authorized a law firm to represent  
2 Sunland in a lawsuit without the direction, or consent, of the Board of Directors, as  
3 required by Article VI (D)(7) of Sunland's Policy Manual. Therefore, the  
4 Administrative Law Judge concludes that Sunland violated the provisions of Article  
5 VI (D)(7) of Sunland's Policy Manual.

6 **RECOMMENDED ORDERS**

7 **DOCKET NO. 11F-H1112006-BFS**

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

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

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

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

16 **DOCKET NO. 11F-H1112010-BFS**

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

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

21 It is further ORDERED that Alan R. Tobin pay a civil penalty in the amount of  
22 \$200.00 to the Department in this matter within thirty (30) days of the date of this  
23 Order.

24 **DOCKET NO. 12F-H121001-BFS**

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

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

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

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

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

8 Done this day, April 30, 2012.

9  
10 /s/ M. Douglas  
11 Administrative Law Judge

12 Transmitted electronically to:

13 Gene Palma, Director  
14 Department of Fire Building and Life Safety  
15 Iding and Life Safety  
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