

1 Failure to notice and conduct publicly ARC [Architectural
2 Review Committee] Meetings pursuant to ARS 33-1804 and the
3 Community Documents.

- 4 6. Petitioners' one issue set forth in their petition in 12F-H1212009-BFS is related to
5 Crossings' alleged failure to provide requested HOA records. The ADDENDUM to
6 the Petition Form provides, in pertinent part, as follows:

7 On multiple occasions in the past, the HOA, via its attorneys,
8 have flatly refused to supply ANY records on the following list:
9 1. Invoices of the HOA attorneys, Carpenter Hazelwood.
10 2. Communications between the HOA Attorneys and third
11 parties. Such communications would, by definition, not
12 comprise client-attorney privileged communications. We also
13 extended that definition to include third party correspondence
14 where such correspondence would be clearly marked-"for
15 settlement purposes." This would avoid the HOA tipping its
16 hand in any negotiations on an outstanding Declaratory Action
17 with the City of Prescott as plaintiff, and all HOA members as
18 defendant.

- 19 7. Respondent's Replies to the Petitions provided, in part, as follows:

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21 [The] Respondent denies each and every allegation set forth in
22 the Petition. The Respondent has complied and continues to
23 comply with A.R.S. § 33-1804 and its Bylaws as they apply to the
24 Respondent's architectural review process.

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26 [The] Respondent denies the complaint items in the Petition.

27 **TESTIMONY**

- 28 8. G. Eugene Neil (hereinafter "Mr. Neil"), testified that he is the interim City Attorney
29 for the City of Prescott. Mr. Neil stated that the City of Prescott provided Petitioners
30 with ninety pages of documents requested in Petitioners' subpoena. Mr. Neil
testified that all of the documents were public records. Mr. Neil stated that the City

of Prescott was currently involved in civil litigation with Crossings.¹

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9. Larry Harding (hereinafter “Mr. Harding”) testified that he is the commercial insurance agent for Crossings. Mr. Harding stated he provided records to Petitioners pursuant to the subpoena issued to him. Mr. Harding testified that when he receives a letter from Crossings’ attorney it usually relates to the potential of a possible insurance claim against the insured.²

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10. Brenda Doziar (hereinafter “Ms. Doziar”) testified that she is a member of the Board for Crossings and an ARC member. Ms. Doziar stated that when she reviews an ARC application, it is to review the plans with Crossings’ architect. Ms. Doziar testified the ARC would then make a determination whether to accept, change, or reject the ARC application. Ms. Doziar stated that a member of the board of Crossings had been on the ARC. Ms. Doziar testified that ARC meetings are not noticed but are open to all members. Ms. Doziar stated that the ARC reviews applicable architectural guidelines. Ms. Doziar stated that the owner of the property is always invited to the ARC meeting. Ms. Doziar testified that the committee meetings take place at one of the committee member’s residence. Ms. Doziar stated that the meetings are open because the committee has never denied access to any member to attend an ARC meeting. Ms. Doziar stated that the committee has never received a request from an owner to attend an ARC meeting.³

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11. Ms. Doziar testified that the ARC meetings take place as often as necessary. Ms. Doziar stated that meetings for the ARC depend upon the architectural submissions presented. Ms. Doziar testified that there have been months when no ARC meetings have taken place and months where the ARC has met more than once a month. Ms Doziar stated that Petitioners would have been granted access to any ARC meeting.⁴

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12. Robert Balzano (hereinafter “Mr. Balzano”) testified that he currently was involved with ARC projects that were submitted prior to September 1, 2012. Mr. Balzano stated that he had previously been the statutory agent and manager of Crossings.

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¹ 9/26/12 Hearing Record (Hereinafter “H.R.”) at 25:48-36:10.

² H.R. at 37:30-46:13.

³ H.R. at 47:27-56:36.

⁴ H.R. at 56:37-1:05:11.

1 Mr. Balzano testified that there were no formal scheduled meetings for the ARC. Mr.
2 Balzano stated that committee meetings are scheduled when applications for review
3 by the ARC are submitted. Mr. Balzano testified that there are no provisions in
4 Crossings' Bylaws that require regularly scheduled meetings by the ARC.⁵

5 13. Mr. Balzano testified if the ARC meetings were scheduled regularly, then notice of
6 the regularly scheduled meetings would be posted. Mr. Balzano stated there has
7 been one request by a homeowner to attend an ARC meeting. Mr. Balzano testified
8 that after he received the request, he notified the homeowner of the ARC meeting.⁶

9 14. Kenneth Burnett (hereinafter "Mr. Burnett") testified that is a member of the Board of
10 Crossings. Mr. Burnett stated that the Board had never taken a policy position about
11 ARC meetings being held publicly. Mr. Burnett testified that he had not attended an
12 ARC meeting. Mr. Burnett stated that ARC meetings occur on demand. Mr. Burnett
13 testified that the minutes the ARC meetings are taken. Mr. Burnett stated that he
14 does not know if the ARC' meeting minutes are published.⁷

15 15. Deborah J. Sellers (hereinafter "Ms. Sellers") testified that she had been an interior
16 designer for over twenty-five years. Ms. Sellers stated that she voluntarily offered to
17 serve on the ARC. Ms. Sellers testified that the Board chose someone else. Ms.
18 Sellers stated that the person selected for the ARC is no longer serving due to
19 health reasons and that no replacement has been appointed by the Board.⁸

20 **APPLICABLE PROVISIONS OF LAW REFERENCED AT HEARING**

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23 1. A.R.S. § 33-1804(A) and (B) provides as follows:

24 A. Notwithstanding any provision in the declaration, bylaws or
25 other documents to the contrary, all meetings of the members'
26 association and the board of directors, and any regularly
27 scheduled committee meetings, are open to all members of the
28 association or any person designated by a member in writing
as the member's representative and all members or designated

29 ⁵ H.R. at 1:05:55-1:11:51.

⁶ H.R. at 1:11:52-1:39:23.

⁷ H.R. at 1:41:40-1:50:47.

⁸ H.R. at 1:52:23-1:56:35.

1 representatives so desiring shall be permitted to attend and
2 speak at an appropriate time during the deliberations and
3 proceedings. The board may place reasonable time restrictions
4 on those persons speaking during the meeting but shall permit
5 a member or member's designated representative to speak
6 once after the board has discussed a specific agenda item but
7 before the board takes formal action on that item in addition to
8 any other opportunities to speak. The board shall provide for a
9 reasonable number of persons to speak on each side of an
10 issue. Persons attending may tape record or videotape those
11 portions of the meetings of the board of directors and meetings
12 of the members that are open. The board of directors of the
13 association may adopt reasonable rules governing the taping of
14 open portions of the meetings of the board and the
15 membership, but such rules shall not preclude such tape
16 recording or videotaping by those attending. Any portion of a
17 meeting may be closed only if that closed portion of the
18 meeting is limited to consideration of one or more of the
19 following:

- 14 1. Legal advice from an attorney for the board or the
15 association. On final resolution of any matter for which the
16 board received legal advice or that concerned pending or
17 contemplated litigation, the board may disclose information
18 about that matter in an open meeting except for matters that
19 are required to remain confidential by the terms of a settlement
20 agreement or judgment.
- 21 2. Pending or contemplated litigation.
- 22 3. Personal, health or financial information about an individual
23 member of the association, an individual employee of the
24 association or an individual employee of a contractor for the
25 association, including records of the association directly related
26 to the personal, health or financial information about an
27 individual member of the association, an individual employee of
28 the association or an individual employee of a contractor for the
29 association.
- 30 4. Matters relating to the job performance of, compensation of,
health records of or specific complaints against an individual
employee of the association or an individual employee of a
contractor of the association who works under the direction of
the association.

1 5. Discussion of a member's appeal of any violation cited or
2 penalty imposed by the association except on request of the
affected member that the meeting be held in an open session.

3 B. Notwithstanding any provision in the community documents,
4 all meetings of the members' association and the board shall
5 be held in this state. A meeting of the members' association
6 shall be held at least once each year. Special meetings of the
7 members' association may be called by the president, by a
8 majority of the board of directors or by members having at least
9 twenty-five per cent, or any lower percentage specified in the
10 bylaws, of the votes in the association. Not fewer than ten nor
11 more than fifty days in advance of any meeting of the members
12 the secretary shall cause notice to be hand-delivered or sent
13 prepaid by United States mail to the mailing address for each
14 lot, parcel or unit owner or to any other mailing address
15 designated in writing by a member. The notice shall state the
16 time and place of the meeting. A notice of any special meeting
17 of the members shall also state the purpose for which the
18 meeting is called, including the general nature of any proposed
19 amendment to the declaration or bylaws, changes in
20 assessments that require approval of the members and any
21 proposal to remove a director or an officer. The failure of any
22 member to receive actual notice of a meeting of the members
23 does not affect the validity of any action taken at that meeting.

18 2. A.R.S. § 33-1805 provides as follows:

20 A. Except as provided in subsection B of this section, all
21 financial and other records of the association shall be made
22 reasonably available for examination by any member or any
23 person designated by the member in writing as the member's
24 representative. The association shall not charge a member or
25 any person designated by the member in writing for making
26 material available for review. The association shall have ten
27 business days to fulfill a request for examination. On request
28 for purchase of copies of records by any member or any person
29 designated by the member in writing as the member's
30 representative, the association shall have ten business days to
provide copies of the requested records. An association may
charge a fee for making copies of not more than fifteen cents
per page.

1 B. Books and records kept by or on behalf of the association
2 and the board may be withheld from disclosure to the extent
3 that the portion withheld relates to any of the following:

- 4 1. Privileged communication between an attorney for the
5 association and the association.
- 6 2. Pending litigation.
- 7 3. Meeting minutes or other records of a session of a board
8 meeting that is not required to be open to all members pursuant
9 to section 33-1804.
- 10 4. Personal, health or financial records of an individual member
11 of the association, an individual employee of the association or
12 an individual employee of a contractor for the association,
13 including records of the association directly related to the
14 personal, health or financial information about an individual
15 member of the association, an individual employee of the
16 association or an individual employee of a contractor for the
17 association.
- 18 5. Records relating to the job performance of, compensation of,
19 health records of or specific complaints against an individual
20 employee of the association or an individual employee of a
21 contractor of the association who works under the direction of
22 the association.

23 C. The association shall not be required to disclose financial
24 and other records of the association if disclosure would violate
25 any state or federal law.

26 3. A.R.S. § 12-2234 provides, in pertinent part, as follows:

27 A. In a civil action an attorney shall not, without the consent of
28 his client, be examined as to any communication made by the
29 client to him, or his advice given thereon in the course of
30 professional employment. An attorney's paralegal, assistant,
secretary, stenographer or clerk shall not, without the consent
of his employer, be examined concerning any fact the
knowledge of which was acquired in such capacity.

B. For purposes of subsection A, any communication is
privileged between an attorney for a corporation, governmental
entity, partnership, business, association or other similar entity
or an employer and any employee, agent or member of the

1 entity or employer regarding acts or omissions of or information
2 obtained from the employee, agent or member if the
communication is either:

3 1. For the purpose of providing legal advice to the entity or
4 employer or to the employee, agent or member.

5 2. For the purpose of obtaining information in order to provide
6 legal advice to the entity or employer or to the employee, agent
7 or member.

8 C. The privilege defined in this section shall not be construed to
9 allow the employee to be relieved of a duty to disclose the facts
10 solely because they have been communicated to an attorney.

11 **APPLICABLE BYLAWS CITED AT HEARING**

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14 1. ARTICLE XI Section 3 of Crossings' Bylaws provides, in pertinent part, as follows:

15 The Architectural Review Committee shall meet from time to
16 time as necessary to perform its duties hereunder. The vote or
17 written consent of a majority of the members of the Committee,
18 at a meeting or other, shall constitute the act of the Committee
19 unless the unanimous decision of the Committee is required by
20 any other provision of the Declaration. The Committee shall
keep and maintain a written record of all actions taken by it at
such meetings or otherwise.

21 **CONCLUSIONS OF LAW**

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24 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to file a
25 petition with the Department for a hearing concerning violations of planned
26 community documents or violations of statutes that regulate planned communities.
27 That statute provides that such petitions will be heard before the Office of
28 Administrative Hearings.
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2. The burden of proof at an administrative hearing falls to the party asserting a claim, right, or entitlement and the standard of proof on all issue in this matter is by a preponderance of the evidence. See A.A.C. R2-19-119.
3. Proof by “preponderance of the evidence” means that it is sufficient to persuade the finder of fact that the proposition is “more likely true than not.” *In re Arnold and Baker Farms*, 177 B.R. 648, 654 (9th Cir. BAP (Ariz.) 1994).
4. Credible testimony and evidence established that the ARC meetings take place as necessary and are not regularly scheduled. Applicable statute and CC&Rs of Crossings do not require notice of irregularly scheduled meetings by committees. Petitioners failed to prove by a preponderance of the evidence that Crossings violated the provisions of A.R.S. § 33-1804 and/or Crossings’ CC&Rs.
5. Petitioners are not the prevailing party in Docket No. 12F-H1212002-BFS and have not shown that they are entitled to the relief that they have requested in their petition.
6. Credible testimony and evidence established that Crossings’ refusal to release the requested documents was based upon the exceptions provided by applicable statute for attorney/client privileged material. Petitioners failed to prove by a preponderance of the evidence that Crossings’ refusal to provide Petitioners with the requested documents violated applicable statute and/or Crossings’ CC&Rs.
7. Petitioners are not the prevailing party in Docket No. 12F-H1212009-BFS and have not shown that they are entitled to the relief that they have requested in their petition.

RECOMMENDED ORDERS

12F-H1212002-BFS

In view of the foregoing, it is ORDERED that this petition shall be dismissed and that no action is required by Crossings.

12F-H1212009-BFS

1 In view of the foregoing, it is ORDERED that this petition shall be dismissed and that
2 no action is required by Crossings.

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4 *In the event of certification of the Administrative Law Judge Decision by the*
5 *Director of the Office of Administrative Hearings, the effective date of this Order will*
6 *be five (5) days from the date of that certification.*

7 Done this day, January 17, 2013.

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9 /s/ M. Douglas
10 Administrative Law Judge

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12 Transmitted electronically to:

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