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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Richard A. DeBoer
Petitioner

No. 17F-H1616006-REL

vs.

Turtle Rock III Homeowners Association
Respondent

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARING: December 19, 2016

APPEARANCES: Petitioner Richard A. DeBoer appeared on his own behalf. Verli Curtiss and Steve Pilcher appeared on behalf of Respondent Turtle Rock III Homeowners Association.

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

FINDINGS OF FACT

1. Turtle Rock III Homeowners Association (Respondent) is an association of homeowners located in Phoenix, Arizona.

2. Richard A. DeBoer (Petitioner) filed a petition with the Arizona Department of Real Estate (Department) on or about August 23, 2016, alleging that Respondent had violated the provisions of A.R.S. § 33-1804. Petitioner specifically alleged, in relative part, as follows:

Contrary to the provisions of ARS 33-1804 and/or Turtle Rock III Bylaws, Division VI, Item 2.i. (Robert's Rules of Order), it is common practice for the Turtle Rock III Board of Directors to conduct[] unnoticed e-mail meetings to consider and vote on non-emergency open-meeting subject matter.

Recently, in March 2016, the board conducted an e-mail vote to purchase and install four high-mast street lights in the common area. And, in April 2016, the board conducted an e-mail vote to remove and sell, or give away, fourteen large, iconic, architectural, light-fixtures from the common areas.

Contrary to the provisions of ARS 33-1804, the e-mail meetings were not open to all members of the association; members were not permitted to attend and speak after discussion but before the board takes formal action; the subject matter of the e-mail meetings did not satisfy the closed meeting provisions of ARS 33-1804(A); notice of the e-mail meetings was not given to members at least forty-eight hours in advance of the meetings; the subject matter of the meetings did not satisfy emergency meeting

1 requirements and the meetings were not identified as emergency meetings
2 in subsequent meetings of the board; and notices and agendas were not
3 provided that contain the information that is reasonably necessary to inform
4 the members of the matters to be discussed or decided.

5 And/or contrary to the provisions of Turtle Rock III Bylaws, Division VI, Item
6 2.i – Robert’s Rules of Order (RONR, 11th ed., pp. 97-99), the email
7 meetings were conducted without authorization in the bylaws, did not
8 provide for “a single official gathering in one room or area,” and did not
9 provide “conditions of opportunity for simultaneous aural communication
10 among participating members equivalent to those of meetings held in one
11 room or area.”

12 3. Respondent’s Answer to the petition denying all allegations.

13 4. On August 31, 2016, the Department issued a Notice of Hearing to the
14 parties notifying them that a hearing on the Petition would be conducted by the Office of
15 Administrative Hearings.

16 5. On December 19, 2016, a hearing was held on the Petition and the parties
17 presented evidence and argument regarding the violations alleged in the Petition.

18 6. At the hearing, Petitioner argued that Respondent employed e-mail
19 communications between board member in lieu of open meetings to vote on the
20 installation of new common area lighting and the removal of the original light fixtures.

21 7. Verl Curtiss, President of Respondent’s Board of Directors, testified that
22 they had been told by the management company and manager that they were not in
23 violation of the open meetings provisions of the applicable Arizona statutes and or
24 Respondent’s bylaws.

25 8. Steven Pilcher, Treasurer of Respondent’s Board of Directors, similarly
26 testified that they had received what they thought was good advice.

27 9. Neither Ms. Curtiss nor Mr. Pilcher denied having votes over email
28 regarding the lighting and, in fact, acknowledged that such votes occurred.

29 **CONCLUSIONS OF LAW**

30 1. The Department has jurisdiction to hear disputes between a property owner
and a condominium owners association. A.R.S. § 32-2199 *et seq.*

1 2. In this proceeding, Petitioner bear the burden of proving by a
2 preponderance of the evidence that Respondent violated A.R.S. § 33-1804. A.A.C. R2-
3 19-119.

4 3. A preponderance of the evidence is “[e]vidence which is of greater weight or
5 more convincing than the evidence which is offered in opposition to it; that is, evidence which
6 as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW
7 DICTIONARY 1182 (6th ed. 1990).

8 4. Petitioner asserts that the Board’s practice of taking action in the absence of
9 a meeting by obtaining unanimous written consent of the Board’s members via email
10 violated the charged provisions of A.R.S. § 33-1804. A.R.S. § 33-1804(A) provides, in
11 relevant part, as follows:

12 Notwithstanding any provision in the declaration, bylaws or other
13 documents to the contrary, all meetings of the members’ association and
14 the board of directors, and any regularly scheduled committee meetings,
15 are open to all members of the association or any person designated by a
16 member in writing as the member’s representative and all members or
17 designated representatives so desiring shall be permitted to attend and
18 speak at an appropriate time during the deliberations and proceedings. . . .

19 5. This Tribunal concludes that the Board’s prior practice of taking action in the
20 absence of a meeting by obtaining unanimous written consent of the Board’s members via
21 email violated the charged provisions of A.R.S. § 33-1804(A).

22 **RECOMMENDED ORDER ON REHEARING**

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

25 It is further ORDERED that Respondent comply with the applicable provisions of
26 A.R.S. § 33-1804(A) in the future.

27 It is further ORDERED that Respondent pay Petitioner his filing fee of \$500.00, to
28 be paid directly to Petitioner within thirty (30) days of this Order.

29 It is further ORDERED that within 60 days of the effective date of the Order
30 entered in this matter, Respondent shall pay to the Department of Real Estate a civil
penalty in the amount of \$1,000.00, and such payment shall be made by cashier’s check
or money order made payable to the Department.

