

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Jay A. Janicek,
4 Petitioner,

5 vs.

6 Sycamore Vista No. 8 Homeowners
7 Association,
8 Respondent.

No. 19F-H1918001-REL-RHG

**ADMINISTRATIVE LAW JUDGE
DECISION**

9
10 **REHEARING:** March 05, 2019 at 1:30 PM.

11 **HEARING:** September 05, 2018 at 9:00 AM.

12 **APPEARANCES:** Jake Kubert, Esq. appeared on behalf Jay Janicek
13 (“Petitioner”). Sycamore Vista No. 8 Homeowners Association (“Respondent” or “the
14 Association”) was represented by Evan Thompson, Esq. Petitioner observed.

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

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

21 **FINDINGS OF FACT**

22 **PROCEDURE AND BACKGROUND**

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

26 2. On or about July 25, 2018, Petitioner filed a single-issue petition with the
27 Department.

28 3. Per the NOTICE OF HEARING, the Department referred this matter to the
29 Office of Administrative Hearings (“OAH”), an independent state agency unaffiliated with
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1 either party, for an evidentiary hearing on September 05, 2018, regarding the following
2 issue:

3 **Whether Sycamore Vista No. 8 Homeowners Association**
4 **(Respondent) violated Association Bylaws Article III, Sections 3 & 4**
5 **and Article VIII, Section 1 in an action taken by the board on**
6 **November 20, 2017.**

7 4. On September 25, 2018, the Office of Administrative Hearings issued the
8 resulting ALJ DECISION in Petitioner's favor.

9 5. On October 23, 2018, Respondent submitted a Request for Rehearing to
10 the Office of Administrative Hearings, in error, which was forwarded to the Department
11 on November 06, 2018.

12 6. The Department granted Respondent's request on November 07, 2018.

13 7. On November 07, 2018, the Department referred the above-captioned
14 matter back to the Office of Administrative Hearings. A NOTICE OF REHEARING was
15 issued to the parties, for hearing on January 04, 2019, at 8:30 a.m. The matter was
16 continued and reset for March 05, 2019, at 1:30 p.m.

17 8. Pursuant to a stipulated agreement by the parties, no new evidence would
18 be presented, rather, counsel for both parties would provide the Tribunal with legal
19 briefs regarding their positions on the underlying issue in advance of the rehearing and
20 then present closing arguments before the Tribunal on the day of the rehearing.

21 **THE PARTIES AND GOVERNING DOCUMENTS**

22 9. Respondent is a homeowners' association whose members own
23 properties in a residential real estate development located in Tucson, Arizona.
24 Membership for the Association is compromised of the Sycamore Vista subdivision.

25 10. Petitioner is a Sycamore Vista subdivision property owner and a member
26 of the Association.

27 11. The Association is governed by its Covenants, Conditions, and
28 Restrictions ("CC&Rs"), and overseen by a Board of Directors ("the Board").

29 12. The Association's CC&Rs were recorded with the Pima County Recorder's
30 Office on October 17, 2002. They were amended for the third time on November 20,

1 2017, by the Board.¹ The CC&Rs empower the Association to control certain aspects of
2 property use within the development. When a party buys a residential unit in the
3 development, the party receives a copy of the CC&Rs and agrees to be bound by their
4 terms. Thus, the CC&Rs form an enforceable contract between the Association and
5 each property owner.

6 13. Bylaws Article VI, Meeting of Directors, Section 1 states "Regular
7 meetings of the Board of Directors shall be held monthly without notice, at such a place
8 and hour as may be fixed from time to time by resolution of the Board. Should said
9 meeting fall upon a legal holiday, then that meeting shall be held at the same time on
10 the next day which is not a legal holiday."²

11 14. Bylaws Article VI, Meeting of Directors, Section 2 states "Special meetings
12 of the Board of Directors shall be held when called by the President of the Association,
13 or by any two Directors, after not less than three (3) days' notice to each Director."³

14 15. Bylaws Article VI, Meeting of Directors, Section 3 states "A majority of the
15 number of Directors shall constitute a quorum for the transaction of business."

16 16. Bylaws Article VII, Powers and Duties of the Board of Directors, Section 1,
17 Powers, subsection (c) states, "The Board of Directors shall have the power to: (a)
18 adopt and publish rules and regulations governing the use of the Common Area and
19 facilities, and the personal conduct of the members and their guests thereon, and to
20 establish penalties for any infractions; (b) suspend the voting rights and right to use of
21 the recreational facilities of a member during any period in which such member shall be
22 in default in the payment of any assessment levied by the Association. Such rights may
23 also be suspended after notice and hearing, for a period not to exceed sixty (60) days,
24 for infraction of published rules and regulations; (c) exercise for the Association all
25 powers, duties and authority vested in or delegated to this Association and not reserved
26 to the membership by other provisions of these Bylaws, the Articles of Incorporation, or
27 the Declaration; (d) deem necessary, and to prescribe their duties."⁴

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29 ¹ See Petitioner's Exhibits B and C.

² See Petitioner's Exhibit B.

³ *Id.*

⁴ *Id.*

1 17. Bylaws Article XIII, Amendments, Section 1 states "These Bylaws may be
2 amended at a regular or special meeting of the Board of Directors of the Association by
3 a vote of a majority of a quorum of members present in person or by proxy."⁵

4 **HEARING EVIDENCE – ADOPTED FROM 09/05/2018 HEARING**

5 18. Petitioner testified on his own behalf and submitted five exhibits.
6 Respondent declined to present any witnesses or exhibits of its own, and further
7 declined to cross-examine Petitioner.

8 19. Respondent's position at the hearing was that the parties had different
9 interpretations of the language contained in the Bylaws, and that the matter would be
10 resolved however the tribunal chose to settle their dispute regarding the interpretation of
11 relevant portions of the governing text.

12 20. Per Petitioner, he brought forth his action as a result of an action taken by
13 Respondent's Board of Directors at a regular meeting of the Board held on November
14 20, 2017, to approve a third amendment to the Association's Bylaws. Petitioner testified
15 that he believed any amendment to Association Bylaws needed to be taken by a vote of
16 the majority of members, present or by proxy, at a meeting of the members called for
17 that purpose.

18 21. Petitioner testified that on January 23, 2017, the Association mailed
19 members, including Petitioner, a list of Board meeting dates for 2017 as follows:
20 January 30, 2017, February 20, 2017, March 20, 2017, April 17, 2017, May 15, 2017,
21 June 19, 2017, July 17, 2017, August 21, 2017, September 18, 2017, October 16, 2017,
22 November 20, 2017, and December 18, 2017. All meetings were scheduled to be held
23 at Tucson Realty & Trust located at 2525 E. Broadway Blvd. #111 Tucson, AZ [85716]
24 at 4:00 p.m.⁶

25 22. Petitioner testified that although no Association members were present for
26 the Board's meeting held on November 20, 2017, that the clause "cause an annual audit
27 of the Association books to be made by a public accountant at the completion of each
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30 ⁵ *Id.*

⁶ See Petitioner's Exhibit E.

1 fiscal year” was removed from Article VIII Section 6(d) from the Association Bylaws by
2 majority vote of the Board, and replaced with “cause an annual audit, review, or
3 compilation of the Associations financial records to be made by a public accountant
4 within 180 days after the end of the HOA’s fiscal year.”⁷

5 23. Petitioner testified that, per his understanding, in accordance with the
6 provisions of the Arizona Revised Statutes (“ARIZ. REV. STAT.”) § 33-1804 and Article III
7 of the Bylaws, the Board’s amendment of the Bylaws was an invalid action and outside
8 their power and authority as defined in the governing documents.⁸

9 24. Petitioner testified that Article XIII of the Bylaws described the process for
10 revising Association Bylaws.

11 25. Further, Petitioner opined that the word “members” in Section 1 of Article
12 XIII refers not to the members of the Board of Directors, but to the members of the
13 Association as defined in Article II Section 7 which states “‘Member’ shall mean and
14 refer to those persons entitled to membership as provided in the Declaration.”

15 26. Petitioner testified that per Section 2.1 of the Declaration, each owner,
16 including Declarant of the lot, by virtue of being an owner shall automatically be a
17 member of the Association.

18 27. Petitioner testified that his belief was supported by a review of the rules
19 regarding the term “proxy” as defined in Article III, as it applies to votes of the members
20 and not the Board of Directors, because members of the Board are not permitted to vote
21 by proxy.

22 28. Article VII of the Bylaws identifies the powers and duties of the Board of
23 Directors. Petitioner testified that because this section does not expressly grant the
24 Board of Directors authority to make or vote on amendments to the Bylaws, that they
25 are prohibited from doing so.

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⁷ See Petitioner’s Exhibits B and C.

⁸ See Petitioner’s Exhibit D.

1 29. Petitioner testified that ARIZ. REV. STAT. § 33-1804(b) and Article III of the
2 Bylaws establish notice and meeting requirements, as well as Bylaw amendment
3 requirements.

4 30. Petitioner noted that in *Powell v. Washburn* the Supreme Court of Arizona
5 held that “We today adopt the approach of the Restatement (Third) of Property:
6 Servitudes (“Restatement”) and hold that restrictive covenants shall be interpreted to
7 give effect to the intention of the parties as determined from the language of the
8 document in its entirety and the purpose for which the covenants were created.” *Powell*
9 *v. Washburn*, 211 Ariz. 553, 125 P.3d 373, 374 (Ariz. 2006).⁹

10 31. Petitioner argued that although he had not been directly impacted by the
11 Board’s November 2017 amendment that he could be as the amendment modified a
12 prior third party audit requirement to check the Association’s financial records. Petitioner
13 further argued that as a homeowner he has an interest in ensuring that the
14 Association’s financials were correct and that the Association was not performing their
15 own financial audits.
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17 **CLOSING ARGUMENTS – FROM 03/05/2019 REHEARING**

18 32. The following documents were admitted into the evidentiary rehearing
19 record: The NOTICE OF REHEARING, PETITIONER’S BRIEF IN SUPPORT OF REQUEST TO
20 RECONFIRM ALJ’S SEPTEMBER 24, 2018 ORDER, and RESPONDENT’S LEGAL BRIEF IN
21 SUPPORT OF ITS CLOSING ARGUMENTS. The audio transcript from the September 05,
22 2018, hearing and corresponding exhibits (1-5) were also admitted into the record.

23 *Petitioner’s closing argument*

24 33. Petitioner argues that Respondent’s conduct violated Arizona’s Open
25 Meeting Law, e.g. ARIZ. REV. STAT. § 33-1804, by amending a Bylaw during an
26 unnoticed closed meeting whereby only three of five Board Members were present.

27 34. Petitioner argues that the Open Meeting Law is one of the few statutes
28 where the legislative intent is actually codified in the statute itself. ARIZ. REV. STAT. §33-
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30 ⁹ Petitioner clarified that he believed in this case the term “restrictive covenants” included the CC&Rs, Bylaws, and rules of the Association.

1 1804(F). As an example, Petitioner offered a public approval message Governor Ducey
2 wrote to the Secretary of State on April 28, 2017, which states in part:

3 *I have signed H.B. 2411, however, because it promotes transparency and*
4 *participation for all residents in homeowners' association governance. This*
5 *bill reflects compromise among many stakeholders. It will, ideally, provide*
6 *residents the opportunity to resolve issues as a community rather than*
7 *seek government intervention.*

8 35. Petitioner argues that Article VII of the Bylaws outline the Board's
9 authority, and nowhere in that section does it mention that the Board may adopt new
10 Bylaws or amend existing Bylaws. Further, Petitioner argues that Article XIII of the
11 Bylaws, section 1, holds that Bylaws may be amended by a vote "of members." Finally,
12 Petitioner argues that if the word "members" in Article XIII, section 1, were meant to
13 have been "directors" than the drafter would have specifically utilized the word director
14 instead; just as the drafter did in other sections of the Bylaws.¹⁰

15 Respondent's closing argument

16 36. Respondent argues that the Tribunal failed to take into account the totality
17 of the Bylaws and review all of the language contained therein.

18 37. Respondent argues that Article IV of the Bylaws, section 1, states that the
19 "affairs of this Association shall be managed by a Board of not less than three (3) nor
20 more than five (5) directors." Article VI of the Bylaws, section 1, provides that "[r]egular
21 meetings of the Board of Directors shall be held monthly without notice, at such place
22 and hours as may be fixed from time to time by resolution of the Board." Respondent
23 argues that at these monthly meetings Article VI of the Bylaws, section 3, empowers the
24 Board to act where a quorum is present, and "a majority of the number of Directors shall
25 constitute a quorum for the transaction of business." Respondent further argues that
26 Article XIII of the Bylaws, section 1, governs amendments to the Bylaws, and provides
27 that they "may be amended at a regular or special meeting of the Board of Directors of
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29 ¹⁰ See Article VI, Section 3 ("majority of the number of *Directors* shall constitute a quorum for transacting
30 business"); Article VI, Section 2 ("[special meetings are called] after not less than (3) days' notice to each
Director").

1 the Association by a vote of a majority of a quorum of members present in person or by
2 proxy.”

3 38. Respondent argues that its conduct at issue was not a violation of
4 Arizona's Open Meeting Law because the November 20, 2017, Meeting Minutes show
5 that three Board members were present, which constituted a necessary quorum of
6 directors.

7 CONCLUSIONS OF LAW

8 1. This matter lies within the Department's jurisdiction. Pursuant to ARIZ. REV.
9 STAT. §§ 32-2102 and 32-2199 et al., regarding a dispute between an owner and a
10 planned community association, the owner or association may petition the department
11 for a hearing concerning violations of condominium documents or violations of the
12 statutes that regulate condominiums as long as the petitioner has filed a petition with
13 the department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

14 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(D), 32-2199.02,
15 and 41-1092, OAH has the authority to hear and decide the contested case at bar. OAH
16 has the authority to interpret the contract between the parties. *See Tierra Ranchos*
17 *Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

18 3. In this proceeding, Petitioner bears the burden of proving by a
19 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1804.¹¹

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

27 5. ARIZ. REV. STAT. § 33-1804(A) provides, in pertinent part, as follows:
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29 ¹¹ See ARIZ. ADMIN. CODE R2-19-119.

30 ¹² MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

¹³ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

1 Notwithstanding any provision in the declaration, bylaws or other
2 documents to the contrary, all meetings of the members' association and
3 the board of directors, and any regularly scheduled committee meetings,
4 are open to all members of the association or any person designated by a
5 member in writing as the member's representative and all members or
6 designated representatives so desiring shall be permitted to attend and
7 speak at an appropriate time during the deliberations and proceedings.
8 Any portion of a meeting may be closed only if that closed portion of the
9 meeting is limited to consideration of one or more of the following:

- 10 1. Legal advice from an attorney for the board or the association.
- 11 2. Pending or contemplated litigation.
- 12 3. Personal, health or financial information about an individual member of
13 the association, an individual employee of the association or an individual
14 employee of a contractor for the association.
- 15 4. Matters relating to the job performance of, compensation of, health
16 records of or specific complaints against an individual employee of the
17 association or an individual employee of a contractor of the association
18 who works under the direction of the association.
- 19 5. Discussion of a member's appeal of any violation cited or penalty
20 imposed by the association except on request of the affected member that
21 the meeting be held in an open session.

22 6. ARIZ. REV. STAT. § 33-1804(B) provides, in pertinent part, as follows:

23 Not fewer than ten nor more than fifty days in advance of any meeting of
24 the members the secretary shall cause notice to be hand-delivered or sent
25 prepaid by United States mail to the mailing address for each lot, parcel or
26 unit owner or to any other mailing address designated in writing by a
27 member. The notice shall state the date, time and place of the meeting. A
28 notice of any annual, regular or special meeting of the members shall also
29 state the purpose for which the meeting is called, including the general
30 nature of **any proposed amendment to the declaration or bylaws, changes in assessments that require approval of the members** and
any proposal to remove a director or an officer. (Emphasis added.)

7. Here, it is undisputed that the Board amended the Association Bylaws on
November 20, 2017, without first calling for a vote by the members of the Association.
The record further establishes that the Association's governing documents do not
support the Board's action. Additionally, Respondent's conduct goes against the spirit of
the legislative intent of ARIZ. REV. STAT. § 33-1804(b) due to the lack of transparency.

8. The Tribunal is not swayed by Respondent's closing arguments.

1 This Administrative Law Judge ORDER, having been issued as a result of a
2 rehearing, is binding on the parties. ARIZ. REV. STAT. § 32-2199.02(B). A party
3 wishing to appeal this order must seek judicial review as prescribed by ARIZ. REV.
4 STAT. § 41-1092.08(H) and title 12, chapter 7, article 6. Any such appeal must be
5 filed with the superior court within thirty-five days from the date when a copy of
6 this order was served upon the parties. ARIZ. REV. STAT. § 12-904(A).

7 Done this day, March 25, 2019.

8 /s/ Jenna Clark
9 Administrative Law Judge

10
11 Transmitted electronically to:

12
13 Judy Lowe, Commissioner
14 Arizona Department of Real Estate

15 Transmitted through US Mail to:

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