

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

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3 **ALJFIN ALJ Decision final by statute**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6  
7 Tom Barrs,  
8 Petitioner,

**No. 18F-H1818035-REL**

9 vs.

**ADMINISTRATIVE LAW JUDGE  
DECISION**

10 Desert Ranch HOA,  
11 Respondent.

12  
13 **HEARING:** August 3, 2018

14 **APPEARANCES:** Petitioner Tom Barrs appeared on his own behalf. Catherine  
15 Overby, President, and Brian Schoeffler, Vice President, appeared on behalf of  
16 Respondent Desert Ranch HOA.

17 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer

18  
19 **FINDINGS OF FACT**

20 1. On or about March 19, 2018, Petitioner Tom Barrs filed a Homeowners  
21 Association (HOA) Dispute Process Petition (Petition) with the Arizona Department of  
22 Real Estate (Department). Petitioner indicated a single issue would be presented and  
23 paid the appropriate \$500.00 filing fee, but then asserted violations of A.R.S. § 33-1813,  
24 A.R.S. § 33-1811, A.R.S. § 33-1804, Desert Ranch Bylaw 3.3, and Desert Ranch Bylaw  
25 2.4. In detailing the single issue petition, Petitioner included a four page narrative.

26 2. On or about April 13, 2018, Petitioner filed an amended version of the  
27 Petition (Amended Petition) in which he added an alleged violation of A.R.S. § 33-1812.  
28 The Amended Petition still indicated Petitioner had paid only for a single issue.

29 3. On or about May 21, 2018, the Department issued a Notice of Hearing in  
30 which it set forth the issue for hearing as follows:

1 The Petitioner alleges that the Carter Ranch Homeowners Association [sic]  
2 (Respondent) has violated A.R.S. § 33-1813, 33-1811, 33-1812 and 33-  
3 1804 as well as the Association Bylaws 3.3 and 2.4 by not upholding the  
4 election results of March 18,2017 [sic] as outlined in the petition.

4 4. On or about July 30, 2018, Petitioner submitted payment to convert the  
5 single issue petition into a multiple issue petition. Petitioner also submitted a “Clarification  
6 of Three Issues alleged in Petition.” Petitioner set forth the three issues as follows:

7 1. Two Directors (Jerome Klinger and Catherine  
8 Overby) were elected to fill two vacant seats on the Board during the March  
9 18, 2017 Annual Meeting. Over a day later, though barred by Bylaw 2.4, the  
10 third candidate challenged the election of Jerome Klinger to the board and  
11 asked for a “re-vote” of his position. The board then sought to remove  
12 Board Director Jerome Klinger in a variety of ways including announcing the  
13 results to be overturned via a closed board meeting and later calling for a  
14 “re-vote” based on a new tally of the election results. Petitioner alleges that  
15 not only were his claims barred by Bylaw 2.4, the methods used do not fall  
16 within proper protocol required to recall an elected Director according to  
17 ARS 33-1813 and Bylaw 3.3. Furthermore, Petitioner finds the means used  
18 highly suspicious based on information and belief.

15 2. The board’s actions relating to the March 18, 2017  
16 Annual Election violated ARS 33-1812. Specifically, the Board disposed of  
17 election materials required to be kept according to ARS 33-1812(7), and  
18 selectively invalidated votes while accepting others cast on invalid ballots  
19 [ARS 33-1812(A)(4-5)&(B)].

18 3. Meetings relating to the elections in 2017 were held  
19 closed and/or without proper notice in violation of ARS 33-1804.  
20 (January ??, March 18<sup>th</sup>, March 20<sup>th</sup>, March 22<sup>nd</sup>, March 24<sup>th</sup>, March ?? and  
21 May 10<sup>th</sup>)

21 All errors in original.

22 5. At hearing, Petitioner testified on his own behalf and presented the  
23 testimony of Mr. Schoeffler, Catherine Overby, and Stephen Barrs. Based on the  
24 evidence presented at hearing, the following occurred:

- 25 a. In advance of the Annual Board Meeting, absentee ballots were sent to  
26 the Association members. The absentee ballots listed the candidates as  
27 Ms. Oberby and Mr. Schoeffler and had a place for a write-in candidate.  
28 b. The absentee ballot indicated that if the member intended to attend the  
29 meeting, the ballot could be turned in then, but if the member was not  
30 able to attend the meeting, the ballot could be emailed by March 16,

1                   2017, to either Ms. Overby or Patrick Rice, both of whom were board  
2                   members at the time.

- 3                   c. On March 18, 2017, at the Annual Board Meeting the members  
4                   submitted their ballots. The ballots were counted and Ms. Overby and  
5                   Jerome Klinger were announced as the winning candidates. None of the  
6                   members present raised an objection to the voting or the announced  
7                   results before the meeting was adjourned.
- 8                   d. Immediately following the meeting, Mr. Rice gathered the ballots and  
9                   expressed his concerns with the election results.
- 10                  e. All of the ballot envelopes were destroyed at or about the time of the  
11                  election.
- 12                  f. On or about March 19, 2017, Mr. Schoeffler sent an email to Ms. Overby,  
13                  Mr. Rice, and three other individuals regarding the election process and  
14                  results. The email stated, "I'm asking you to review the situation and  
15                  make a decision if there is enough concern that there should be a  
16                  revote."
- 17                  g. On or about March 20, 2017, Ms. Overby sent an email to the members  
18                  indicating, "In regard to the current election, it has been contested. For  
19                  that reason, the Board is obligated to look further into the matter to  
20                  determine that everything was done properly." Ms. Overby further stated  
21                  that Respondent's bylaws did not allow for a write-in candidate, and  
22                  therefore, Mr. Schoeffler and Ms. Overby were the new directors per the  
23                  current vote count.
- 24                  h. Ms. Overby and Mr. Rice decided the Board should contact an attorney  
25                  regarding the issue. On or about March 29, 2017, certain Board  
26                  members including Ms. Overby and Mr. Rice met with an attorney at Ms.  
27                  Overby's house. During the meeting, it was discovered that there were  
28                  duplicate ballots and a proxy ballot that were improperly counted.
- 29                  i. Following the meeting with the attorney, the Board members determined  
30                  that the valid votes resulted in a tie between Mr. Schoeffler and Mr.  
                    Klinger. The Board members decided to have a run-off between the two

1 individuals, which was held on April 29, 2017. Mr. Schoeffler was  
2 announced as the winner after the run-off election.

3 j. On or about May 10, 2017, the Board of Directors held an organizational  
4 meeting.

### 5 CONCLUSIONS OF LAW

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

11 2. Petitioner bears the burden of proof to establish that Respondent committed  
12 the alleged violations by a preponderance of the evidence.<sup>1</sup> Respondent bears the burden  
13 to establish affirmative defenses by the same evidentiary standard.<sup>2</sup>

14 3. "A preponderance of the evidence is such proof as convinces the trier of fact  
15 that the contention is more probably true than not."<sup>3</sup> A preponderance of the evidence is  
16 "[t]he greater weight of the evidence, not necessarily established by the greater number of  
17 witnesses testifying to a fact but by evidence that has the most convincing force; superior  
18 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable  
19 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than  
20 the other."<sup>4</sup>

21 4. While Petitioner purportedly clarified his three issues for hearing with the  
22 statement he submitted on July 30, 2018, he actually included five issues within his  
23 description. At hearing, Petitioner was allowed to proceed on only three of the issues he  
24 presented. Those three issues were as follows:

25 A. Respondent violated Bylaw 2.4 when it acted on Mr. Schoeffler's objection  
26 to the election results raised the day after the Annual Board Meeting.

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<sup>1</sup> See ARIZ. REV. STAT. section 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*,  
29 74 Ariz. 369, 372, 249 P.2d 837 (1952).

<sup>2</sup> See A.A.C. R2-19-119(B)(2).

<sup>3</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

<sup>4</sup> BLACK'S LAW DICTIONARY at page 1220 (8<sup>th</sup> ed. 1999).

1 B. Respondent violated A.R.S. § 33-1812(A)(7) when it discarded the ballot  
2 envelopes at or about the time of the election.

3 C. Respondent violated A.R.S. § 33-1804 when it held meetings that were  
4 closed and/or without proper notice.

5 Issue 1

6 5. Bylaw 2.4 provides, in relevant part, as follows:

7 Any Member who fails to object to any perceived or actual irregularity at the  
8 meeting (whether procedural, parliamentary, substantive or technical)  
forever waives that claim.

9 6. Petitioner argued that because Mr. Schoeffler did not raise an objection to  
10 the election results prior to the Board Meeting adjourning, the Board was not allowed to  
11 then investigate those concerns Mr. Schoeffler raised in the email the following day.

12 7. The testimony offered at hearing established that Mr. Rice, as a Board  
13 member, expressed his concerns with the vote immediately after the Annual Meeting  
14 adjourned. Mr. Schoeffler's email did not initiate the Board's investigation of the election.

15 8. Petitioner argued that "Member" used in the bylaw should be read as  
16 including "the Board of Directors." It should be noted that throughout the bylaws, the  
17 terms "Member," "Directors," and "Board of Directors" were used with specific meanings  
18 and were not interchangeable.

19 9. Petitioner made no showing that a Director could not raise questions as to  
20 the validity of the election results after the meeting adjourned. Thus, Petitioner failed to  
21 sustain his burden to establish a violation of Respondent's Bylaw 2.4.

22 Issue 2

23 10. A.R.S. § 33-1812(A)(7) provides, in relevant part, as follows:

24 A. Notwithstanding any provision in the community documents, after  
25 termination of the period of declarant control, votes allocated to a unit may  
26 not be cast pursuant to a proxy. The association shall provide for votes to  
27 be cast in person and by absentee ballot and, in addition, the association  
28 may provide for voting by some other form of delivery, including the use of e-  
29 mail and fax delivery. Notwithstanding section 10-3708 or the provisions of  
the community documents, any action taken at an annual, regular or special  
meeting of the members shall comply with all of the following if absentee  
ballots or ballots provided by some other form of delivery are used:

30 . . . .

1 7. Ballots, envelopes and related materials, including sign-in sheets if used,  
2 shall be retained in electronic or paper format and made available for  
3 member inspection for at least one year after completion of the election.

4 11. The uncontroverted evidence presented at hearing established that  
5 Respondent discarded the ballot envelopes at or about the time of the election. Thus,  
6 Petitioner established that Respondent violated A.R.S. § 33-1812(A)(7).

7 Issue 3

8 12. A.R.S. § 33-1804 provides, in relevant part, as follows:

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

1. Legal advice from an attorney for the board or the association.

. . . .

16 C. Before entering into any closed portion of a meeting of the board of  
17 directors, . . . the board shall identify the paragraph under subsection A of  
18 this section that authorizes the board to close the meeting.

19 13. The uncontroverted evidence established that, at a minimum, following the  
20 Annual Meeting, certain members of the Board of Directors met with an attorney and did  
21 not provide any notice of the upcoming meeting and/or provide notice that the meeting  
22 would be closed because it involved legal advice from an attorney.

23 14. Thus, Petitioner established that Respondent violated A.R.S. § 33-1804.

24 **ORDER**

25 In view of the foregoing, IT IS ORDERED that the Petition be dismissed as to Issue

26 1.

27 IT IS FURTHER ORDERED Petitioner be deemed the prevailing party in this  
28 matter as to Issues 2 and 3.

29 IT IS FURTHER ORDERED that Respondent pay Petitioner his filing fee of  
30 \$1,000.00, to be paid directly to Petitioner within thirty (30) days of this Order.

No Civil Penalty is found to be appropriate in this matter.

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**NOTICE**

**Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties unless a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S. § 41-1092.09, a request for rehearing in this matter must be filed with the Commissioner of the Department of Real Estate within 30 days of the service of this Order upon the parties.**

Done this day, August 23, 2018

*/s/ Tammy L. Eigenheer*  
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner  
Arizona Department of Real Estate

Transmitted U.S. mail to:

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