

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

2
3 **ALJFIN ALJ Decision final by statute**

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

6
7 Jay A. Janicek,
8 Petitioner,

No. 19F-H1918001-REL

9 vs.

**ADMINISTRATIVE LAW JUDGE
DECISION**

10 Sycamore Vista No. 8 Homeowners
11 Association (FKA New Tucson Unit No. 8
12 Homeowners Association, Inc.),
13 Respondent.

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

15 **APPEARANCES:** Jay Janicek ("Petitioner") appeared on his own behalf.
16 Sycamore Vista No. 8 Homeowners Association ("Respondent" or "the Association") was
17 represented by Evan Thompson, Esq. Observers present were Dennis Legere, Becky
18 Nutt, and Caleb Rhodes.

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

20
21 After review of the hearing record in this matter, the undersigned Administrative
22 Law Judge makes the following Findings of Fact and Conclusions of Law, and issues this
23 Order to the Director of the Arizona Department of Real Estate ("the Department").

24 **FINDINGS OF FACT**

25 **PROCEDURE AND BACKGROUND**

26 1. The Department is authorized by statute to receive and to decide petitions
27 for hearings from members of homeowners' associations and from homeowners'
28 associations in Arizona.

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

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

4 **Whether Sycamore Vista No. 8 Homeowners Association**
5 **(Respondent) violated Association Bylaws Article III, Sections 3 & 4**
6 **and Article VIII, Section 1 in an action taken by the board on November**
7 **20, 2017.**

8 THE PARTIES AND GOVERNING DOCUMENTS

9 4. Respondent is a homeowners’ association whose members own properties
10 in a residential real estate development located in Tucson, Arizona. Membership for the
11 Association is compromised of the Sycamore Vista subdivision.

12 5. Petitioner is a Sycamore Vista subdivision property owner and a member of
13 the Association.

14 6. The Association is governed by its Covenants, Conditions, and Restrictions
15 (“CC&Rs”), and overseen by a Board of Directors (“the Board”).

16 7. The Association’s CC&Rs were recorded with the Pima County Recorder’s
17 Office on October 17, 2002. They were amended for the third time on November 20, 2017,
18 by the Board.¹ The CC&Rs empower the Association to control certain aspects of property
19 use within the development. When a party buys a residential unit in the development, the
20 party receives a copy of the CC&Rs and agrees to be bound by their terms. Thus, the
21 CC&Rs form an enforceable contract between the Association and each property owner.

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

27 9. Bylaws Article VI, Meeting of Directors, Section 2 states “Special meetings
28 of the Board of Directors shall be held when called by the President of the Association, or
29 by any two Directors, after not less than three (3) days notice to each Director.”³ [sic]

30 ¹ See Petitioner’s Exhibits B and C.

² See Petitioner’s Exhibit B.

³ *Id.*

1 he believed any amendment to Association Bylaws needed to be taken by a vote of the
2 majority of members, present or by proxy, at a meeting of the members called for that
3 purpose.

4 16. Petitioner testified that on January 23, 2017, the Association mailed
5 members, including Petitioner, a list of Board meeting dates for 2017 as follows: January
6 30, 2017, February 20, 2017, March 20, 2017, April 17, 2017, May 15, 2017, June 19,
7 2017, July 17, 2017, August 21, 2017, September 18, 2017, October 16, 2017, November
8 20, 2017, and December 18, 2017. All meetings were scheduled to be held at Tucson
9 Realty & Trust located at 2525 E. Broadway Blvd. #111 Tucson, AZ [85716] at 4:00 p.m.⁶

10 17. Petitioner testified that although no Association members were present for
11 the Board's meeting held on November 20, 2017, that the clause "cause an annual audit
12 of the Association books to be made by a public accountant at the completion of each
13 fiscal year" was removed from Article VIII Section 6(d) from the Association Bylaws by
14 majority vote of the Board, and replaced with "cause an annual audit, review, or
15 compilation of the Associations financial records to be made by a public accountant within
16 180 days after the end of the HOA's fiscal year."⁷

17 18. Petitioner testified that, per his understanding, in accordance with the
18 provisions of ARIZ. REV. STAT. §33-1804 and Article III of the Bylaws, the Board's
19 amendment of the Bylaws was an invalid action and outside their power and authority as
20 defined in the governing documents.⁸

21 19. Petitioner testified that Article XIII of the Bylaws described the process for
22 revising Association Bylaws.

23 20. Further, Petitioner opined that the word "members" in Section 1 of Article
24 XIII refers not to the members of the Board of Directors, but to the members of the
25 Association as defined in Article II Section 7 which states "'Member' shall mean and refer
26 to those persons entitled to membership as provided in the Declaration."
27

28
29

⁶ See Petitioner's Exhibit E.

30 ⁷ See Petitioner's Exhibits B and C.

⁸ See Petitioner's Exhibit D.

1 1. This matter lies within the Department’s jurisdiction. Pursuant to ARIZ. REV.
2 STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a
3 planned community association, the owner or association may petition the department for
4 a hearing concerning violations of condominium documents or violations of the statutes
5 that regulate condominiums as long as the petitioner has filed a petition with the
6 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

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

11 3. In this proceeding, Petitioner bears the burden of proving by a
12 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1804.¹⁰

13 4. “A preponderance of the evidence is such proof as convinces the trier of fact
14 that the contention is more probably true than not.”¹¹ A preponderance of the evidence is
15 “[t]he greater weight of the evidence, not necessarily established by the greater number of
16 witnesses testifying to a fact but by evidence that has the most convincing force; superior
17 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
18 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
19 the other.”¹²

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

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

30 ¹⁰ See ARIZ. ADMIN. CODE R2-19-119.

¹¹ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

¹² BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

1 6. In closing Respondent argued that Bylaws should be reviewed in their
2 entirety and interpreted based on the text of the document, while giving deference to
3 Articles VI, VII, and XIII. Regarding Article XIII, Respondent argued that the term
4 “members” referred to the Board, and not the general members of the Association, as the
5 word is not capitalized, and that section 1 authorized Board members to amend the
6 Bylaws at regular or special meetings as long as there was a quorum of Board members
7 present. Respondent concluded by arguing that the November 2017 amendment was for
8 the benefit of the members of the Association.

9 7. Petitioner closed by praying for the following relief: an invalidation the
10 Board’s third amendment of the Bylaws, an order requiring Respondent to comply with the
11 Bylaws and ARIZ. REV. STAT. § 33-1804(b) henceforth, an assessment of a fine against
12 Respondent, an award/refund of his hearing filing fee, and an issued decision in his favor.

13 8. Here, it is undisputed that the Board amended the Association Bylaws on
14 November 20, 2017, without first calling for a vote by the members of the Association. The
15 record further establishes that the Association’s governing documents do not support the
16 Board’s action.

17 9. In the case at bar Petitioner has sustained his burden of proof.

18 10. Bylaws must be construed to avoid an absurdity.¹³ The voices of few cannot
19 speak for all, unless all have bestowed those few with the power and authority to speak on
20 their behalf. In this case the governing documents for the Association are clear:
21 “members” refers to the body of owners who make up the membership of the Association,
22 and “Directors” refers to the few who are elected to the membership’s Board. The Board
23 does not have power to act where authority is expressly delegated to the membership of
24 the Association.

25 11. Therefore, the Administrative Law Judge concludes that the Board’s action
26 on November 20, 2017, in the absence of a quorum of Association members whereby a
27 majority of said members voted in favor of the proposed third amendment of Association
28 Bylaws, violated the charged provisions of ARIZ. REV. STAT. § 33-1804(B) and Article III of
29 the Association Bylaws.

30

¹³ See *Mail Boxes v. Indus. Comm’n of Ariz.*, 181 Ariz. 119, 122, 888 P.2d 777, 780 (1995).

ORDER

Based on the foregoing findings and conclusions,

IT IS ORDERED that Petitioner's petition be granted.

IT IS FURTHER ORDERED that Respondent's third amendment to the Association Bylaws, as taken on November 20, 2017, is invalidated.

IT IS FURTHER ORDERED that pursuant to ARIZ. REV. STAT. § 32-2199.02(A), Respondent shall pay to Petitioner the filing fee required by ARIZ. REV. STAT. § 32-2199.01 and shall pay to the planned community hearing office fund established by ARIZ. REV. STAT. § 32-2199.05 the sum of \$250.00 as a civil penalty for the violation(s) as detailed above.

In the event of certification of the Administrative Law Judge Decision by the Director of the Office of Administrative Hearings, the effective date of the Order will be five days from the date of that certification.

NOTICE

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

Done this day, September 24, 2018.

/s/ Jenna Clark
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate

Transmitted US Mail to:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

Jay Janicek
1098 S. Chatfield Place
Corona de Tucson, Arizona 85641

Sycamore Vista No. 8 HOA
c/o Andrew F. Vizcarra
Tucson Realty & Trust Co. Management
PO Box 57610
Tucson, Arizona 85732