

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

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

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

7 Clifford (Norm) Burnes,
8 Petitioner,

9 vs.

10 Saguario Crest Homeowners Association,
11 Inc.,
12 Respondent.

No. 21F-H2121051-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

13 **HEARING:** July 16, 2021

14 **APPEARANCES:** Clifford (Norm) Burnes on his own behalf; John Crotty, Esq. for
15 Respondent

16 **ADMINISTRATIVE LAW JUDGE:** Thomas Shedden

17 **FINDINGS OF FACT**

18 1. On June 4, 2021, the Arizona Department of Real Estate (“Department”)
19 issued a Notice of Hearing setting the above-captioned matter for hearing on July 16,
20 2021 at the Office of Administrative Hearings in Phoenix, Arizona.

21 2. The issue for hearing is Petitioner Clifford (Norm) Burnes’s allegation that
22 on May 3, 2020, Respondent Saguario Crest Homeowners Association Inc.’s Board of
23 Directors violated ARIZ. REV STAT. section 33-1803 “Open meetings; exceptions” when it
24 “took two actions in the absence of an open meeting by obtaining unanimous written
25 consent of the Board’s members.”

26 3. Respondent acknowledges that it took the two actions by consent as
27 allowed by ARIZ. REV. STAT. section 10-3821 and it asserts that consistent with that
28 statute, no meeting actually occurred and therefore section 33-1803 does not apply.

29 4. Mr. Burnes filed his single-issue petition on May 7, 2021. In his petition Mr.
30 Burnes asserted that the Respondent had violated section 33-1803 in at least seven

1 ways. At the hearing, the ALJ informed Mr. Burnes that because he paid the fee for only
2 a single issue, he was required to identify a single violation for adjudication.

3 5. Mr. Burnes identified that single alleged violation as: at the meeting on
4 May 3, 2020 “members were not permitted to attend and speak after discussion but
5 before the Board takes formal action.”

6 6. Mr. Burnes appeared and testified and he called Board president
7 Esmerelda Sarina Martinez as a witness. The parties stipulated to the admission of their
8 exhibits.

9 7. In April 2020, Mr. Burnes and his wife raised with the Board two issues or
10 complaints related to lot 7 that abuts the Burnes’s lot: whether lot 7 was entitled to a
11 waiver of the construction bond or deposit and a concern regarding the placement of the
12 house on lot 7.

13 8. After Mr. Burnes raised the issues, Jamie Argueta, whose position and
14 function apparently are not in the record, conducted research, and Mr. Burnes, the
15 Board members and Mr. Argueta exchanged emails about the issues.

16 9. On April 19 and 21, 2020, the Board members and Mr. and Ms. Burnes
17 met and discussed the issues. Exhibit B is minutes from those meetings.

18 10. Ms. Martinez, Board member Mr. Madill, and perhaps Mr. Burnes, also had
19 a discussion or two with a couple of other HOA members, but Ms. Martinez
20 characterized this as neighbors talking and not a meeting.

21 11. Ms. Martinez drafted the two consent forms at issue without input from
22 others and on May 3, 2020, she brought the forms and related documents to each of the
23 other Board member’s homes, and she asked each to read the information and sign if
24 they felt it appropriate. Each Board member signed each consent form.

25 12. Exhibit A is the signed unanimous consent form and related information
26 through which the Board agreed to honor a waiver of the construction deposit for lot 7.

27 13. Exhibit B is the signed unanimous consent form regarding the placement
28 of the home on lot 7 and other information, which although not explicit in the record,
29 appears to be the information that the Board members had when determining whether
30 to sign the second consent form.

1 5. ARIZ. REV. STAT section 10-3821 "Action without meeting" provides in part:

2 A. Unless the articles of incorporation or bylaws provide
3 otherwise, action required or permitted by chapters 24
4 through 40 of this title to be taken at a directors' meeting may
5 be taken without a meeting if the action is taken by all of the
6 directors. The action must be evidenced by one or more
7 written consents describing the action taken, signed by each
8 director and included in the minutes filed with the corporate
9 records reflecting the action taken.

10 ***

11 C. The consent signed under this section has the effect of a
12 meeting vote and may be described as such in any document.

13 6. ARIZ. REV. STAT. section 33-1803 "Open meetings; exceptions" provides in
14 part:

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

24 ***

25 E. Notwithstanding any provision in the declaration, bylaws or
26 other community documents, for meetings of the board of
27 directors that are held after the termination of declarant
28 control of the association, all of the following apply:

29 ***

30 4. Any quorum of the board of directors that meets informally
to discuss association business ... shall comply with the open
meeting and notice provisions of this section without regard to
whether the board votes or takes any action on any matter at
that informal meeting.

1 F. It is the policy of this state as reflected in this section that all
2 meetings of a planned community ... be conducted ... and to
3 ensure that members have the ability to speak after
4 discussion of agenda items, but before a vote of the board of
5 directors or members is taken. Toward this end, any person or
6 entity that is charged with the interpretation of these
7 provisions ... shall construe any provision of this section in
8 favor of open meetings.

7 7. Mr. Burnes has not proven that Respondent violated ARIZ. REV. STAT.
8 section 33-1803 because Respondent did not conduct a meeting on May 3, 2020, but
9 rather took action without a meeting as allowed by section 10-3821.

10 8. Consequently, Mr. Burnes's petition should be dismissed and Respondent
11 be deemed the prevailing party in this matter.

12 **ORDER**

13 **IT IS ORDERED** that Petitioner Clifford (Norm) Burnes's petition is dismissed.

14 **NOTICE**

15 **Pursuant to ARIZ. REV. STAT. section 32-2199.02(B), this Order is binding on the**
16 **parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. section 32-**
17 **2199.04. Pursuant to ARIZ. REV. STAT. section 41-1092.09, a request for rehearing**
18 **in this matter must be filed with the Commissioner of the Department of Real**
19 **Estate within 30 days of the service of this Order upon the parties.**

20 Done this day, July 28, 2021

21 /s/ Thomas Shedden

22 Thomas Shedden

23 Administrative Law Judge

24 Transmitted by either mail, e-mail, or facsimile to:

25 Judy Lowe, Commissioner
26 Arizona Department of Real Estate

27 Judy Lowe, Commissioner
28 Arizona Department of Real Estate
29 100 N. 15th Avenue, Suite 201
30 Phoenix, Arizona 85007

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15 By Miranda Alvarez