

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 In the Matter of
8 Senol Pekin
9 Petitioner
10 vs
11 Artesian Ranch Community Association
12 Respondent

No. 23F-H034-REL
No. 23F-H037-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

13 **HEARING:** March 20, 2023

14 **APPEARANCES:** Petitioner Senol Pekin appeared on behalf of himself. Ashley
15 Moscarello, Esq. appeared on behalf of Respondent Artesian Ranch Community
16 Association.

17 **ADMINISTRATIVE LAW JUDGE:** Velva Moses-Thompson

18 **FINDINGS OF FACT**

19 1. The Arizona Department of Real Estate (Department) is authorized by
20 statute to receive and to decide Petitions for Hearings from members of homeowners'
21 associations and from homeowners' associations in Arizona. Homeowners'
22 associations and their members are governed by the Chapter 16 of Title 33, the
23 Planned Communities Act, A.R.S. §§ 33-1801 to 33-1818 ("the Act").

24 2. On January 25, 2023, the Department of Real Estate issued Notices of
25 Hearing setting the above-captioned matters for hearing on March 20, 2023, at the
26 Office of Administrative Hearings in Phoenix, Arizona. Although each hearing was
27 originally set to begin at a different time on March 20, 2023, the matters were
28 consolidated on February 28, 2023, and the hearing convened at 9:00 a.m. on March
29 20, 2023. The Notices of Hearing provided that the five (5) issues set for determination
30 were Petitioner's allegations that Respondent committed the following violations:

1 1. "...violates Bylaws Article II Paragraph 2.3 Annual
2 Meetings on an ongoing basis by not holding its annual
3 meeting as required by its Bylaws; the specific violation given
4 herein is the Annual Meeting in 2022."

5 2. "...does not elect officers in an exclusively and timely
6 scheduled Organizational Meeting as required by its
7 Bylaws...." Petitioner states that this action is in violation of
8 Bylaws Article III Section A Paragraph 3.5, Sections B
9 Paragraph 3.7, and Article IV Paragraph 4.2.

10 3. "...held a Board Meeting on 9/22/2022 not called or
11 scheduled by the Board of members, but was organized by
12 the HOA Manager who is not authorized to call a board
13 meeting." Petitioner states that this action is in violation of
14 Bylaws Article III Section B. Article IV Section 6.7(b), Article I
15 Paragraph 1.3."

16 4. "violated ARS 33-1804 A by prohibiting the recording of
17 open session 6:30-7:30 PM on October 24th, 2022."

18 5. "In the Open Board Meeting at 6:30-7:30 PM on October
19 24th, which was held through Zoom videoconferencing, the
20 HOA didn't allow the opposing side of the issues to be spoken
21 as they muted in the videoconference." Petitioner states that
22 this action is in violation of ARS§ 33-1804.

23 3. Petitioner Senol Pekin testified on his own behalf and presented the
24 testimony of Julie Willowby, Shelly Nelson, and Sherry Swanson¹. Respondent Artisan
25 Ranch Community Association presented the testimony of Susanne Easterday
26 Roskens, the Director of Respondent's Board, and Mandy Rogers, an employee of
27 Respondent's Community Manager, AAM, LLC.

28 4. Respondent's Bylaws Article II, Section 2.3 provide, in relevant part, as
29 follows:

30 The first meeting of the Association, whether a regular or
special meeting, shall be held within one year after
incorporation of the Association. Subsequent regular annual
meetings shall be held on the second Wednesday of April of
each year.

5. Respondent's Bylaws Article III, Section B. 3.7 provide, in
relevant part, as follows:

¹ The Administrative Law Judge has read and considered each page of each admitted exhibit, even if not mentioned in this Decision. The Administrative Law Judge has also considered the testimony of every witness, even if the witness is not specifically mentioned in this Decision.

1 Organizational Meetings.

2 Each Board shall hold an organizational meeting within a
3 reasonable time after newly-elected or newly-appointed
4 directors take office.

5 6. Respondent's Bylaws, Article IV 4.2 provide, in relevant part,
6 as follows:

7 The officers of the Association shall be elected by the Board at
8 an organizational meeting of the Board taking place pursuant
9 to Section 3.5

10 7. The evidence presented at hearing shows that Respondent failed to hold
11 its regular annual meeting on the second Wednesday of April 2022 as required under
12 Respondent's Bylaws Article II Paragraph 2.3. Instead, Respondent held its regular
13 annual meeting in May of 2022.

14 8. In August of 2022, Respondent conducted an organizational meeting
15 during its board of directors meeting where the Board appointed officers of the
16 Association. See Respondent's Exhibit D. Respondent contended at hearing that the
17 Bylaws not require that the organizational meeting be held separate from any other
18 board meeting.

19 9. In September of 2022, the Board's president, Susanne Roskens
20 requested that Mandy Rogers organize a board meeting, because the Board was
21 unable to obtain a sufficient amount of votes regarding a landscaping issue related to
22 over seeding, and it was important to make a prompt decision. Accordingly, Ms. Rogers
23 organized a board meeting for September 22, 2022.

24 10. The Board conducted a board meeting on October 24, 2022, Ms. Rogers
25 informed the homeowners that they were not allowed to record the board meeting,
26 without admonishing participants that the prohibition only applied to closed sessions.
27 Ms. Rogers placed Petitioner on mute at different times during the board meeting. At
28 hearing, Ms. Rogers explained that she placed Petitioner on mute because he was
29 generally aggressive. However, the evidence shows that Petitioner had several times to
30 speak during the board meeting and even suggested that he could discuss one of the

1 board meeting items with another Board member after the meeting. Ms. Rogers also
2 stated at hearing that the Board required advanced notice of anyone recording the
3 board meeting.

4 **CONCLUSIONS OF LAW**

5 1. A.R.S. § 32-2199(B) permits an owner or a planned community
6 organization to file a petition with the Department for a hearing concerning violations of
7 planned community documents under the authority Title 33, Chapter 16.² Such petitions
8 will be heard before the Office of Administrative Hearings, an independent state agency,

9 2. Petitioners bear the burden of proof to establish that Respondent violated
10 the Act or Respondent's Bylaws by a preponderance of the evidence.³ Respondent bears
11 the burden to establish affirmative defenses by the same evidentiary standard.⁴

12 3. "A preponderance of the evidence is such proof as convinces the trier of
13 fact that the contention is more probably true than not."⁵ A preponderance of the
14 evidence is "[t]he greater weight of the evidence, not necessarily established by the
15 greater number of witnesses testifying to a fact but by evidence that has the most
16 convincing force; superior evidentiary weight that, though not sufficient to free the mind
17 wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one
18 side of the issue rather than the other."⁶

19 4. A.R.S. §1804 (A) provides:

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

26 ² See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce
the development's CC&Rs.

27 ³ See A.R.S. § 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74
Ariz. 369, 372, 249 P.2d 837 (1952).

28 ⁴ See A.A.C. R2-19-119(B)(2).

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

30 ⁶ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

1 deliberations and proceedings. The board may place
2 reasonable time restrictions on those persons speaking
3 during the meeting but shall permit a member or member's
4 designated representative to speak once after the board has
5 discussed a specific agenda item but before the board takes
6 formal action on that item in addition to any other opportunities
7 to speak. The board shall provide for a reasonable number of
8 persons to speak on each side of an issue. **Persons**
9 **attending may audiotape or videotape those portions of**
10 **the meetings of the board of directors and meetings of**
11 **the members that are open. The board of directors of the**
12 **association shall not require advance notice of the**
13 **audiotaping or videotaping and may adopt reasonable**
14 **rules governing the audiotaping and videotaping of open**
15 **portions of the meetings of the board and the**
16 **membership, but such rules shall not preclude such**
17 **audiotaping or videotaping by those attending, unless**
18 **the board audiotapes or videotapes the meeting and**
19 **makes the unedited audiotapes or videotapes available to**
20 **members on request without restrictions on its use as**
21 **evidence in any dispute resolution process.** Any portion of
22 a meeting may be closed only if that closed portion of the
23 meeting is limited to consideration of one or more of the
24 following:

25 Emphasis in bold.

26 5. Respondent did not dispute that it failed to hold an annual board meeting
27 in April of 2022. However, Respondent contends that it was simply a technical violation
28 and there was no harm to Petitioner. Respondent argued that such violations are
29 permitted under A.R.S. § 10-4701(e).

30 6. Upon consideration of the written evidence and testimony provided at
hearing, the Administrative Law Judge concludes that the preponderance of the
evidence shows that Respondent violated Respondent's Bylaws Article II Paragraph 2.3
when it failed to hold an annual meeting in April of 2022. While A.R.S. § 10-3701(e)
provides that the failure of to hold an annual meeting at the time prescribed in the
Bylaws does not affect the validity of a corporate action, the section does not provide an
exception to the adherence to Bylaws that require a set time for an annual meeting.

Administrative Law Judge

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Transmitted by either mail, e-mail, or facsimile April 10, 2023 to:

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