

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

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

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 MARILYN A. STEVENS,

8 Petitioner,

9 vs.

10
11 CLIFFS CONDOMINIUM ASSOCIATION

12 Respondent.

No. 08F-H078001-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

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15 **HEARING:** September 4, 2007 and October 22, 2007

16 **APPEARANCES:** Marilyn A. Stevens on her own behalf; John Caldamone on
17 behalf of the Cliffs Condominium Association

18 **ADMINISTRATIVE LAW JUDGE:** Michael K. Carroll on September 4, 2007 and
19 Lewis D. Kowal on October 22, 2007¹

20
21 **PROCEDURAL ISSUE**

22 The parties were advised by a Minute Entry dated October 23, 2007, that the
23 Administrative Law Judge will be taking into consideration the Petition that was filed
24 with the Arizona Department of Fire, Building and Life Safety, the Covenants, conditions
25 and Restrictions and By-Laws attached to the Petition and the Response to the Petition.
26 Cliffs Condominium Association filed an objection asserting that there was no
27 verification that the Association documents were those that existed as of January 10,
28 2004. The Administrative Law Judge finds that the provisions of the Association

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30 ¹ As of October 22, 2007, when the hearing of this matter reconvened, Administrative Law Judge Michael K. Carroll was no longer with the Office of Administrative Hearings. This matter was reassigned to Administrative Law Judge Lewis D. Kowal, who reviewed the entire record of the September 4, 2007 hearing and advised the parties of same.

1 documents that were relied upon by the parties during the hearing appear to be as
2 reflected in the documents attached to the Petition. Although the objection is noted for
3 the record, the Administrative Law Judge does not find that the Cliffs Condominium
4 Association to be prejudiced by consideration being given to the documents attached to
5 the Petition.

6 **FINDINGS OF FACT**

7 **Background**

8 1. Marilyn A. Stevens ("Petitioner") is a member of the Cliffs Condominium
9 Association ("Association") and has filed a Petition with the Department of Fire, Building
10 and Life Safety alleging that the Association has violated specific provisions of the
11 Association's Declaration of Covenants, Conditions and Restrictions ("CC&Rs") and
12 Association By-Laws ("By-Laws").

13 2. In accordance with the undersigned Administrative Law Judge's ruling, Petitioner
14 represented that she had two issues: (1) electing Association Directors to a term of
15 three years rather than one year term at the January 10, 204 annual meeting and (2)
16 that the January 10, 2004, was an improper date to hold such meeting. With respect to
17 the challenge of the election of directors, Petitioner asserted that the By-Laws were not
18 properly amended to reflect a change of term of a director from 1 year to 3 years.
19 Petitioner contended that she had not seen such amendment nor was such amendment
20 recorded with the Maricopa County Recorder's Office.

21 3. The evidence of record indicates that Petitioner is one of about twenty unit
22 owners at the Association who are concerned about the above two issues. However,
23 for purposes of this hearing, those issues are being considered solely as they relate to
24 Petitioner.

25 **Issue No. 1- Holding Annual Meeting on January 10, 2004**

26 4. Petitioner presented witnesses who testified that they did not receive notice of
27 the January 10, 2004 meeting and that they did not receive notice of proxy votes.
28 Petitioner contended that the annual meeting in the past had been held in March and
29 that based on information obtained from John Caldamone ("Mr. Caldamone, the
30

1 president of the Association, the annual meeting should have been held on the third
2 Thursday in May.

3 5. Section 4.08 of the CC& R and Article II, Section 1 of the By-Laws provide that
4 the setting of the annual meeting date of unit owners shall be the anniversary date of
5 the meeting which was to be initially held within 120 days from the first conveyance of a
6 unit from the Association to an owner is recorded.

7 6. Although Mr. Caldamone presented lengthy testimony along with supporting
8 documentation as to the records of the conveyances and when annual meetings were
9 noticed², it is not necessary for the Administrative Law Judge to address them in light of
10 the evidence that was presented by Petitioner who bears the burden of proof at this
11 proceeding.³

12 7. Petitioner relied upon page 34 of Exhibit 8, a deposition of Mr. Candalmone in a
13 Maricopa County Superior Court action, wherein he admitted holding the annual
14 meeting held on January 10, 2004 violated the By-Laws.

15 8. Article II, Section 9 of the By-Laws cited by Petitioner provides that “[a]ll
16 informalities and/or irregularities in calls, notices of meetings, and in the manner of
17 voting, credentials, and methods of ascertaining those present, shall be deemed waived
18 if no objection is made at the meeting.”

19 9. Petitioner acknowledged during the hearing that there were protests before and
20 after the meeting. Connie Luckenbach (“Ms. Luckenbach”), a unit owner who was
21 present at the January 10, 2004 meeting, testified that objections were raised as to the
22 timing or content of the meeting. However, such testimony was vague and general in
23 nature. When requested by Petitioner to be specific, Ms. Luckenbach presented
24 information having to do with the fact that the January 10, 2004 annual meeting was
25 held one and a half-hour prior to the special meeting rather than the scheduling the
26 annual meeting on January 10, 2004. Under the circumstances, it is found that

27 _____
28 ² Mr. Caldamone’s research revealed that there is no record that the first three purchasers of the
29 Association ever held an annual meeting.

30 ³Petitioner elicited testimony of witnesses who disagree with the annual meeting being held on January
10, 2004 and claim that it the annual meeting was held in an attempt to moot the special meeting that
had been scheduled, which was held after the annual meeting. Any issue of the special meeting is
determined outside the scope of the hearing and is not properly before the Administrative Law Judge.

1 Petitioner did not present reliable evidence that an objection was made at the January
2 10, 2004 meeting as to the holding of the annual meeting on that date.

3 10. Regardless of any admission that may have been made by Mr. Caldamone as to
4 whether the January 10, 2004 annual meeting date was proper as reflected in Exhibit 8
5 (Mr. Caldemone's November 23, 2004 deposition) the Administrative Law Judge
6 concludes that by virtue of Article II, Section 9 of the By-Laws, which must be given
7 effect, any objection Petitioner now has as to the holding of the January 10, 2004
8 meeting was waived.

9 Issue No. 2-The Election of Directors to a Term of 3 Years

10 11. At the annual meeting held on January 10, 2004, directors were voted to a three
11 year term.

12 12. Petitioner presented evidence that certain unit members: a) did not receive a
13 copy of the amendment to the By-Laws that reflect a change of term for the directors; b)
14 they did not receive a copy of the minutes of the meeting wherein the amendment to the
15 By-Laws took place; c) have not received a copy of the By-Laws reflecting that an
16 amendment was made changing the term of the directors from one year to three years;
17 and d) that Petitioner subsequent to the date when the amendment of the By-Laws
18 purportedly took place, she purchased another unit at the Cliffs and the copy of the By-
19 Laws as she received did not contain the amendment provision changing the term of the
20 directors office from one year to three years.

21 13. Mr. Caldamone testified that the meeting that took place to amend the By-Laws
22 was a special meeting that took place on April 26 or April 27, 2001 and that he had the
23 By-Laws changed to reflect that amendment about two weeks later.

24 14. Pursuant to Section 4.07 of the CC&Rs, the By-Laws may be amended by a
25 majority of quorum of the voting owners of the Association comprised of at least 25% of
26 the total votes present.

27 15. Article III, Section 3 of the By-Laws provides in pertinent part that directors shall
28 be elected at the annual meeting of the members and shall hold office until their
29 successors have been elected and hold their first meeting.
30

1 16. Article VII, Section 1 provides, in pertinent part, that owners shall have the power
2 to amend By-Laws by a vote of the majority of a quorum of the member voting in person
3 or by proxy, provided written notice of intention to amend By-Laws is given in a notice of
4 the meeting.

5 17. Petitioner contended that to be effective the amendment must be recorded. In
6 support of that assertion, Petitioner presented the testimony of Donna Nutter (“Ms.
7 Nutter”) testified that she went to the Maricopa County Recorder’s Office and spoke with
8 a gentleman who informed her that while the by-laws do not have to be recorded, an
9 amendment to the by-laws must be “registered”. Ms. Nutter also testified that the
10 Maricopa County Recorder’s Office had no record of any amendment to the By-Laws
11 being “registered”.

12 18. In contrast to Petitioner’s assertion regarding the recordation of the amendment
13 of the By-Laws, the Association maintained that if the By-Laws were not initially
14 recorded, then the amendment does not have to be recorded. The Association relied
15 upon an opinion of a title officer and information that Mr. Caldamone received from an
16 attorney who concentrates in homeowners association matters. However, the
17 Association did not cite to any legal authority that would support those opinions.

18 19. The Administrative Law Judge concludes that recordation of the amendment of
19 the By-Laws is not a proper issue before the Administrative Law Judge to address as
20 there is no provision of the CC&Rs or By-Laws cited by Petitioner in the Petition that
21 contains a requirement for an amendment to the By-Laws to be recorded.

22 **CONCLUSIONS OF LAW**

23 1. At this proceeding, Petitioner bears the burden of proving by a preponderance of
24 the evidence that the allegations set forth in the Petition violated the specific provisions
25 of the CC&Rs and By-Laws cited in the Petition. See A.A.C. R2-19-119.

26 2. In her closing argument, Petitioner requested specific relief in the nature of
27 specific direction made to the Association as to what action is should take, how it should
28 be taken, and how it should be monitored. The nature of the relief requested is outside
29 the scope of the Administrative Law Judge’s authority.⁴

30 ⁴ Had Petitioner prevailed, at best, the Association would be ordered to comply with the provisions of the applicable CC&Rs and By-Laws. However, it is not the function of this Tribunal to monitor and enforce

1 3. The weight of the evidence of record established that the Association voted to
2 amend the By-Laws to change the term of the directors from one year to three years in
3 April 2001.

4 4. Petitioner failed to prove by preponderance of the evidence that the Association
5 violated the provisions of the CC&Rs and By-Laws cited in the Petition with respect to
6 holding an annual meeting on January 10, 2004.

7 5. Petitioner failed to prove by preponderance of the evidence that the Association
8 violated the provisions of the CC&Rs and By-Laws cited in the Petition with respect to
9 the election of directors to three year terms at the January 10, 2004 annual meeting.

10 **ORDER**

11 Based on the above, no action is required of the Association and the Petition is
12 dismissed.

13 Done this day, November 6, 2007.

14
15 _____
16 Lewis D. Kowal
17 Administrative Law Judge

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19 Copy transmitted by mail this
20 ____ day of _____, 2007, to:

21 Department of Fire Building and Life Safety - H/C
22 Robert Barger, Director
23 ATTN: Joyce Kesterman
24 1110 W. Washington, Suite 100
25 Phoenix, AZ 85007

26 Marilyn Stevens
27 4722-46th Ave. S.W.
28 Seattle, WA 98116

29 John Caldamone
30 Cliffs Condominium Association

_____ compliance.

1 12129 W. Bell Rd.
2 Surprise, AZ 85374

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4 By _____
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