

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

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

4
5 **STATE OF ARIZONA**
6 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

7
8 JOHN F. AND PATRICIA E. MONAHAN,

9 Petitioner,

10 vs.

11
12 SYCAMORE HILLS HOMEOWNERS
13 ASSOCIATION, INC.

14 Respondent.

No. 08F-H088008-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

15
16
17 **HEARING:** May 2, 2008

18 **APPEARANCES:** Petitioners John and Patricia Monahan appeared personally.
19 Respondent Sycamore Hills Homeowners Association, Inc. was represented by its
20 attorney, Carolyn Goldschmidt, Esq.

21 **ADMINISTRATIVE LAW JUDGE:** Michael G. Wales

22
23
24 Based upon the evidence of record, the Administrative Law Judge makes the
25 following Findings of fact, Conclusions of Law and Order:

26 **FINDINGS OF FACT**

27 1. John and Patricia Monahan ("Petitioners") are the owners of record of a lot
28 and home at 16495 S. Saguaro View Lane, in the Sycamore Hills Community (the
29 "Community") in Corona de Tucson, Arizona. The lot and its improvements thereon are
30 subject to the deed restrictions and certain planned community governing documents
recorded by, or promulgated by, Respondent Sycamore Hills Homeowners Association,
Inc. ("Respondent Association" or "Association"). An owner of a lot in the Community

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007
(602) 542-9826

1 automatically becomes a member of the Respondent Association, and is bound by the
2 governing documents of the Association, by virtue of being a purchaser of, or
3 subsequent purchaser of, any lot within the Community.

4
5 2. On February 7, 2008 Petitioners filed a Petition, pursuant to A.R.S. §41-
6 2198.01(B), with the Arizona Department of Fire, Building and Life Safety (“the
7 Department”) alleging, in multiple counts, that the Respondent Association had violated
8 the following governing documents and state statutes governing planned communities:

9 Count 1 (Harassment)

10 1a – Respondent violated the Association’s Design Guidelines, Section II.I by requiring
11 Petitioners to enclose Petitioners’ pool pump and by not requiring other lot owners to
12 abide by these guidelines.

13 1b – Respondent violated the Association’s Design Guidelines, paragraph II. M or II.N
14 and II.B.2 by requiring Petitioners to move a utility trailer that was in view of the street,
15 and by not requiring other lot owners to abide by these guidelines.

16 Count 2 (Barking Dogs)

17 Respondent violated Article IX, Section 5 (Animals) of the Declaration of Covenants,
18 Conditions, Restrictions and Easements dated December 20, 2002 (“CC&Rs”) and
19 Article III, Section 8a of the CC&Rs by failing to take appropriate action against an
20 individual in the Association who allowed his dogs to bark;

21 Count 3 (RV Parking)

22 Respondent violated Article IX, Section 6 (Temporary Structures), and Section 26 of the
23 CC&Rs, as well as Design Guidelines, paragraph II.C by not imposing sufficient fines
24 against two lot owners who keep Recreational Vehicles (“RVs”) on their lots.

25 Count 4 (No Nominating Committee Formed / No Architectural Committee)

26 Respondent violated the Articles V and IX of the Association’s Bylaws by failing to
27 appoint a nominating committee and an architectural control committee.

28 Count 5 (Violation of Open Meeting Law)

29 Respondent violated A.R.S. §33-1804 by failing to meet in public concerning the Board’s
30 vote to override the Association’s Architectural Control Committee (“ACC”) prior decision
denying two homeowners’ requests to build additional structures on their respective lots.

3. On March 3, 2008, Respondent Association filed a Response to the
Petition denying Petitioner’s allegations. The matter was set for hearing before the
Office of Administrative Hearings.

1 have a trailer or older vehicle exposed to the street, in violation of the Design
2 Guidelines.

3 f. Property manager Sandy Sandoval testified that, as property manager,
4 she conducts regular inspections of the Community on a monthly basis and issues
5 notices of violations regarding mechanical pool equipment and all other violations of
6 Association's Rules and Design Guidelines, other than trash receptacles out for pickup
7 before or after the time allotted, when she observes them.

8 g. Paul Swan, President of the Board of Directors for Respondent
9 Association, testified the Board had voted not to pursue trash can violations as such
10 violations were trivial in nature and compliance is left to the honor system.

11 **The Barking Dogs**

12 h. Petitioner Patricia Monahan testified that she had repeated complained to
13 the Board of Directors about the barking dogs on Lot 37. Mrs. Monahan testified that
14 the Board of Directors failed to properly investigate her complaints regarding the animal
15 noise. Mrs. Monahan testified that the Board decided to send a warning letter to Lot 37
16 at the February 22, 2008 meeting but Board President Paul Swan later instructed the
17 property manager not to send the letter. Finally, Ms. Monahan testified that on April 21,
18 2008 she attended a hearing before Pima County Animal Noise Control wherein the
19 owners of Lot 37 were fined and warned by the hearing Officer that continued violations
20 would result in additional fines. Ms. Monahan testified that the dogs were no longer
21 barking after the April 21, 2008 hearing.

22 i. Board of Directors President Paul Swan testified that after the initial
23 complaints of animal noise by the Monahans, he personally tried to determine if there
24 was constant barking coming from Lot 37 on six different occasions and did not hear the
25 dogs barking. Mr. Swan further testified that shortly after the February 22, 2008
26 meeting wherein the Board decided to send a warning letter to the owners of Lot 37, he
27 instructed the property manager to hold the letter that was going out to the owners of
28 Lot 37 because the February 22, 2008 meeting had not been properly noticed and he
29 was concerned that other owners may have wished to speak to the animal noise issue.

30 **RV Parking**

1 j. Petitioner John Monahan testified that the owners of lots 35 and 60
2 routinely have their RVs parked in their driveways in violation of Article IX, Section 6 of
3 the CC&Rs (Temporary Structures), and that the Association is not taking sufficient
4 action against these lot owners. Specifically, Petitioner John Monahan alleges that the
5 fine of \$50.00 per month levied against these lot owners by the Board of Directors for
6 violating the rules against parking RVs is insufficient to change the lot owners' behavior
7 because monthly RV storage fees are significantly higher.

8 k. Board of Directors President Paul Swan testified that a Resolution was
9 adopted by the Board of Directors on May 26, 2007 prohibiting lot owners from parking
10 or storing RVs on their lots for any period greater than a 48 hour load, unload and clean,
11 time period. The 2007 resolution supercedes a 2006 Policy Resolution wherein the
12 Board "grandfathered in" existing RVS as exempt from any RV parking restrictions.

13 l. Mr. Swan testified that on October 30, 2007, at a meeting of the Board of
14 Directors, the owner of lot 35, appeared and plead his case that his RV should be
15 "grandfathered in" was given 60 days to move his RV. The owner of lot 60 sent notice
16 that he refused to move his RV. At the February 26, 2008 Meeting of the Board, the
17 Board voted to begin fining the owners of lots 35 and 50 \$50 per month for violating the
18 2007 Board resolution prohibiting the parking of RVs.

19 **The Nominating Committee & Architectural Control Committee**

20 m. Petitioner John Monahan testified that the Respondent violated the
21 Articles V and IX of the Association's Bylaws by failing to appoint a nominating
22 committee and an architectural control committee ("ACC") prior to the December 7,
23 2007 Annual Meeting. Petitioner testified that the Board was acting as ACC after all
24 members of the ACC other than Petitioner John Monahan resigned from the ACC in
25 September 2007. Finally, Petitioner testified that as of February 29, 2008 the
26 Association's website does list three lot owners as members of the Association's
27 Architectural Control Committee.

28 n. Property Manager Sandy Sandoval testified in 2007 the Association did
29 not have a nominating committee. Ms. Sandoval testified that she did send out a call for
30 nominations of candidates for potential board members by e-mail and U.S. mail on or

1 about October 18, 2007. Ms. Sandoval testified that because there were some difficult
2 personalities creating upheaval and challenging the actions of Board of Directors and
3 members of the Architectural Committee, thus making obtaining volunteers for any
4 committee, including a nominations committee difficult, if not impossible.

5 o. On January 22, 2008, at the first Board meeting after the December 2007
6 annual election, Board President Paul Swan advised the other Board members that one
7 task before the Board was to make their best efforts to appoint a nominations
8 committee.

9 p. Mr. Swan testified that the Board was forced to temporarily act as the ACC
10 and that no governing document prohibits this. The Association does now have an
11 Architectural Control Committee comprised of non-Board members and that its
12 members are set forth on the Association website.

13 **The Closed Meeting**

14 q. Petitioner John Monahan testified he was on the ACC in September, 2007
15 when the owners of lots 36 and 56 sought approval to build detached garages. At that
16 time, the ACC sought additional information from the lot owners and other affected
17 owners and withheld approval pending obtaining further information. The decision not
18 to approve the requests caused great disagreement and upheaval between ACC
19 members and Board Members alike.

20 r. Petitioner testified that Board of Directors on October, 30 2007 and voted
21 to approve the request despite the fact that the ACC had not approved the requests.
22 Petitioner alleged that the October 30, 2007 meeting was not an open meeting and, as
23 such, Respondent violated A.R.S. §33-1804, the Open Meetings Law.

24 s. Board President Paul Swan testified that the Board conducted an open
25 meeting on October 30, 2007 to discuss the requests. No decision had been made at
26 that time. Also, the Board announced that the issue would be discussed in executive
27 session after the open meeting. Mr. Swan testified that the meeting was held in
28 executive session due to the fact that the Association had received a two letters from
29 attorney Steven Sandoval on October 4, 2007 threatening litigation as to both lots 56
30 and 36 if approval was not granted. Mr. Swan testified that the decision to approve was

1 not made in executive session, but was made in early November by the ACC, not the by
2 the Board of Directors.

3
4 **CONCLUSIONS OF LAW**

5 1. In adjudicating petitions forwarded to the Office of Administrative
6 Hearings by the Department of Fire, Building, and Life Safety the jurisdiction of Office of
7 Administrative Hearings is limited to adjudicating complaints regarding and ensuring
8 compliance with Title 33, Chapter 16, Arizona Revised Statutes, and the planned
9 community documents of the Respondent Association.¹ This authority is granted by
10 statute, specifically, A.R.S. §41-2198. The Office of Administrative Hearings does not
11 have the authority to adjudicate any claims against an Association other than those
12 specifically authorized by A.R.S. §41-2198. Thus, this tribunal does not have the
13 authority to hear and decide claims of harassment or selective enforcement of community
14 documents.

15 1. Likewise, a petitioner does not have legal standing pursuant to A.R.S
16 §41-2198 et seq. to pursue claims against an Association for the Association's failure to
17 enforce its governing documents against other members of the Association. A.R.S.
18 §41-2198.01B.1 specifically states the Department of Fire, Building, and Life Safety,
19 which assigns the hearings to the Office of Administrative Hearings, does not have
20 jurisdiction to hear "any dispute among or between owners to which the association is not
21 a party." A petitioner's claim that another lot owner is leaving his RV parked on the street
22 overnight or leaving his trash can out too long is a dispute between owners who have an
23 contractual obligation to each other pursuant to the CC&Rs to comply with the rules and
24 other governing documents by which they are bound to each other, and cannot be
25 disguised as a dispute with the Association over lax enforcement of its rules under A.R.S
26 §41-2198 et seq. To hear and decide such a dispute would require an analysis by the
27 Administrative Law Judge as to whether the decisions and/or actions of an association's
28 architectural control committee or Board of Directors were reasonable, capricious or
29 arbitrary *as applied to lot owners who are not a party to the proceedings* before the

30 _____
¹ See A.R.S. §§ 41-2198(3) and 33-1801 et seq.

1 administrative tribunal. The authority to make such decisions has not been conferred
2 upon the Department of Fire, Building, and Life Safety or the Office of Administrative
3 Hearings and certainly cannot be implied to have been conferred by a reading the plain
4 language of A.R.S. §§ 41-2198 and 41-2198.01B. Those types of decisions are left to the
5 Superior Court, a court with which this tribunal does not share concurrent jurisdiction.
6 With this in mind, this tribunal looks to the evidence to see if the Petitioners have
7 established that the Respondent Association either (a) violated any provision of Title 33,
8 Chapter 16, Arizona Revised Statutes or (b) acted in contravention of any of the planned
9 community documents of the Association, *as applied to Petitioners*.

10 2. Petitioners bear the burden of proof and must establish that the
11 Association violated either specific statute set forth in Title 33, Chapter 16, Arizona
12 Revised Statutes, or a specific section of the relevant planned community documents of
13 the Respondent Association by a preponderance of the evidence.² “A preponderance of
14 the evidence is such proof as convinces the trier of fact that the contention is more
15 probably true than not.”³ A preponderance of the evidence is defined as “[t]he greater
16 weight of the evidence, not necessarily established by the greater number of witnesses
17 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
20 than the other.”⁴

21 3. In regards to Count 1 of the Petition, as it pertains to the claim of
22 harassment, or, by implication, selective enforcement, of the Association’s governing
23 documents, Petitioners’ claim is dismissed as outside the jurisdiction of this court. In
24 regards to the Association’s enforcement of its governing documents against Petitioners,
25 specifically regarding the exposed mechanical pool equipment and utility trailer,
26 Petitioners testified they complied with both requests of the Association before they even
27 filed their complaint. Thus, a dispute or controversy no longer exists and the claim is
28 dismissed as moot. Finally, as to Petitioners’ allegation in Count 1 that the Association is

29 ² See A.A.C. R2-19-119; see also *Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952).

30 ³ Morris K. Udall, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁴ BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

1 failing to enforce its governing documents against other homeowners, this tribunal holds
2 that, as discussed in Conclusions of Law, paragraph 2, above, Petitioners do not have
3 standing to bring such claims under A.R.S §41-2198 et seq. Therefore, Count 1 is
4 dismissed in its entirety.

5 4. As to Count 2 of the Petition, this tribunal concludes there is no longer a
6 current dispute or controversy for which this tribunal could apply a remedy and the issue
7 is moot. Petitioner Patricia Monahan testified that the dogs have stopped barking and
8 that she now has a forum with a Pima County animal noise control agency to resolve her
9 concerns regarding the barking dogs if they should ever bother her again. Because this
10 is no longer a current dispute, this tribunal need not address whether or not Board
11 President Paul Swan acted reasonably in withholding the warning letter to lot 37. Count 2
12 is dismissed as moot.

13 5. As to Count 3, Article IX, Section 6 (Temporary Structures) has no
14 relation to the parking of RVs within the Community, but the May 26, 2007 Board
15 Resolution, however, does address the parking of RVs within the Community. As in
16 Count 1, however, this tribunal holds that Petitioners do not have standing to bring a claim
17 that the Association is not enforcing its governing documents in regards to other lot
18 owners under A.R.S §41-2198 et seq. Therefore, Count 3 is also dismissed in its entirety
19 for lack of standing.

20 6. Count 4 alleges a violation of Article IX of the Associations Bylaws.
21 These Bylaws state:

22 The Association shall appoint an Architectural Committee, as provided for
23 in the Declaration, and a Nominating Committee, as provided in these
24 Bylaws...

25 7. The testimony at hearing was that when members of the ACC resigned,
26 the Board temporarily stepped in to act as the ACC until other members of the community
27 could be appointed. Petitioner did not present any evidence that by doing so, the Board,
28 or the Association, violated the governing documents or any relevant statute.
29 Additionally, by admission of Petitioners, an Architectural Control Committee is now in
30 place. Thus, Petitioners' claim that the Board of Directors failed to abide by the Bylaws is

1 moot as well. A current dispute or controversy no longer exists because the ACC is now
2 in place.

3 8. Likewise, the Petitioners' claim that the Board of Directors failed to abide by
4 the Bylaws by failing to appoint a nominating committee fails as well. The nominating
5 committee was needed to find potential candidates for the board of directors prior to the
6 December, 2007 annual meeting. The election has been held and board members were
7 elected for their respective terms. Thus, there is no longer a current dispute or
8 controversy. Additionally, evidence was presented regarding the implausibility, if not the
9 impossibility of, creating a nominating committee caused by certain difficult personalities
10 causing upheaval within the Community and the resultant lack of volunteers. Count 4 is
11 dismissed.

12 9. Finally, as to Count 5, Petitioners alleged that the Respondent
13 Association violated A.R.S. §33-1804 (Open Meeting Law), specifically alleging the
14 Board of Directors met in private and voted to override the ACC's prior decision
15 regarding two homeowners' requests to build additional structures on their respective
16 lots. It was not alleged in the petition, and this tribunal does not address, whether or not
17 approval should have been given to the lot owners for their additional structures.
18 A.R.S. § 33-1804(A) provides:

19 Notwithstanding any provision in the declaration, bylaws or other
20 documents to the contrary, all meetings of the association and board of
21 directors are open to all members of the association or any person
22 designated by a member in writing as the member's representative and
23 all members or designated representatives so desiring shall be permitted
24 to attend and speak at an appropriate time during the deliberations and
25 proceedings. The board may place reasonable time restrictions on those
26 persons speaking during the meeting but shall permit a member or a
27 member's designated representative to speak before the board takes
28 formal action on an item under discussion in addition to any other
29 opportunities to speak. The board shall provide for a reasonable number
30 of persons to speak on each side of an issue. Any portion of a meeting
may be closed only if that portion of the meeting is limited to
consideration of one or more of the following:

1. Legal advice from an attorney for the board or the association. On
final resolution of any matter for which the board received legal advice or
that concerned pending or contemplated litigation, the board may
disclose information about that matter in an open meeting except for

1 matters that are required to remain confidential by the terms of a
2 settlement agreement or judgment.

3 2. Pending or contemplated litigation.

4 3. Personal, health or financial information about an individual member
5 of the association, an individual employee of the association or an
6 individual employee of a contractor for the association, including records
7 of the association directly related to the personal, health or financial
8 information about an individual member of the association, an individual
9 employee of the association or an individual employee of a contractor for
10 the association.

11 4. Matters relating to the job performance of, compensation of, health
12 records of or specific complaints against an individual employee of the
13 association or an individual employee of a contractor of the association
14 who works under the direction of the association.

15 10. The evidence at trial established the Board met in executive session
16 after an open meeting to discuss the threatened litigation by the attorney for owners of
17 lots 36 and 56. The discussion of pending or contemplated litigation is an appropriate
18 and legal reason for meeting behind closed doors. No evidence was presented that the
19 Board made a formal decision to approve the requested construction on lots 36 and 56.
20 In fact, the testimony of Board President Paul Swan established that it was the ACC that
21 made the actual decision to approve the construction requests shortly after the October
22 30, 2007 meeting. The October 30, 2007 discussion of the lot owners' requests for
23 approval of construction, having been done in closed session due to the threat of pending
24 or contemplated litigation, was not done in violation of A.R.S. 33-1804. Count 5,
25 therefore, is dismissed.

26 11. Although Respondent prevailed in this matter, an administrative
27 proceeding is not an "action" such as to make attorney's fees awardable under A.R.S.
28 §§ 33-1807(H) or 12-341.01.⁵ Respondent's request for attorneys' fees must therefore
29 be denied.

30 12. Petitioners are not the prevailing party and are not entitled to be
reimbursed the cost of their filing fees under A.R.S. § 41-2198.02(A).

⁵ See *Semple v. Tri-City Drywall, Inc.*, 172 Ariz. 608, 611-612, 838 P.2d 1369, 1372-73 (App. 1992)
(Prevailing party in administrative claim before Registrar of Contractors was not entitled to attorney's
fees from its opponent under A.R.S. § 12-341.01(A) because administrative hearing is not an "action").

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

ORDER

Based on the foregoing,

IT IS ORDERED dismissing the Petition against Respondent Sycamore Hills Homeowners Association, Inc. in its entirety in Case No. HO 08-8/008.

IT IS FURTHER ORDERED denying Respondent's request for attorney's fees.

Pursuant to A.R.S. §41-2198.04(A), this Order is the final administrative decision and it is not subject to a request for rehearing.

Done this day, May 22, 2008.

Office of Administrative Hearings

Michael G. Wales
Administrative Law Judge

Original transmitted by mail this
____ day of _____, 2008, to:

Department of Fire Building and Life Safety - H/C
Robert Barger, Director
ATTN: Debra Blake
1110 W. Washington, Suite 100
Phoenix, AZ 85007

John F. and Patricia E. Monahan
16495 S. Saguaro View Lane

1 Tucson, Arizona 85741

2 Petitioners

3
4 Carolyn B. Goldschmidt, Esq.

5 Goldschmidt Law Firm

6 4558 North First Avenue, Suite 150

7 Tucson, Arizona 85718

8 Attorney for Respondent

9 By _____