

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

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3 **ALJFIN ALJ Decision final by statute**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 LON JAMES

8 Petitioner,

9 vs.

10
11 CORTE BELLA COUNTRY CLUB
12 ASSOCIATION,

13 Respondent.

No. 08F-H089001-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

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16 **HEARING:** September 16, 2008

17 **APPEARANCES:** Lon James appeared on his own behalf; Angela Potts, Esq.
18 appeared on behalf of Corte Bella Country Club Association

19 **ADMINISTRATIVE LAW JUDGE:** Lewis D. Kowal

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22 **RULINGS AT HEARING**¹

23 **Allegation of Violation of Sec 3.14 of Bylaws:** Precluded based on requirement
24 of Article XVII of Corte Bella Country Club Association's ("Respondent") Declaration
25 of Covenants, Conditions, and Restrictions ("CC&Rs") that requires that such
26 disputes be resolved by alternative dispute resolution.

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¹ This Administrative Law Decision is issued pursuant to A.R.S. § 41-1092.08(A).

1 **Violation of A.R.S. § 33-1804 (open meeting)**: Respondent's holding of a closed
2 meeting on May 5, 2008 did not violate the requirement to hold an open meeting
3 because the purpose for holding the closed meeting fell within one of the exceptions
4 provided for in A.R.S. § 33-1804.
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10 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

11 1. Lon James ("Petitioner") filed with the Arizona Department of Fire, Building and
12 Life Safety a petition pursuant to A.R.S. 41-2198.01 (B), stating that "[o]n or about May
13 5, 2008...A closed Board Meeting was held to discuss and vote on a proposal to realign
14 the Board. Homeowners were refused permission to attend/participate, in violation of
15 ...Community Bylaws 3.14 A.R.S. 33-1804 [sic]." Respondent, through counsel, filed its
16 response denying the claims and requesting dismissal on the grounds that the claims
17 were subject to alternative dispute resolution and that the exceptions of A.R.S. § 33-
18 1804(A)(1-4) applied.

19 2. Prior to the hearing, Respondent filed a document entitled: "Request for In
20 Camera Review". Along with that filing, Respondent submitted documents "under seal."
21 Respondent also filed a document entitled: " Memorandum of Law Re: Mandatory
22 ADR," in which Respondent requested that the claim regarding a violation of Bylaws
23 Section 3.14 be dismissed because of the existence of mandatory alternative dispute
24 resolution provisions within the CC&Rs.

25 3. Petitioner filed his response to Respondent's memorandum of law and opposed
26 dismissal of the above-mentioned claim.

27 **Allegation of Violation of Sec 3.14 of Bylaws:**

28 4. The parties presented oral argument with respect to the motion for dismissal of
29 the claim as to an alleged violation of Section 3.14 of Respondent's Bylaws. According
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1 to Petitioner, the alternative dispute resolution provisions in Article XVII of the CC&Rs
2 relate to the design or construction of improvement on property. In contrast,
3 Respondent argued that the provisions should be read in the disjunctive and that the
4 alternative dispute resolution provisions apply not only to the design or construction of
5 improvement on property but to claims arising out of or relating to the interpretation,
6 application or enforcement of Respondent's governing documents.

7 5. Upon consideration of the parties' legal arguments and a review of the pertinent
8 provisions of the CC&Rs, the Administrative Law Judge concluded that the alternative
9 dispute resolution provisions contained within the CC&Rs precludes Petitioner's claim
10 pertaining to a violation of Section 3.14 of the Bylaws.

11 **Violation of A.R.S. § 33-1804 (open meeting)**

12 6. Respondent asserted that it would not be able to present evidence showing that
13 the purpose for Respondent's Board of Directors ("Board") holding a closed meeting,
14 because such evidence was inextricably intertwined with confidential information that
15 pursuant to law, Respondent must not publicly disclose. Respondent requested at the
16 Administrative Law Judge review eleven documents *in camera* to make a determination
17 as to whether the documents support a finding that the reason for the Board's closed
18 meeting fell within one of the stated exceptions to an open meeting as provided for in
19 A.R.S. § 33-1804, which governs open meetings of an association such as Respondent.
20 Petitioner objected to that request.

21 7. Respondent identified the following provisions in A.R.S. § 33-1804(A) as the
22 reasons why Respondent's Board held the closed meeting:

23 2. Pending or contemplated litigation.

24 3. Personal, health or financial information about an individual
25 member of the association, an individual employee of the
26 association or an individual employee of a contractor for the
27 association, including records of the association directly related
28 to the personal, health or financial information about an
29 individual member of the association, an individual employee of
30 the association or an individual employee of a contractor for the
association.

4. Matters relating to the job performance of, compensation of,
health records of or specific complaints against an individual
employee of the association or an individual employee of a

1 contractor of the association who works under the direction of
2 the association.

3 8. Although the Administrative law Judge initially did not grant Respondent's
4 request for *in camera* review of documents, upon consideration of oral argument
5 presented by the parties, the Administrative Law Judge considered the competing legal
6 principles of having a full hearing on the merits that is open to the public in contrast to
7 preserving the confidentiality of action taken by Respondent's Board in a closed
8 meeting. The Administrative Law Judge concluded that in order to make a
9 determination how the hearing should proceed, an *in camera* review of Respondent's
10 sealed documents was necessary.

11 9. As guidance in reaching the determination to perform an *in camera* review of
12 documents, the Administrative Law Judge considered action taken by the Arizona
13 Supreme Court in *Griffis v. Pinal County and Phoenix Newspapers, Inc.*, 215 Ariz. 1,
14 156 P.3d 418 (2006), wherein the Supreme Court remanded the case to the trial court
15 to perform an *in camera* review to determine whether purely personal e-mails generated
16 or maintained on a governmental e-mail system fall within the public records law.

17 10. Respondent generally identified the eleven documents that were provided to the
18 Administrative Law Judge for his *in camera* review. The Administrative Law Judge
19 informed the parties that the *in camera* review of the eleven documents revealed that
20 the Board's closed meeting was properly held as a closed meeting because the purpose
21 of holding the meeting fell within at least one of the stated exceptions to requiring an
22 open meeting as set forth in A.R.S. § 33-1804. The Administrative Law Judge admitted
23 into evidence under seal the above-mentioned eleven documents.

24 11. The Administrative Law Judge provided an opportunity for Petitioner to make an
25 Offer of Proof as to the testimonial and documentary evidence he would have
26 presented. The information presented in Petitioner's Offer of Proof did not cause further
27 review as to whether the Board's closed meeting was held in accordance with A.R.S. §
28 33-1804. In fact, some of the information that was presented in Petitioner's Offer of
29 Proof supports the conclusion that the Board's closed meeting was held in accordance
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1 with one of the permissible exceptions to an open meeting as provided for in A.R.S. §
2 33-1804, namely, a personnel matter.

3 12. In lieu of taking this matter under advisement, having fully considered the results
4 of the *in camera* review of documents and Petitioner's Offer of Proof, the Administrative
5 Law Judge issued his ruling from the bench. The Administrative Law Judge informed
6 the parties that Petitioner was not the prevailing party and dismissed the Petition.
7 Consequently, it is determined that Petitioner is not entitled to reimbursement of his
8 filing fee.

9 13. Although Respondent did not request attorneys' fees at the hearing, it did make
10 such a request in its Response to the Petition. Therefore, the Administrative Law Judge
11 shall address that issue. In the Response, Respondent relied upon A.R.S. § 12-341.10
12 for an award of attorneys' fees and costs. An administrative proceeding is not an
13 "action" such as to make attorney's fees awardable under A.R.S. § 12-341.01.² It is
14 noted that Respondent did not cite to any provision in its governing documents that
15 provides for an award of attorneys' fees or costs in a proceeding such as the instant
16 one. Consequently, Respondent did not establish an entitlement to its attorneys' fees or
17 costs.

18 **ORDER**

19 **IT IS ORDERED** dismissing the Petition.³

20 A party may appeal a final administrative decision pursuant to Title 12, Chapter
21 7, Article 6. See A.R.S. § 41-1092.08(H). A.R.S. § 12-904(A) provides, in pertinent
22 part, that: "[a]n action to review a final administrative decision shall be commenced by
23 filing a complaint within thirty-five days from the date when a copy of the decision
24 sought to be reviewed is served upon the party affected. . . . Service is complete on
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26 ² See *Semple v. Tri-City Drywall, Inc.*, 172 Ariz. 608, 611-612, 838 P.2d 1369, 1372-73 (App. 1992)
27 (Prevailing party in administrative claim before Registrar of Contractors was not entitled to attorney's
28 fees from opponent under A.R.S. § 12-341.01(A) because an administrative hearing is not an "action").

29 ³ Pursuant to A.R.S. § 41-2198.04(A), this Order is the final administrative decision and is not subject to
30 a request for rehearing. It is enforceable through contempt of court proceedings. A.R.S. § 41-
2198.02(B).

1 personal service or five days after the date that the final administrative decision is
2 mailed to the party's last known address.”

3 Done this day, September 25, 2008.

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5 _____
6 Lewis D. Kowal
7 Administrative Law Judge

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

10 Department of Fire Building and Life Safety - H/C
11 Robert Barger, Director
12 ATTN: Debra Blake
13 1110 W. Washington, Suite 100
14 Phoenix, AZ 85007

15 Lon James
16 21824 North Las Positas Ct.
17 Sun City West, AZ 85375

18 Angela Potts, Esq.
19 Ekmark & Ekmark, LLC
20 6720 N. Scottsdale road, Suite 261
21 Scottsdale, AZ 85253

22 By _____
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