

Final agency action regarding decision below:

AACCEP Agency accepts decision FINAL ORDER the Director accepts the Recommended Order .rjr 11/2/12: Two duplicate copies received.rjr

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

JOHN AND DEBBORAH SELLERS,  
Petitioners,

No. 11F-H1112003-BFS  
ADMINISTRATIVE  
LAW JUDGE DECISION

vs.

CROSSINGS AT WILLOW CREEK  
PROPERTY OWNERS ASSOCIATION,  
Respondent.

**HEARING:** October 11, 2012, at 8:00 a.m.  
**APPEARANCES:** John and Debborah Sellers (hereinafter "Petitioners")  
appeared through John Sellers. Crossings at Willow Creek Property Owners  
Association (hereinafter "Crossings") appeared through its attorney, Matthew G. Hayes  
Esq., Jones, Skelton & Hochuli PLC.  
**ADMINISTRATIVE LAW JUDGE:** M. Douglas

Evidence and testimony were presented and the following Findings of Fact,  
Conclusions of Law and Recommended Order are made:

**FINDINGS OF FACT**

1. The Department of Fire, Building and Life Safety (the “Department”) is authorized by statute to receive Petitions for Hearings from members of homeowners’ associations and from homeowners’ associations in Arizona.
2. Crossings is a homeowners’ association located in Prescott, Arizona.
3. Petitioners own a residence in, and are members of, Crossings.
4. Petitioners filed a petition with the Department alleging that Crossings had violated the provisions of A.R.S. § 33-1812 and Article IV, Section 5 of Crossings’ Bylaws. Petitioners specifically alleged that Crossings sought to obtain a 75% vote of property owners to amend Crossings’ CC&Rs but failed to respect the provisions of A.R.S. § 33-1812 “in that Crossings allowed the vote to be carried over and remain open, as they had insufficient votes at closure of the meeting as scheduled.”. Petitioners further allege that Crossing failed to “respect” Article IV, Section 5 of the Bylaws by allowing property owners with alleged conflicts to vote on the motion to amend Crossings’ CC&Rs.
5. Crossings’ Answer to the Petition provided, in part, as follows:

The Association did not go through with the vote that [Petitioners are] complaining about. Rather, the Association conducted a subsequent vote on certain matters, however, as to the amendments to the declaration, the Association used written approvals signed [by] members as opposed to absentee ballots and votes. The Associations conduct was completely in line with the governing documents and the applicable law.

**Janice Dow’s testimony**

6. Janice Dow (hereinafter “Ms. Dow”) testified that that she owns four lots in Crossings but does not live in Crossings. Ms. Dow stated that she is the secretary for Crossings. Ms. Dow testified that there are 79 lots in the Association and that a 75% vote of the property owners in Crossings is required for a change in CCRs.
7. Ms. Dow testified that on July 15, 2010, Crossings held an association meeting regarding a proposed change in CC&Rs. Ms. Dow stated that there were 58 yes votes and 2 no votes at the July 15, 2010 meeting. Ms. Dow acknowledged that 58 votes were less than the required 75% vote of property owners necessary to change the CCRs.

- 1 8. Ms. Dow testified that the association meeting was extended until July 26, 2010.  
2 Ms. Dow stated that the Association “carried-over” absentee votes from the July 15  
3 meeting and that with the carried-over absentee votes there was total of 62 yes  
4 votes on July 26, 2010.
- 5 9. On July 29, 2010, the Board of Directors for Crossings voted to “re-do” the previous  
6 balloting with new ballots to be due on September 17, 2010.
- 7 10. Ms. Dow testified that in the “re-do” ballot counting there were 46 votes for the  
8 change in Crossings’ CCRs and 2 against. Ms. Dow acknowledged that the total of  
9 48 votes was less than 75% of the property owners of Crossings.
- 10 11. Ms. Dow testified that on January 18, 2011, the Board accepted and approved the  
11 October 11, 2010 vote for the proposed CCR amendments.
- 12 12. Ms. Dow testified that every member of the Crossings has a right to vote in any in  
13 any elections held by Crossings.

14 **Robert Balzano’s testimony**

- 15 13. Robert Balzano (hereinafter “Mr. Balzano”) testified that in 2010 he was the  
16 managing agent for Crossings. Mr. Balzano acknowledged that a 75% vote of  
17 property owners was required to amend the CC&Rs of Crossings. Mr. Balzano  
18 stated that a least 60 votes would have to be cast in order to constitute 75% of the  
19 property owners necessary to amend the CCRs. Mr. Balzano acknowledged that  
20 the Board “carried-over” and re-counted the same votes that were cast on July 15,  
21 2010, in the counting that took place on July 26, 2010.

22 **Debra Sellers’ testimony**

- 23 14. Debra Sellers (hereinafter “Mrs. Sellers”) testified that she attended the July 26,  
24 2010 special members meeting for Crossings. Mrs. Sellers stated that the material  
25 she received for the special members meeting stated that all of the votes in the July  
26 15, 2010 meeting were to be counted at that time, with the conclusion of all voting on  
27 July 15, 2010. Mrs. Sellers stated that the Board “unilaterally” decided to extend the  
28 voting process until July 26, 2010.

29 **John Seller’s testimony**

- 30 15. Mr. Sellers opined that Crossings’ action in allowing votes to be carried over from

1 the July 15, 2010 meeting to the July 26, 2010 meeting were in violation of A.R.S. §  
2 33-1812. Mr. Sellers alleged that Crossings failed to “respect” the provisions of  
3 Article IV, Section 5 of Crossings’ Bylaws because he believed that members of the  
4 Association with alleged conflicts were allowed to vote.

5  
6 **PROVISIONS OF LAW REFERENCED AT HEARING**

7  
8 1. A.R.S. § 33-1812 provides as follows:

9 A. Notwithstanding any provision in the community documents,  
10 after termination of the period of declarant control, votes allocated  
11 to a unit may not be cast pursuant to a proxy. The association  
12 shall provide for votes to be cast in person and by absentee ballot  
13 and may provide for voting by some other form of delivery.  
14 Notwithstanding section 10-3708 or the provisions of the  
15 community documents, any action taken at an annual, regular or  
16 special meeting of the members shall comply with all of the  
17 following if absentee ballots are used:

- 18 1. The absentee ballot shall set forth each proposed action.
- 19 2. The absentee ballot shall provide an opportunity to vote for or  
20 against each proposed action.
- 21 3. The absentee ballot is valid for only one specified election or  
22 meeting of the members and expires automatically after the  
23 completion of the election or meeting.
- 24 4. The absentee ballot specifies the time and date by which the  
25 ballot must be delivered to the board of directors in order to be  
26 counted, which shall be at least seven days after the date that the  
27 board delivers the unvoted absentee ballot to the member.
- 28 5. The absentee ballot does not authorize another person to cast  
29 votes on behalf of the member.

30 B. Votes cast by absentee ballot or other form of delivery are valid  
for the purpose of establishing a quorum.

C. Notwithstanding subsection A of this section, an association for  
a timeshare plan as defined in section 32-2197 may permit votes  
by a proxy that is duly executed by a unit owner.

1 D. For the purposes of this section, "period of declarant control"  
2 means the time during which the declarant or persons designated  
3 by the declarant may elect or appoint the members of the board of  
4 directors pursuant to the community documents or by virtue of  
5 superior voting power.

6 **Bylaws Referenced at Hearing**

- 7 1. Article IV, Section 5 of Crossings' Bylaws provides, in pertinent part, as follows:

8 Procedure. Robert's Rules of Order (latest edition) shall govern  
9 the conduct of the Association meetings when not in conflict with  
10 the Declaration, the Articles or these Bylaws.

11 **CONCLUSIONS OF LAW**

- 12 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to file a  
13 petition with the Department for a hearing concerning violations of planned  
14 community documents or violations of statutes that regulate planned communities.  
15 That statute provides that such petitions will be heard before the Office of  
16 Administrative Hearings.
- 17 2. The burden of proof at an administrative hearing falls to the party asserting a claim,  
18 right, or entitlement and the standard of proof on all issue in this matter is by a  
19 preponderance of the evidence. See A.A.C. R2-19-119.
- 20 3. Proof by "preponderance of the evidence" means that it is sufficient to persuade the  
21 finder of fact that the proposition is "more likely true than not." *In re Arnold and*  
22 *Baker Farms*, 177 B.R. 648, 654 (9<sup>th</sup> Cir. BAP (Ariz.) 1994).
- 23 4. In this matter, Crossings utilized absentee ballots from a special members' meeting  
24 on July 15, 2010, at a second special members' meeting on July 26, 2010. This  
25 Tribunal concludes that Crossings violated the charged provision of A.R.S. § 33-  
26 1812(3).
- 27 5. There was no credible evidence that Crossings violated Article IV, Section 5 of its  
28 Bylaws.

29 **RECOMMENDED ORDER**

1 In view of the foregoing, it is ORDERED that Petitioners be deemed the  
2 prevailing party in this matter.

3 It is further ORDERED that Crossings comply with the applicable provisions of  
4 A.R.S. § 33-1812 in the future.

5 It is further ORDERED that Crossings pay Petitioners their filing fee of \$550.00,  
6 to be paid to the Department in this matter within thirty (30) days of this Order.

7 It is further ORDERED that Crossings pay a civil penalty in the amount of  
8 \$200.00 to the Department within thirty (30) days of the date of this Order.

9 *In the event of certification of the Administrative Law Judge Decision by the*  
10 *Director of the Office of Administrative Hearings, the effective date of this Order will*  
11 *be five (5) days from the date of that certification.*

12 Done this day, October 22, 2012.

13  
14 /s/ M. Douglas  
15 Administrative Law Judge  
16

17 Transmitted electronically to:

18 Gene Palma, Director  
19 Department of Fire Building and Life Safety  
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