

BEFORE THE DEPARTMENT OF FIRE, BUILDING AND LIFE SAFETY
OFFICE OF ADMINISTRATION
IN AND FOR THE STATE OF ARIZONA

JOHN AND DEBBORAH SELLERS,)
)
 Petitioners,)
)
 vs.)
)
 CROSSING AT WILLOW CREEK)
 PROPERTY OWNERS ASSOCIATION,)
)
 Respondent.)

CASE NO. HO 11-12/003

DOCKET NO. 11F-H1112003-BFS

FINAL ORDER

Pursuant to Arizona Revised Statutes ("A.R.S.") § 41-1092.08, the attached Administrative Law Judge Decision was reviewed by the Director of the Department of Fire, Building and Life Safety ("Director") and is accepted, in part, and modified, in part, as follows:

ORDER

The Director accepts the Recommended Order that Respondent shall comply with the applicable provision of Arizona Revised Statutes ("A.R.S.") § 33-1812 in the future; and

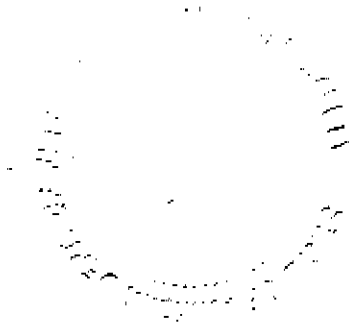
The Director accepts that Respondent shall pay Petitioners their filing fee in the amount of \$550.00 within thirty (30) days of this Order; however, the Director modifies that the payment shall be made directly to Petitioners instead of to the Department. Within forty-five days of the date of this Order, Respondent shall submit to the Department proof of payment made to Petitioners within thirty (30) days of this Order; and

The Director accepts the Recommended Order that Respondent is ordered to pay a civil penalty in the amount of \$200.00 to the Department within thirty (30) days of the date of this Order.

1 Pursuant to A.R.S. § 41-1092.09, a party may file a motion for rehearing or
2 review within thirty (30) days after the service of this final Order. A written request for
3 rehearing should be addressed to Joni Cage, 1110 West Washington, Suite 100, Phoenix,
4 Arizona, 85007.

5 This Order is a final administrative action and is effective immediately from
6 the date service is complete. A party may appeal this final administrative decision by filing
7 a complaint for judicial review pursuant to title 12, chapter 7, article 6. The Order will not be
8 stayed unless a stay is obtained from the court in conjunction with the judicial review action.

9 **DATED this 2nd day of November, 2012.**



10
11 
12 _____
13 **Gene Palma, Director**
14 **DEPARTMENT OF FIRE, BUILDING**
15 **AND LIFE SAFETY**

16 **The foregoing mailed this 2nd day of November, 2012,**
17 **via certified mail receipt no. 7010 2780 0001 6949 8051 to:**

18 John and Debborah Sellers
19 595 Robin Drive
20 Prescott, AZ 86305

21 **Copy sent via certified mail receipt no. 7010 2780 0001 6949 8068 to:**

22 Esquire Village Homeowners Association
23 c/o Jones, Skelton & Hochuli, P.L.C.
24 2901 North Central Avenue, Suite 800
25 Phoenix, AZ 85012

26 *////*

27 *////*

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1 Copy electronically transmitted to:

2 Office of Administrative Hearings
3 1400 W. Washington, Suite 101
4 Phoenix, AZ 85007

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6 By: Debra Blake for
7 Joni Cage
8 Complaint Program Manager
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1 4. Petitioners filed a petition with the Department alleging that Crossings had violated
2 the provisions of A.R.S. § 33-1812 and Article IV, Section 5 of Crossings' Bylaws.
3 Petitioners specifically alleged that Crossings sought to obtain a 75% vote of
4 property owners to amend Crossings' CC&Rs but failed to respect the provisions of
5 A.R.S. § 33-1812 "in that Crossings allowed the vote to be carried over and remain
6 open, as they had insufficient votes at closure of the meeting as scheduled."
7 Petitioners further allege that Crossing failed to "respect" Article IV, Section 5 of the
8 Bylaws by allowing property owners with alleged conflicts to vote on the motion to
9 amend Crossings' CC&Rs.

10 5. Crossings' Answer to the Petition provided, in part, as follows:

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

18 **Janice Dow's testimony**

- 19 6. Janice Dow (hereinafter "Ms. Dow") testified that that she owns four lots in
20 Crossings but does not live in Crossings. Ms. Dow stated that she is the secretary
21 for Crossings. Ms. Dow testified that there are 79 lots in the Association and that a
22 75% vote of the property owners in Crossings is required for a change in CCRs.
23 7. Ms. Dow testified that on July 15, 2010, Crossings held an association meeting
24 regarding a proposed change in CC&Rs. Ms. Dow stated that there were 58 yes
25 votes and 2 no votes at the July 15, 2010 meeting. Ms. Dow acknowledged that 58
26 votes were less than the required 75% vote of property owners necessary to change
27 the CCRs.
28 8. Ms. Dow testified that the association meeting was extended until July 26, 2010.
29 Ms. Dow stated that the Association "carried-over" absentee votes from the July 15
30 meeting and that with the carried-over absentee votes there was total of 62 yes
votes on July 26, 2010.

1 9. On July 29, 2010, the Board of Directors for Crossings voted to "re-do" the previous
2 balloting with new ballots to be due on September 17, 2010.

3 10. Ms. Dow testified that in the "re-do" ballot counting there were 46 votes for the
4 change in Crossings' CCRs and 2 against. Ms. Dow acknowledged that the total of
5 48 votes was less than 75% of the property owners of Crossings.

6 11. Ms. Dow testified that on January 18, 2011, the Board accepted and approved the
7 October 11, 2010 vote for the proposed CCR amendments.

8 12. Ms. Dow testified that every member of the Crossings has a right to vote in any in
9 any elections held by Crossings.

10 **Robert Balzano's testimony**

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

18 **Debra Sellers' testimony**

19 14. Debra Sellers (hereinafter "Mrs. Sellers") testified that she attended the July 26,
20 2010 special members meeting for Crossings. Mrs. Sellers stated that the material
21 she received for the special members meeting stated that all of the votes in the July
22 15, 2010 meeting were to be counted at that time, with the conclusion of all voting
23 on July 15, 2010. Mrs. Sellers stated that the Board "unilaterally" decided to extend
24 the voting process until July 26, 2010.

25 **John Seller's testimony**

26 15. Mr. Sellers opined that Crossings' action in allowing votes to be carried over from
27 the July 15, 2010 meeting to the July 26, 2010 meeting were in violation of A.R.S. §
28 33-1812. Mr. Sellers alleged that Crossings failed to "respect" the provisions of
29 Article IV, Section 5 of Crossings' Bylaws because he believed that members of the
30 Association with alleged conflicts were allowed to vote.

1
2 **PROVISIONS OF LAW REFERENCED AT HEARING**
3

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

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

14 1. The absentee ballot shall set forth each proposed action.

15 2. The absentee ballot shall provide an opportunity to vote for or
16 against each proposed action.

17 3. The absentee ballot is valid for only one specified election or
18 meeting of the members and expires automatically after the
19 completion of the election or meeting.

20 4. The absentee ballot specifies the time and date by which the
21 ballot must be delivered to the board of directors in order to be
22 counted, which shall be at least seven days after the date that the
23 board delivers the unvoted absentee ballot to the member.

24 5. The absentee ballot does not authorize another person to cast
25 votes on behalf of the member.

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

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

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

Bylaws Referenced at Hearing

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

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

5
6 **CONCLUSIONS OF LAW**

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

24
25 **RECOMMENDED ORDER**

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

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

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

3 It is further ORDERED that Crossings pay a civil penalty in the amount of
4 \$200.00 to the Department within thirty (30) days of the date of this Order.

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

8
9 Done this day, October 22, 2012.

10
11 /s/ M. Douglas
12 Administrative Law Judge

13
14 Transmitted electronically to:

15 Gene Palma, Director
16 Department of Fire Building and Life Safety