

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

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3 **ALJCERT ALJ decision certified as final**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 JOHN AND DEBBORAH SELLERS

8 Petitioners,

9 vs

10 CROSSINGS AT WILLOW CREEK
11 PROPERTY OWNERS ASSOCIATION,

12 Respondent.

**No. 12F-H1212002-BFS
No. 12F-H1212009-BFS
ADMINISTRATIVE
LAW JUDGE DECISION**

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16 **HEARING:** September 26, 2012, at 8:00 a.m., and January 4, 2013, at 8:00 a.m.

17 **APPEARANCES:** John and Debborah Sellers (hereinafter "Petitioners")
18 appeared through John Sellers. Crossings at Willow Creek Property Owners
19 Association (hereinafter "Crossings") appeared through its attorney, Joshua M. Bolen,
20 Esq., Carpenter, Hazlewood, Delgado & Bolen, PLC.

21 **ADMINISTRATIVE LAW JUDGE:** M. Douglas

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

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27 **FINDINGS OF FACT**

- 28
29 1. The Department of Fire, Building and Life Safety (the "Department") is authorized by
30 statute to receive Petitions for Hearings from members of homeowners' associations
and from homeowners' associations in Arizona.

- 1 2. Crossings is a homeowners' association located in Prescott, Arizona.
2 3. Petitioners own a residence in and are members of Crossings.
3 4. These two matters, 12F-H1212002-BFS and 12F-H1212009-BFS involved the same
4 parties and were consolidated for hearing.
5 5. Petitioners' one issue set forth in their petition in 12F-H1212002-BFS is as follows:
6 Failure to notice and conduct publicly ARC [Architectural
7 Review Committee] Meetings pursuant to ARS 33-1804 and the
8 Community Documents.

- 8 6. Petitioners' one issue set forth in their petition in 12F-H1212009-BFS is related to
9 Crossings' alleged failure to provide requested HOA records. The ADDENDUM to
10 the Petition Form provides, in pertinent part, as follows:

11 On multiple occasions in the past, the HOA, via its attorneys,
12 have flatly refused to supply ANY records on the following list:
13 1. Invoices of the HOA attorneys, Carpenter Hazelwood.
14 2. Communications between the HOA Attorneys and third
15 parties. Such communications would, by definition, not
16 comprise client-attorney privileged communications. We also
17 extended that definition to include third party correspondence
18 where such correspondence would be clearly marked "for
19 settlement purposes." This would avoid the HOA tipping its
20 hand in any negotiations on an outstanding Declaratory Action
21 with the City of Prescott as plaintiff, and all HOA members as
22 defendant.

- 20 7. Respondent's Replies to the Petitions provided, in part, as follows:

21 12F-H1212002-BFS

22 [The] Respondent denies each and every allegation set forth in
23 the Petition. The Respondent has complied and continues to
24 comply with A.R.S. § 33-1804 and its Bylaws as they apply to the
25 Respondent's architectural review process.

26 12F-H1212009-BFS

27 [The] Respondent denies the complaint items in the Petition.

28 **TESTIMONY**
29
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1 8. G. Eugene Neil (hereinafter "Mr. Neil"), testified that he is the interim City Attorney
2 for the City of Prescott. Mr. Neil stated that the City of Prescott provided Petitioners
3 with ninety pages of documents requested in Petitioners' subpoena. Mr. Neil
4 testified that all of the documents were public records. Mr. Neil stated that the City
5 of Prescott was currently involved in civil litigation with Crossings.¹

6 9. Larry Harding (hereinafter "Mr. Harding") testified that he is the commercial
7 insurance agent for Crossings. Mr. Harding stated he provided records to
8 Petitioners pursuant to the subpoena issued to him. Mr. Harding testified that when
9 he receives a letter from Crossings' attorney it usually relates to the potential of a
10 possible insurance claim against the insured.²

11 10. Brenda Doziar (hereinafter "Ms. Doziar") testified that she is a member of the Board
12 for Crossings and an ARC member. Ms. Doziar stated that when she reviews an
13 ARC application, it is to review the plans with Crossings' architect. Ms. Doziar
14 testified the ARC would then make a determination whether to accept, change, or
15 reject the ARC application. Ms. Doziar stated that a member of the board of
16 Crossings had been on the ARC. Ms. Doziar testified that ARC meetings are not
17 noticed but are open to all members. Ms. Doziar stated that the ARC reviews
18 applicable architectural guidelines. Ms. Doziar stated that the owner of the property
19 is always invited to the ARC meeting. Ms. Doziar testified that the committee
20 meetings take place at one of the committee member's residence. Ms. Doziar
21 stated that the meetings are open because the committee has never denied access
22 to any member to attend an ARC meeting. Ms. Doziar stated that the committee has
23 never received a request from an owner to attend an ARC meeting.³

24 11. Ms. Doziar testified that the ARC meetings take place as often as necessary. Ms.
25 Doziar stated that meetings for the ARC depend upon the architectural submissions
26 presented. Ms. Doziar testified that there have been months when no ARC
27 meetings have taken place and months where the ARC has met more than once a
28 month. Ms Doziar stated that Petitioners would have been granted access to any

29 ¹ 9/26/12 Hearing Record (Hereinafter "H.R.") at 25:48-36:10.

30 ² H.R. at 37:30-46:13.

³ H.R. at 47:27-56:36.

ARC meeting.⁴

12. Robert Balzano (hereinafter "Mr. Balzano") testified that he currently was involved with ARC projects that were submitted prior to September 1, 2012. Mr. Balzano stated that he had previously been the statutory agent and manager of Crossings. Mr. Balzano testified that there were no formal scheduled meetings for the ARC. Mr. Balzano stated that committee meetings are scheduled when applications for review by the ARC are submitted. Mr. Balzano testified that there are no provisions in Crossings' Bylaws that require regularly scheduled meetings by the ARC.⁵

13. Mr. Balzano testified if the ARC meetings were scheduled regularly, then notice of the regularly scheduled meetings would be posted. Mr. Balzano stated there has been one request by a homeowner to attend an ARC meeting. Mr. Balzano testified that after he received the request, he notified the homeowner of the ARC meeting.⁶

14. Kenneth Burnett (hereinafter "Mr. Burnett") testified that is a member of the Board of Crossings. Mr. Burnett stated that the Board had never taken a policy position about ARC meetings being held publicly. Mr. Burnett testified that he had not attended an ARC meeting. Mr. Burnett stated that ARC meetings occur on demand. Mr. Burnett testified that the minutes the ARC meetings are taken. Mr. Burnett stated that he does not know if the ARC' meeting minutes are published.⁷

15. Deborah J. Sellers (hereinafter "Ms. Sellers") testified that she had been an interior designer for over twenty-five years. Ms. Sellers stated that she voluntarily offered to serve on the ARC. Ms. Sellers testified that the Board chose someone else. Ms. Sellers stated that the person selected for the ARC is no longer serving due to health reasons and that no replacement has been appointed by the Board.⁸

APPLICABLE PROVISIONS OF LAW REFERENCED AT HEARING

1. A.R.S. § 33-1804(A) and (B) provides as follows:

⁴ H.R. at 56:37-1:05:11.

⁵ H.R. at 1:05:55-1:11:51.

⁶ H.R. at 1:11:52-1:39:23.

⁷ H.R. at 1:41:40-1:50:47.

⁸ H.R. at 1:52:23-1:56:35.

1 A. Notwithstanding any provision in the declaration, bylaws or
2 other documents to the contrary, all meetings of the members'
3 association and the board of directors, and any regularly
4 scheduled committee meetings, are open to all members of the
5 association or any person designated by a member in writing
6 as the member's representative and all members or designated
7 representatives so desiring shall be permitted to attend and
8 speak at an appropriate time during the deliberations and
9 proceedings. The board may place reasonable time restrictions
10 on those persons speaking during the meeting but shall permit
11 a member or member's designated representative to speak
12 once after the board has discussed a specific agenda item but
13 before the board takes formal action on that item in addition to
14 any other opportunities to speak. The board shall provide for a
15 reasonable number of persons to speak on each side of an
16 issue. Persons attending may tape record or videotape those
17 portions of the meetings of the board of directors and meetings
18 of the members that are open. The board of directors of the
19 association may adopt reasonable rules governing the taping of
20 open portions of the meetings of the board and the
21 membership, but such rules shall not preclude such tape
22 recording or videotaping by those attending. Any portion of a
23 meeting may be closed only if that closed portion of the
24 meeting is limited to consideration of one or more of the
25 following:

- 26 1. Legal advice from an attorney for the board or the
27 association. On final resolution of any matter for which the
28 board received legal advice or that concerned pending or
29 contemplated litigation, the board may disclose information
30 about that matter in an open meeting except for matters that
are required to remain confidential by the terms of a settlement
agreement or judgment.
2. Pending or contemplated litigation.
3. Personal, health or financial information about an individual
member of the association, an individual employee of the
association or an individual employee of a contractor for the
association, including records of the association directly related
to the personal, health or financial information about an
individual member of the association, an individual employee of
the association or an individual employee of a contractor for the
association.

1 4. Matters relating to the job performance of, compensation of,
2 health records of or specific complaints against an individual
3 employee of the association or an individual employee of a
4 contractor of the association who works under the direction of
5 the association.

6 5. Discussion of a member's appeal of any violation cited or
7 penalty imposed by the association except on request of the
8 affected member that the meeting be held in an open session.

9 B. Notwithstanding any provision in the community documents,
10 all meetings of the members' association and the board shall
11 be held in this state. A meeting of the members' association
12 shall be held at least once each year. Special meetings of the
13 members' association may be called by the president, by a
14 majority of the board of directors or by members having at least
15 twenty-five per cent, or any lower percentage specified in the
16 bylaws, of the votes in the association. Not fewer than ten nor
17 more than fifty days in advance of any meeting of the members
18 the secretary shall cause notice to be hand-delivered or sent
19 prepaid by United States mail to the mailing address for each
20 lot, parcel or unit owner or to any other mailing address
21 designated in writing by a member. The notice shall state the
22 time and place of the meeting. A notice of any special meeting
23 of the members shall also state the purpose for which the
24 meeting is called, including the general nature of any proposed
25 amendment to the declaration or bylaws, changes in
26 assessments that require approval of the members and any
27 proposal to remove a director or an officer. The failure of any
28 member to receive actual notice of a meeting of the members
29 does not affect the validity of any action taken at that meeting.
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2. A.R.S. § 33-1805 provides as follows:

24 A. Except as provided in subsection B of this section, all
25 financial and other records of the association shall be made
26 reasonably available for examination by any member or any
27 person designated by the member in writing as the member's
28 representative. The association shall not charge a member or
29 any person designated by the member in writing for making
30 material available for review. The association shall have ten
business days to fulfill a request for examination. On request
for purchase of copies of records by any member or any person
designated by the member in writing as the member's

1 representative, the association shall have ten business days to
2 provide copies of the requested records. An association may
3 charge a fee for making copies of not more than fifteen cents
4 per page.

5 B. Books and records kept by or on behalf of the association
6 and the board may be withheld from disclosure to the extent
7 that the portion withheld relates to any of the following:

8 1. Privileged communication between an attorney for the
9 association and the association.

10 2. Pending litigation.

11 3. Meeting minutes or other records of a session of a board
12 meeting that is not required to be open to all members pursuant
13 to section 33-1804.

14 4. Personal, health or financial records of an individual member
15 of the association, an individual employee of the association or
16 an individual employee of a contractor for the association,
17 including records of the association directly related to the
18 personal, health or financial information about an individual
19 member of the association, an individual employee of the
20 association or an individual employee of a contractor for the
21 association.

22 5. Records relating to the job performance of, compensation of,
23 health records of or specific complaints against an individual
24 employee of the association or an individual employee of a
25 contractor of the association who works under the direction of
26 the association.

27 C. The association shall not be required to disclose financial
28 and other records of the association if disclosure would violate
29 any state or federal law.

30 3. A.R.S. § 12-2234 provides, in pertinent part, as follows:

A. In a civil action an attorney shall not, without the consent of
his client, be examined as to any communication made by the
client to him, or his advice given thereon in the course of
professional employment. An attorney's paralegal, assistant,
secretary, stenographer or clerk shall not, without the consent
of his employer, be examined concerning any fact the
knowledge of which was acquired in such capacity.

1 B. For purposes of subsection A, any communication is
2 privileged between an attorney for a corporation, governmental
3 entity, partnership, business, association or other similar entity
4 or an employer and any employee, agent or member of the
5 entity or employer regarding acts or omissions of or information
6 obtained from the employee, agent or member if the
7 communication is either:

8 1. For the purpose of providing legal advice to the entity or
9 employer or to the employee, agent or member.

10 2. For the purpose of obtaining information in order to provide
11 legal advice to the entity or employer or to the employee, agent
12 or member.

13 C. The privilege defined in this section shall not be construed to
14 allow the employee to be relieved of a duty to disclose the facts
15 solely because they have been communicated to an attorney.

16 **APPLICABLE BYLAWS CITED AT HEARING**

- 17 1. ARTICLE XI Section 3 of Crossings' Bylaws provides, in pertinent part, as follows:

18 The Architectural Review Committee shall meet from time to
19 time as necessary to perform its duties hereunder. The vote or
20 written consent of a majority of the members of the Committee,
21 at a meeting or other, shall constitute the act of the Committee
22 unless the unanimous decision of the Committee is required by
23 any other provision of the Declaration. The Committee shall
24 keep and maintain a written record of all actions taken by it at
25 such meetings or otherwise.

26 **CONCLUSIONS OF LAW**

- 27 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to file a
28 petition with the Department for a hearing concerning violations of planned
29 community documents or violations of statutes that regulate planned communities.
30

1 That statute provides that such petitions will be heard before the Office of
2 Administrative Hearings.

- 3 2. The burden of proof at an administrative hearing falls to the party asserting a claim,
4 right, or entitlement and the standard of proof on all issue in this matter is by a
5 preponderance of the evidence. See A.A.C. R2-19-119.
- 6 3. Proof by “preponderance of the evidence” means that it is sufficient to persuade the
7 finder of fact that the proposition is “more likely true than not.” *In re Arnold and*
8 *Baker Farms*, 177 B.R. 648, 654 (9th Cir. BAP (Ariz.) 1994).
- 9 4. Credible testimony and evidence established that the ARC meetings take place as
10 necessary and are not regularly scheduled. Applicable statute and CC&Rs of
11 Crossings do not require notice of irregularly scheduled meetings by committees.
12 Petitioners failed to prove by a preponderance of the evidence that Crossings
13 violated the provisions of A.R.S. § 33-1804 and/or Crossings’ CC&Rs.
- 14 5. Petitioners are not the prevailing party in Docket No. 12F-H1212002-BFS and have
15 not shown that they are entitled to the relief that they have requested in their petition.
- 16 6. Credible testimony and evidence established that Crossings’ refusal to release the
17 requested documents was based upon the exceptions provided by applicable statute
18 for attorney/client privileged material. Petitioners failed to prove by a preponderance
19 of the evidence that Crossings’ refusal to provide Petitioners with the requested
20 documents violated applicable statute and/or Crossings’ CC&Rs.
- 21 7. Petitioners are not the prevailing party in Docket No. 12F-H1212009-BFS and have
22 not shown that they are entitled to the relief that they have requested in their petition.

23
24 **RECOMMENDED ORDERS**

25
26 **12F-H1212002-BFS**

27 In view of the foregoing, it is ORDERED that this petition shall be dismissed and
28 that no action is required by Crossings.
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12F-H1212009-BFS

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2 In view of the foregoing, it is ORDERED that this petition shall be dismissed and that
3 no action is required by Crossings.
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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, January 17, 2013.

10
11 /s/ M. Douglas
12 Administrative Law Judge
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14 Transmitted electronically to:

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