

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**

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7 NANCY L. BABINGTON,

8 Petitioner,

9 vs

10 PARK SCOTTSDALE II TOWNHOUSE  
11 HOA,

12 Respondent.

**No. 13F-H1313004-BFS**

**ADMINISTRATIVE  
LAW JUDGE DECISION**

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17 **HEARING:** March 10, 2014, at 8:00 a.m.

18 **APPEARANCES:** Nancy L. Babington (hereinafter "Petitioner" or "Ms.  
19 Babington") appeared on her own behalf. Park Scottsdale II Townhouse HOA  
20 (Hereinafter "Park," "association" or "Respondent") was represented by Charlene Cruz,  
21 Esq., Mulcahy Law Firm, P.C.

22 **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 Order are made:

26 **FINDINGS OF FACT**

- 27 1. The Department of Fire, Building and Life Safety (the "Department") is authorized by  
28 statute to receive Petitions for Hearings from members of homeowners' associations  
29 and from homeowners' associations in Arizona.  
30 2. Park is a homeowners' association located in Scottsdale, Arizona.  
3. Petitioner owns a residence in and is a member of Park.

1 4. Petitioner filed a petition with the Department alleging that Park had violated the  
2 provisions of A.R.S. § 33-1248(B). Petitioner specifically alleged as follows: “We have  
3 not had an annual or any open meeting since 10/01/10.”

4 5. Park’s Amended Answer to the Petition provided, in relevant part, as follows:

5 For clarification the Board has not held an annual meeting in  
6 2010, 2011, 2012, and 2013. The Board attempted to hold a 2014  
7 annual meeting; however, the meeting did not take place because  
8 quorum was not obtained. In addition, the Board had not had any  
9 regular meeting of the membership. Further now the Board has  
only held executive session meetings, which are not noticed to the  
membership.

10 **Petitioner’s Testimony**

11 6. Ms. Babington testified that that Park has not had an annual meeting or an election  
12 since 2009. Ms. Babington stated that she and her friends have repeatedly attempted  
13 to force the Board to hold an annual meeting so that there could be an election for new  
14 members for the Board of Directors (hereinafter “Board”) for Park. Ms. Babington  
15 testified that the Board now consists of individuals who were never elected or whose  
16 terms have expired. Ms. Babington asserted that Park is in violation of the provisions  
17 of A.R.S. § 33-1248(B).

18 **Joe Silberschlag’s Testimony**

19 7. Joe Silberschlag (hereinafter “Mr. Silberschlag”) testified that he is a member of the  
20 Board. Mr. Silberschlag testified that he was elected to the Board in 2009. Mr.  
21 Silberschlag stated that there have been no annual meetings or elections at Park since  
22 2009, because Park was in a very poor financial situation and “we chose not have  
23 annual meetings.”

24 **BYLAWS REFERENCED AT THE HEARING**

25 8. Article III, Corporation Meetings, Section 1, Annual Meetings provides as follows:

26 The annual meeting of the corporation shall be held on the second  
27 Thursday in January, or at such other time as the membership  
28 may [by] majority vote approve. At such meeting there shall be  
29 elected a Board of Directors in accordance with the requirements  
30 of Article IV of these By-Laws. The directors may be elected for a  
three, two, or one year term. The membership may also transact  
such other business of the corporation as may properly come

1 before them.<sup>1</sup>

2 **PROVISIONS OF LAW REFERENCED AT HEARING**

- 3 1. A.R.S. § 33-1248(B) provides as follows:

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

25 **CONCLUSIONS OF LAW**

- 26 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to  
27 file a petition with the Department for a hearing concerning violations of planned  
28 community documents or violations of statutes that regulate planned communities.  
29 That statute provides that such petitions will be heard before the Office of  
30 Administrative Hearings.
2. The burden of proof at an administrative hearing falls to the party asserting a  
claim, right, or entitlement and the standard of proof on all issue in this matter is by a  
preponderance of the evidence. See A.A.C. R2-19-119.

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<sup>1</sup> See Petition in electronic file.

1 3. Proof by “preponderance of the evidence” means that it is sufficient to persuade  
2 the finder of fact that the proposition is “more likely true than not.” *In re Arnold and*  
3 *Baker Farms*, 177 B.R. 648, 654 (9<sup>th</sup> Cir. BAP (Ariz.) 1994).

4 4. Park has failed to hold an annual meeting in 2010, 2011, 2012, 2013, and 2014.  
5 This Tribunal concludes that Park violated the charged provision of A.R.S. § 33-  
6 1248(B), by not holding annual meetings in 2010, 2011, 2012, 2013, and 2014.

7 **RECOMMENDED ORDER**

8 In view of the foregoing, it is ORDERED that Petitioner be deemed the prevailing  
9 party in this matter.

10 It is further ORDERED that Park comply with the applicable provisions of A.R.S.  
11 § 33-1248(B) in the future and that Park schedule an annual meeting within sixty  
12 (60) days of the effective date of this Order.

13 It is further ORDERED that Park pay Petitioner her filing fee of \$550.00, to be  
14 paid to the Petitioner within thirty (30) days of this Order.

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

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

20 Done this day, March 11, 2014.

21 /s/ M. Douglas  
22 Administrative Law Judge  
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25 Transmitted electronically to:

26 Gene Palma, Director  
27 Department of Fire Building and Life Safety  
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