

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

2  
3 **ALJCERT ALJ decision certified as final**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6  
7 CATHERINE MULLANE,

8 Petitioner,

9  
10 VS

11 THUNDER FE CONDOMINIUM GROUP,

12 Respondent.

**No. 15F-H1515016-BFS**

**ADMINISTRATIVE  
LAW JUDGE DECISION**

13  
14  
15 **HEARING:** September 2, 2015, at 8:00 a.m.

16 **APPEARANCES:** Catherine Mullane ("Petitioner") appeared on her own behalf;  
17 Respondent Thunder Fe Condominium Group ("Thunder Fe") appeared through Cliff  
18 DeVlieg, its Chairman of the Board of Management.

19 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

20  
21 **FINDINGS OF FACT**

22 **BACKGROUND AND PROCEDURE**

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

26 2. Thunder Fe is a homeowners' association located in Sun City, Arizona.

27 3. Petitioner owns a residence in and is a member of Thunder Fe.

28 4. Petitioner filed a petition with the Department alleging that Thunder Fe had  
29 violated Article V, paragraph i, number 1 of its Bylaws and applicable Arizona statutes.

30 Petitioner specifically alleged as follows:

On 12/10/2014 @ 2 pm four members of the BOM and unit  
owner/advisor agreed to spend \$13,700 on a landscape project

1 which had never been submitted to a vote of all Thunder Fe unit  
2 owners.

3 5. Thunder Fe's Answer to the Petition provided, in relevant part, as follows:

4 - The project in question was originally voted during the  
5 Annual Meeting November 18, 2010. The need to change from  
6 grass to desert landscape had been discussed for 4 years  
7 previous to that date. (Sheet 1 highlighted area) The vote was  
8 20 yes 3 no. Discussion on this vote was discussed at Board of  
9 Management meetings on Nov. 9, 2011 (Sheet 2 highlighted),  
10 March 22, 2012 (sheet 3 highlighted), and April 18, 2013 (sheet  
11 4 highlighted). The work was scheduled in phases, as money  
12 was available in the "landscape" account. Usually the removal  
13 of the grass and watering system was one project and  
14 placement of gravel was another project since two companies  
15 would do the work. Placement of landscape plants would be on  
16 another project.

17 - In the Annual General Meeting of the HOA, January 29,  
18 2014 the amount that was to be put out to bid and approval  
19 under the present bylaws (Bylaw article V: paragraph i: 1) was  
20 changed by UNANIMOUS vote from \$50 to \$7500. (Sheet 5  
21 highlighted section)

22 - The Board of Management continued discussion as shown  
23 [in] the minutes of the meeting from April 26, 2014 (sheet 6  
24 highlighted section) and Oct. 13, 2014 (sheet 7 highlighted  
25 section).

26 - The urgency of the work was spurred by the Rate Increase  
27 by EPCOR water to the AZ Corporation Commission which  
28 would increase the cost of water and wastewater treatment by  
29 86%. Further we were changing the landscape company  
30 servicing this HOA to Enviroscope Company. We wanted to  
get a lower cost of this service during contract negotiation.

- The work was undertaken in two phases as usual. The  
removal of the sod and watering system for the grass was  
undertaken in December 2014 and paid \$6500 for that work.  
The second phase of the work was in January 2015 for  
contouring the land, placement of landscape fabric and plastic,  
spreading of rock, placement of a watering system for the  
future desert landscape plantings. The bill for that work was  
paid in 2015.

1 - Two weeks before this work there was a notice sent to all  
2 homes describing the scope of the work and the approximate  
3 schedule. There was no comment from any of the  
4 homeowners.

5 - We have recognized the need to update the Bylaws of the  
6 HOA since the last comprehensive update was incomplete.  
7 There have been changes to the HOA regulations from the  
8 Legislature and other bodies and we have to update. We are  
9 increasingly becoming a community of "snowbird" residents.  
10 We have a committee to accomplish this update to be ratified at  
11 the next Annual Meeting of the HOA. We have already  
12 scheduled meetings for discussions beginning Oct 8, 2015.

13 - We held informational meetings at the Sun City Condo  
14 Owner Association ["SCCOA"] regarding this and the Bylaws  
15 issue on May, 2015. (Sheet 8 highlighted) where this SCCOA,  
16 an advisory body of 386 HOAs in Sun City, found the handling  
17 of the recent landscaping project acceptable.

18 Thunder Fe attached to its answer the referenced minutes of general meetings and  
19 board meetings at which the decisions described in its answer were made.

#### 20 HEARING EVIDENCE

21 6. Petitioner testified that Thunder Fe's former treasurer, Terry Lord, did not  
22 support the proposal to transform all landscaping in the community to desert and that  
23 Rod Beale, who signed the contractor's proposal to accept it, was not Thunder Fe's  
24 treasurer at the time. Petitioner testified that people in the community were very  
25 unhappy with desert landscaping. Petitioner testified that Thunder Fe's property was  
26 valuable and should not be treated as "rinky dinky."

27 7. Petitioner testified that the bylaws require at least a two-thirds majority of all  
28 unit owners, nor just the owners in attendance at a meeting, for any change and for the  
29 Board of Management to submit to a vote any expenditure over \$50.00. Petitioner  
30 testified that for any change, the CC&Rs needed to be amended. Petitioner testified  
that once a budget is set, it cannot be changed for at least a year.

8. Petitioner testified that she participated in a canvas survey in the 1990's and  
that most residents preferred to retain grass in Thunder Fe's common areas.

9. Jacque Ledbetter drove Petitioner to the hearing because she has macular

1 degeneration and is blind. Ms. Ledbetter testified that she has lived in Thunder Fe for  
2 ten years and that one morning, the area in front of her house was half rock and half  
3 grass, and she did not have any idea what was going on.

4 10. Ms. Ledbetter acknowledge that she does not attend general or Board  
5 meetings at Thunder Fe.

6 11. Mr. DeVlieg testified that the CC&Rs had been recorded by Del Webb  
7 when Thunder Fe was developed and they could not be changed. In contrast, the  
8 Bylaws granted the Board of Management the right and power to maintain common  
9 areas and to enter into contracts to fulfill its responsibilities. Mr. DeVlieg testified the  
10 \$50.00 limit on expenditures had been regularly violated because \$50.00 was not  
11 enough to cover any expenditure. Mr. DeVlieg testified that at Thunder Fe's annual  
12 general meeting on January 29, 2014, members unanimously voted to raise the \$50.00  
13 limit to \$7,500.00.<sup>1</sup>

14 12. Mr. DeVlieg testified that half of Thunder Fe's owners were absentee and  
15 printing notices of meetings or proposed issues to be discussed at meetings costs more  
16 than \$50.00. Mr. DeVlieg testified that the properties needed for a quorum does not  
17 include properties in probate and that fiduciaries do not vote at general meetings. Mr.  
18 DeVlieg testified that he has personally absorbed the cost of providing notices to  
19 members, but that he cannot even get a bid for work to be done for \$50.00.

20 13. Mr. DeVlieg testified that Terry Lord resigned as Thunder Fe's treasurer in  
21 late summer or early fall 2014, but was invited to continue attending board meetings as  
22 a courtesy. The Board appointed Rod Beale to fill the vacancy left by Mr. Lord's  
23 resignation.

24 14. Mr. DeVlieg testified that Thunder Fe's Board and members have taken  
25 several votes to change the landscaping in common areas from grass to desert  
26 landscaping, as noted in the written answer. The change has become more urgent  
27 because the water company is raising its rates 87%. In addition, because the previous  
28 landscaping company was raising its rates, the Board wanted to begin negotiation with  
29 a new landscape company. Mr. DeVlieg testified that since beginning the work to

30 \_\_\_\_\_  
<sup>1</sup> See Sheet 5 attached to answer.

1 change the landscaping to desert landscaping, Thunder Fe's water bills are down  
2 \$400.00 per month.

3 15. Mr. Beale testified that he is Thunder Fe's current treasurer. Mr. Beale set  
4 up a meeting with the SCCOA to go over what Thunder Fe's Board of Management and  
5 membership were doing. Mr. Beale testified that he invited all the members of Thunder  
6 Fe to the meeting with SCCOA. Mr. Beale testified that SCCOA approved everything  
7 that the Board and members had done, including amending the bylaws and approving  
8 the change to desert landscaping.

9 **THUNDER FE BYLAWS REFERENCED AT THE HEARING**

10 1. Article III provides, in relevant part, as follows:

11 b. These By-Laws may be amended by an affirmative  
12 two-thirds vote of the Thunder-Fe owners of record. Each  
13 Garden Apartment unit shall be entitled to a single vote.  
14 Voting may be accomplished at a General or Special  
15 Meeting or by special ballot circulated to each unit by mail or  
16 personal delivery. . . .

17 1. Article V concerns Board of Management meetings, general meetings, and  
18 special meetings and provides, in relevant part, as follows:

19 e. QUORUM: The presence, either in person or by  
20 proxy, of a majority of the Owners shall constitute a quorum  
21 for the transaction of business at all meetings. . . .

22 . . . .

23 h. Procedure for Modification: A two-thirds affirmative  
24 vote of the Owners present at a meeting shall be required for  
25 adoption of the following:

- 26 1. Amendments to these By-laws.
- 27 2. To levy any special assessments.
- 28 3. To change the amount of monthly assessments once  
29 they have been approved for the next fiscal year.

30 i. Powers: The powers, rights, and duties of the Board  
of Management shall be those detailed in the Declaration of  
Restrictions, Sections A through P except as amended by  
these By-Laws. These amendments are:

1. [As amended] The Chairman is authorized to approve

1 expenditures not exceeding \$7,500.00. Any expenditures in  
2 excess of that shall be approved by a vote of the BOM. . . .  
3 The BOM shall submit to a vote of all THUNDER-FE unites  
4 such items as affect the major moneys (e.g., Changes in  
Insurance Companies, vital changes of budget allotments, et  
cetera) . . . .

5 . . . .  
6 m. Replacement of BOM Members: In the event of a  
7 vacancy on the BOM for any reason, a replacement Member  
8 may be appointed to fill the unexpired vacancy by the  
remaining members of the BOM. . . .

9 **CONCLUSIONS OF LAW**

10 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization  
11 to file a petition with the Department for a hearing concerning violations of planned  
12 community documents or violations of statutes that regulate planned communities.  
13 Applicable statute provides that such petitions will be heard before the Office of  
14 Administrative Hearings.

15 2. Petitioner bears the burden of proof to establish that the Board of Management  
16 violated the charged bylaw by a preponderance of the evidence.<sup>2</sup> The Thunder Fe Board  
17 of Management bears the burden to establish affirmative defenses by the same  
18 evidentiary standard.<sup>3</sup>

19 3. "A preponderance of the evidence is such proof as convinces the trier of fact  
20 that the contention is more probably true than not."<sup>4</sup> A preponderance of the evidence is  
21 "[t]he greater weight of the evidence, not necessarily established by the greater number of  
22 witnesses testifying to a fact but by evidence that has the most convincing force; superior  
23 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable  
24 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather  
25 than the other."<sup>5</sup>

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27  
28 <sup>2</sup> See A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d  
837 (1952).

29 <sup>3</sup> See A.A.C. R2-19-119(B)(2).

30 <sup>4</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

<sup>5</sup> BLACK'S LAW DICTIONARY at page 1220 (8<sup>th</sup> ed. 1999).

1 4. Thunder Fe's Board of Management established by a preponderance of the  
2 evidence that at a duly noticed general meeting, the qualified owners in the community  
3 unanimously voted to raise the expenditure allowed in Article V, paragraph i, number 1  
4 of its Bylaws to \$7,500.00.

5 5. Therefore, Petitioner did not establish by a preponderance of the evidence  
6 that Thunder Fe's Board of Management violated any bylaw in approving the change to  
7 desert landscaping in common areas and in entering into contracts with contractors to  
8 effect the change.

9 **RECOMMENDED ORDER**

10 In view of the foregoing, it is ORDERED that Petitioner Catherine Mullane's  
11 petition shall be dismissed.

12 *In the event of certification of the Administrative Law Judge Decision by the*  
13 *Director of the Office of Administrative Hearings, the effective date of this Order will be*  
14 *five (5) days from the date of that certification. Done this day, September 21, 2015.*

15 Dated this 22<sup>nd</sup> day of September, 2015.

16 /s/ Diane Mihalsky  
17 Administrative Law Judge

18 Transmitted electronically to:

19 Debra Blake, Interim Director  
20 Department of Fire Building and Life Safety  
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