

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

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

4
5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 DAVID CARR,

8 Petitioner,

9
10 vs

11 SUNSET PLAZA CONDO ASSOCIATION,

12 Respondent

No. 16F-H1616011-BFS

**ADMINISTRATIVE LAW JUDGE
DECISION**

13
14
15 **HEARING:** August 23, 2016

16 **APPEARANCES:** David Carr on his own behalf; Paige Hulton, Esq. for
17 Respondent

18 **ADMINISTRATIVE LAW JUDGE:** Thomas Shedden

19
20 **FINDINGS OF FACT**

21 1. On June 30, 2016, the Arizona Department of Fire, Building and Life
22 Safety issued a Notice of Hearing setting the above-captioned matter for hearing on
23 August 23, 2016, at the Office of Administrative Hearings in Phoenix, Arizona.

24 2. As of July 1, 2016, the Department of Fire, Building and Life Safety's
25 responsibilities pertinent to this matter were reassigned to the Arizona Department of
26 Real Estate.

27 3. The Notice of Hearing shows that Petitioner David Carr alleged that
28 Respondent Sunset Plaza Condo Association violated Article VI, Section 2 of
29 Respondent's By-Laws.¹

30

¹ The By-Laws at issue are dated November 10, 2009. Respondent's Exhibit 3. The Board amended the By-Laws effective March 24, 2016. Respondent's Exhibit 4.

1 4. Article VI, Section 2 provides that a special meeting of the membership
2 may be called upon written application to the Board of Management's Chairman by five
3 or more homeowners.

4 5. Through an undated letter, six homeowners requested that a special
5 meeting be set. The letter provided that the meeting would be held at 11:00 a.m.
6 February 13, 2016, but if that time or date was not acceptable, the meeting should be
7 held within thirty days.

8 6. In a notice dated February 4, 2016, the Board informed all homeowners
9 that the Board was denying the request for a special meeting because there was an
10 open meeting scheduled for February 22, 2016. In that notice, the Board provided an
11 agenda and informed the members that they could submit other items for discussion.

12 7. In a letter dated February 5, 2016, Leslie Grant informed the Board and
13 homeowners that despite the Board's decision not to hold the requested meeting on
14 February 13, 2016, the proposed special meeting would take place on that date and that
15 there would be a discussion and vote about changing the By-Laws and Rules.

16 8. In a letter dated February 10, 2016, Ms. Grant provided the homeowners
17 with a replacement ballot for use at the February 13, 2016 Special Meeting.

18 9. Nine homeowners met on February 13, 2016 and held what they
19 considered to be a special meeting.² At that time, the nine homeowners voted to make
20 changes to the By-Laws and Rules.

21 10. Homeowners who attended the February 13, 2016 special meeting sought
22 to have the Board modify the By-Laws and Regulations by effecting the changes that
23 had been approved at that meeting. The Board did not make the requested changes.

24 11. On April 4, 2016, Mr. Carr filed with the Department of Fire, Building and
25 Life Safety the Petition that gave rise to this matter. In that Petition, Mr. Carr alleged that
26 the Board violated Article VI, Section 2 of the By-Laws, that it had declined to schedule
27 the requested special meeting, that the meeting was held on February 13, 2016 at
28 which time eleven balloted revisions to the By-Laws and Rules were passed, and that
29 the Board had refused to incorporate these changes into the By-Laws and Rules.

30 _____
² There are sixteen homes in the association, and nine homeowners would make a quorum.

1 12. At the hearing, Mr. Carr asserted that there was conflict in the governing
2 documents and that the Declaration was therefore controlling.³

3 13. Article XIII of the By-Laws provides that amendments to the By-Laws may
4 be made by a majority of a quorum of the Board at any regular or special meeting,
5 provided that adequate notice is given. The Association's Declaration at paragraph 3(K)
6 shows that the Board has the authority to make and amend rules and that these rules
7 and amendments are binding when a majority of homeowners have approved them in
8 writing.⁴ There is no conflict between these provisions.

9 14. Mr. Carr requests that the Association be ordered to comply with Article VI,
10 Section 2 of the By-Laws and that it be required to make the changes that were
11 ostensibly approved on February 13, 2016.

12 15. The Association requests that Mr. Carr be assessed a civil penalty for what
13 it characterizes as Mr. Carr attempt to amend the By-Laws by improper means and his
14 filing of a frivolous Petition.

15 **CONCLUSIONS OF LAW**

16 1. The Department of Real Estate has authority over this matter. ARIZ. REV.
17 STAT. Title 32, Ch. 20, Art. 11.

18 2. Mr. Carr bears the burden of proof to show that the Association committed
19 the alleged violation. The Association bears the burden to show that Mr. Carr should be
20 assessed a civil penalty. The standard of proof on all issues in this matter is that of a
21 preponderance of the evidence. ARIZ. ADMIN. CODE § R2-19-119.

22 3. A preponderance of the evidence is:

23 The greater weight of the evidence, not necessarily established
24 by the greater number of witnesses testifying to a fact but by
25 evidence that has the most convincing force; superior
26 evidentiary weight that, though not sufficient to free the mind
27 wholly from all reasonable doubt, is still sufficient to incline a
28 fair and impartial mind to one side of the issue rather than the
29 other.

28 ³ Mr. Carr was confused as to the nature of the condominium documents at issue, frequently referring to
29 the Articles of Incorporation, but because the Association is not incorporated, there are no Articles.

30 ⁴ The Administrative Record contains a copy of the Declaration that shows it was re-typed on May 21,
2014. That version has a typographical error in that it has two paragraph 2s, and no paragraph 3. As
such, some documents reference the provision at issue as paragraph 2(K).

BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

1
2 4. The homeowners who made the request for a special meeting explicitly
3 provided that the Board could set that meeting for a date other than February 13, 2016.
4 The Board held a meeting on February 22, 2016 and afforded the homeowners the
5 opportunity to add items to the agenda at that meeting. These facts and circumstances
6 are sufficient to show that the Board did not violate Article VI, Section 2 of the By-Laws,
7 and that Mr. Carr did not meet his burden of proof.

8 5. Mr. Carr provided no substantial evidence and no persuasive legal
9 authority showing that the homeowners have authority to amend either the By-Laws or
10 the Rules, and to the contrary, the By-Laws and Declaration show that this authority
11 rests with the Board.⁵ Consequently, there is no authority for the Board to make the
12 changes that were purportedly passed on February 13, 2016.

13 6. "The administrative law judge may order any party to abide by the statute,
14 condominium documents, community documents or contract provision at issue and may
15 levy a civil penalty on the basis of each violation." ARIZ. REV. STAT. § 32-2199.02(A).

16 7. Although Mr. Carr has misconstrued the condominium documents at issue,
17 the Association has not shown that he violated any of these documents. The Board has
18 not demonstrated that Mr. Carr should be assessed a civil penalty.

19 8. Mr. Carr's petition should be dismissed and the Association be deemed
20 the prevailing party in this matter.

21 **ORDER**

22 **IT IS ORDERED** that David Carr's petition is dismissed.

23 *In the event of certification of the Administrative Law Judge Decision by the Director of*
24 *the Office of Administrative Hearings, the effective date of the Order is five days after*
the date of that certification.

25 Done this day, September 9, 2016.

26
27 /s/ Thomas Shedden
28 Thomas Shedden
29 Administrative Law Judge

30 _____
⁵ Any amendments to the Rules are not effective until approved by the homeowners.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

Transmitted electronically to:

Judy Lowe, Commissioner
Department of Real Estate