

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 James Dutton,
4 Petitioner,

No. 19F-H1918014-REL

5 vs.

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 Cielo Noche Community Association,
7 Respondent.

8 **HEARING:** January 04, 2019 at 1:30 PM and March 07, 2019 at 10:00 AM.¹

9 **APPEARANCES:** Steven Cheifetz, Esq. appeared on behalf of James Dutton
10 (“Petitioner”). Lydia Linsmeier, Esq. and Nicholas Nogami, Esq., appeared on behalf of
11 Cielo Noche Community Association (“Association” and “Respondent”) with Kari Moyer
12 and David Hibler as witnesses. Cindo Dutton, Aaron Smith, Bob Willis, Thomas Pruitt,
13 Kenny Shepherd, Luke Clesceri, Carol Clesceri, Derek Zeigler, Carole Cozzi, and
14 Anthony Cozzi observed.

15 **ADMINISTRATIVE LAW JUDGE:** Jenna Clark.

17 After review of the hearing record in this matter, the undersigned Administrative
18 Law Judge makes the following Findings of Fact and Conclusions of Law, and issues
19 this ORDER to the Commissioner of the Arizona Department of Real Estate
20 (“Department”).

21 **FINDINGS OF FACT**

22 **BACKGROUND AND PROCEDURE**

23 1. The Department is authorized by statute to receive and to decide petitions
24 for hearings from members of homeowners’ associations and from homeowners’
25 associations in Arizona.

26 2. On or about July 25, 2018, Petitioner filed a single-issue petition with the
27 Department.² Petitioner tendered \$500.00 to the Department with his petition.³

28 ¹ The hearing on January 04, 2019, was continued to March 07, 2019, as the parties ran out of time.
29 Moreover, the parties agreed to hold the record open to permit the undersigned Administrative Law Judge
one additional week in which to render her decision (e.g. on or before Friday, April 05, 2019).

30 ² See Agency Record, pages 5-13.

³ *Id.*

1 3. Per the NOTICE OF HEARING, the Department referred this matter to the
2 Office of Administrative Hearings (“OAH”), an independent state agency, for an
3 evidentiary hearing on September 05, 2018 , regarding the following issues based on
4 Petitioner’s petition:

5 **Whether Cielo Noche Community Association (Respondent) violated**
6 **A.R.S. 33-1804 by not providing notice of meetings and acting on the**
7 **results of these secret meetings.**

8 **THE PARTIES AND GOVERNING DOCUMENTS**

9 4. Respondent is a homeowners’ association whose members own
10 properties in a residential real estate development located in Tucson, Arizona.
11 Membership for the Association is compromised of the Cielo Noche subdivision.

12 5. Petitioner is a Cielo Noche subdivision property owner and a member of
13 the Association.

14 6. The Association is governed by its Covenants, Conditions, and
15 Restrictions (“CC&Rs”), and overseen by a Board of Directors (“the Board”).

16 7. The CC&Rs empower the Association to control certain aspects of
17 property use within the development. When a party buys a residential unit in the
18 development, the party receives a copy of the CC&Rs and agrees to be bound by their
19 terms. Thus, the CC&Rs form an enforceable contract between the Association and
20 each property owner.

21 8. Bylaws Article VII, Meeting of Directors, Section 1 states “Regular
22 meetings of the Board may be held not less than quarterly at such place and time as
23 may be determined from time to time by resolution by the Board. The Board may permit
24 any or all Directors to participate in a regular or special meeting by, or conduct the
25 meeting through, the use of any means of communication by which all directors
26 participating may simultaneously hear each other during the meeting. A director
27 participating in a meeting by this means is deemed to be present in person at the
28 meeting.”⁴

29
30

⁴ See Respondent Exhibit A.

1 9. Bylaws Article VII, Meeting of Directors, Section 2 states "Special
2 meetings of the Board shall be held when called by the President of the Association or
3 by any two Directors after not fewer than three (3) days' notice to each Director."⁵

4 10. Bylaws Article VII, Meeting of Directors, Section 3 states "A majority of the
5 number of Directors shall constitute a quorum for the transaction of business. Every act
6 of decision done or made by a majority of the Directors present at a duly held meeting
7 at which a quorum is present shall be regarded as the act of the Board."⁶

8 11. Bylaws Article VII, Meeting of Directors, Section 5, states "The Directors
9 shall have the right to take any action in the absence of a meeting that they could take
10 at a meeting, by obtaining the written consent of all the Directors. Any action so
11 consented to shall have the same effect as though taken at a meeting of the Directors.
12 A signature on the unanimous consent may be by electronic signature as provided in
13 A.R.S. Section 10-3821(E).⁷

14 12. Bylaws Article VIII, Powers and Duties of the Board of Directors, Section
15 1, Powers, states "The Board of Directors shall have the power to: (1) Adopt and
16 publish rules and regulations governing the use of the Common Area, the personal
17 conduct of the Members, the Residents and their guests and invitees thereon, and any
18 other matters contemplated by the Declaration and the Articles, and to establish
19 monetary penalties for infractions thereof; (2) Suspend the voting rights of a Member
20 and/or the Member's right to use all or any portion of the Common Area during any
21 period in which such Member shall be in default in the payment of any assessment
22 levied by the Association or for non-monetary infractions of the Declaration or the
23 Association Rules; (3) Exercise for the Association all powers, duties and authority
24 vested in or delegated to the Association and not reserved to the Members by other
25 provisions of the Declaration, the Articles or these Bylaws; (4) Declare the office of a
26 Director of the Board to be vacant in the event such Director shall be absent from three
27 (3) consecutive regular meetings of the Board; and (5) Employ a manager, independent

28 ⁵ *Id.*

29 ⁶ *Id.*

30 ⁷ See Respondent Exhibit A. ARIZ. REV. STAT. § 10-3821(E) holds consent may be signed using an electronic signature as defined in section 44-7002. Per ARIZ. REV. STAT. § 44-7002(8) "Electronic signature" means an electronic sound, symbol or process that is attached to or logically associated with a record and that is executed or adopted by an individual with the intent to sign the record.

1 contractors or such other employees as it deems necessary and to prescribe the duties
2 of such persons.”⁸

3 13. Bylaws Article VIII, Powers and Duties of the Board of Directors, Section
4 2, Duties, states “It shall be the duty of the Board to: (1) Manage the affairs of the
5 Association; and (2) Cause to be kept a complete record of all of its acts and corporate
6 affairs and to present a statement thereof to the Members at the annual meeting of the
7 Members or at any special meeting when such statement is requested in writing by at
8 least ten percent (10%) of the Members who are entitled to vote.”⁹

9 **HEARING EVIDENCE**

10 14. Petitioner testified on his own behalf and submitted twenty-two exhibits.
11 Respondent called Kari Moyer and David Hibler as witnesses, and submitted three
12 exhibits.

13 *Petitioner’s testimony*

14 15. Per Petitioner, the development was built by K. Hovnanian Homes
15 (“KHOV”) in 2013. There are one hundred and sixty-four homes in the Cielo Noche
16 subdivision. On or about July 31, 2016, the Developer transferred authority to the
17 Board, and the first election was held on August 31, 2016.

18 16. Petitioner testified that he was elected to the Board and served as
19 President from August 31, 2016, through November 14, 2017.

20 17. At the time of Petitioner’s election the division was managed privately by
21 Trestle Management Group (“Trestle”). Trestle guided the Board through completing a
22 punch-list with KHOV, assisting with the negotiation regarding KHOV’s funding the
23 reserve account, interpreting and enforcing the CC&Rs, creating an initial budget, and
24 setting up architectural reviews.

25 18. Petitioner testified that the Board met several times during his tenure, but
26 never in executive session. Petitioner also denied ever calling an emergency meeting.

27 19. Per Petitioner, he resigned from the Board on November 14, 2017,
28 because of conflicts he was having with other Board members.

29 _____
30 ⁸ See Respondent Exhibit A.

⁹ *Id.*

1 20. At that time Trestle was nearly finished negotiating on the Board's behalf
2 with the Developer. All discussions regarding Trestle's negotiations with KHOV were
3 held in open session.

4 21. On or about November 15, 2017, KHOV made a \$102,000.00 settlement
5 offer to the Board.

6 22. As a result, the Board announced that it was going to go into executive
7 session to discuss KHOV's offer. The minutes of the November 15, 2017, meeting are
8 redacted in part. Per Petitioner, the legible notes indicate that an attorney was present
9 for part of the meeting but left.¹⁰ Afterward, the Board voted to hire said attorney, voted
10 to accept bids for a reserve study, and then voted on whether to keep Trestle as their
11 management company through the KHOV settlement.¹¹ All of this conduct took place in
12 executive session.

13 23. Per Petitioner, the January 24, 2018 meeting minutes indicate that the
14 reserve study had been completed.¹² The minutes also indicate that the Board would
15 issue a counter-proposal to KHOV within the following week.¹³

16 24. Petitioner testified that he contacted the community manager at Trestle to
17 inquire about the attorney that had been hired and the terms of the attorney's
18 employment. Per Petitioner, he was only provided with the law firm's name.

19 25. The next Board meeting took place on March 19, 2018. Meeting minutes
20 indicate that a final payment for the reserve fund had been made.¹⁴

21 26. On or about May 20, 2018, Petitioner received a flyer in the mail which
22 stated that the community was under new management with a company named Tri-City
23 Management Company. Per Petitioner, no notice was provided to the community that
24 Trestle was replaced by Tri-City. No meeting minutes that Petitioner reviewed indicated
25 that hiring Tri-City was discussed in open session by the Board.
26
27

28 ¹⁰ See Petitioner Exhibit 1.

29 ¹¹ *Id.*

30 ¹² See Petitioner Exhibit 3.

¹³ *Id.*

¹⁴ See Petitioner Exhibit 4.

1 27. At a subsequent Board meeting on May 30, 2018, the Board ratified a vote
2 to hire Tri-City.¹⁵ Per Petitioner, the Board also replaced the community's landscaper
3 with a company names Peak by executive vote on May 30, 2018.¹⁶

4 28. Tri-City began their duties as the Association's management company on
5 June 01, 2018. Petitioner learned later that the Board signed its contract with Tri-City on
6 April 24, 2018, and that community members would pay an additional 3% more for their
7 services than they had for Trestle's services.¹⁷ Per bank statements that Petitioner
8 reviewed, Tri-City began receiving payments from the Board in May of 2018.

9 29. Petitioner testified that he was concerned that the community had no input
10 in Tri-City's hiring because that was the Board's most important task that effected
11 everyone. Specifically, Petitioner argued that a planned community's management
12 company was responsible for handling all of the community's financial statements, all
13 correspondence with residents, collect dues, conduct enforcement, and oversee
14 contractors.

15 30. Petitioner also testified that he was concerned that the community had no
16 input in Peak's hiring because that vendor received approximately one-third of the
17 community's annual budget, and also a direct and significant effect on the community's
18 water budget.

19 31. Petitioner further testified that, he incidentally found out about a meeting
20 the Board held on July 23, 2018.¹⁸ Per Petitioner, when he followed-up on a request for
21 financial documentation July 24, 2018, he was told that the documents had just become
22 available as the Board had voted on them the prior evening. Petitioner testified that the
23 Board did not provide notice to residents of their July 23, 2018, meeting.

24 32. Petitioner submitted a records request to Tri-City and conducted an
25 unofficial audit at their offices. On August 19, 2018, Petitioner reached out to community
26 members via social media regarding his findings, and inquired if any other members
27 were interested in pursuing a complaint through the Department against the Board.¹⁹

28 ¹⁵ See Petitioner Exhibit 7.

29 ¹⁶ See Petitioner Exhibits 7, 20, and 24.

30 ¹⁷ See Petitioner Exhibits 23.

¹⁸ See Petitioner Exhibit 9.

¹⁹ See Respondent Exhibit C.

1 33. On or about August 20, 2018, the Board met in executive session to
2 discuss Petitioner's social media posting regarding their conduct in executive
3 session(s). The following day, on August 21, 2018, the Board penned a letter to the
4 community accusing Petitioner of misinformation. In the letter the Board rationalized the
5 change in management and landscaping companies during executive session, but
6 alleged that negotiations with the Developer were still pending and closed pursuant to
7 the privilege they had with their attorney.²⁰

8 34. Petitioner testified that the Board held an emergency meeting on
9 September 09, 2018, and that on the next open meeting held September 25, 2018, the
10 Board did not mention the emergency meeting or read the minutes from that session.²¹

11 35. Petitioner testified that the Board held an emergency meeting on
12 November 01, 2018, and that on the next open meeting held November 07, 2018, the
13 Board did not mention the emergency meeting or read the minutes from that session.²²

14 36. Petitioner testified, per his review of documentation that he obtained, that
15 the Board also met in executive session(s) to discuss a drainage issue with an
16 engineer, parking variances, front gate lighting, outstanding invoices to their former
17 landscaper, and the community website.

18 37. Petitioner testified that he did not accuse the Board of improperly
19 conducted business via email in his complaint because he believed that addressing
20 and/or completing minor administrative tasks via email was permissible. Petitioner
21 clarified that when he first became President of the Board, based on the Board's
22 interpretation of the Bylaws, and with the advice and consent of the Association's
23 management company, the Board conducted minor administrative tasks, including
24 voting on architectural requests, via email.²³ Petitioner clarified that the Board always
25 used their professional email accounts, and kept the emails in question as community
26 records.

27 Kari Moyer's testimony

28 _____
29 ²⁰ See Petitioner Exhibit 21.

²¹ See Petitioner Exhibits 12-13.

²² See Petitioner Exhibits 14-15.

²³ See Respondent Exhibit B.

1 38. Ms. Moyer testified that she has been a community manager for the past
2 six years. She is currently employed by Tri-City as a community manager. Ms. Moyer is
3 CAAM Certified by the Arizona Association of Community Managers.

4 39. Ms. Moyer testified that Tri-City became the Association's community
5 management company on June 01, 2018, and she assumed her responsibilities as the
6 Association's community manager on that date. Per Ms. Moyer, Cielo Noche is a mid-
7 sized high-end community located in Queen Creek, Arizona.

8 40. Ms. Moyer testified that her company was hired to replace Trestle
9 because the Association was unhappy with the way they were being represented to the
10 Developer.²⁴ Per Ms. Moyer, the Association's discussions regarding their potential
11 replacement of Trestle was rightfully held in executive session because it was regarding
12 employee performance.

13 41. Per Ms. Moyer, the Association disclosed to potential homeowners that
14 there was pending litigation regarding the punch list negotiation with the KHOV, as the
15 Association alleged construction defects against the developer.

16 42. Ms. Moyer testified that all legal inquiries should be directed to the
17 Association's general counsel. She noted, however, that when the Association was
18 being represented by Trestle that they did not have legal counsel.

19 43. Ms. Moyer testified that although she was not the Association's community
20 manager on May 30, 2018, after the Board meeting held that day she informed the
21 Board that they were not permitted to hold executive sessions for the reason(s) they did,
22 and that in the future such discussions needed to take place in open session. Ms.
23 Moyer had to issue this reminder to the Board several times afterward, through
24 November 2018.²⁵ Ms. Moyer did concede that she instructed the Board to blind copy
25 itself on questions Board members sent her via email, and that voting via email should
26 be done on an emergency basis only.²⁶

27 44. Per Ms. Moyer, the Board held meetings in executive session after
28 Petitioner filed his complaint with the Department because they were seeking the advice

29 ²⁴ See Petitioner Exhibit 19.

30 ²⁵ See Petitioner Exhibits 26-28.

²⁶ See Petitioner Exhibit 26.

1 of legal counsel, as litigation was pending and/or being contemplated. Since the
2 information was privileged the Association did not, and was not required to, read the
3 minutes of the executive session at the next open meeting.

4 45. Ms. Moyer also testified that the Board's May 30, 2018, meeting to discuss
5 the Association's landscaping vendor's performance was rightly held in executive
6 session.

7 46. Ms. Moyer conceded that the Board's July 18, 2018, meeting was not
8 noticed. Ms. Moyer explained that there was a miscommunication between herself and
9 the Board. Specifically, each party believed the other was going to post notice to the
10 community, but neither did. An apology was issued to the community.²⁷

11 David Hibler's testimony

12 47. Mr. Hibler testified that he is a community member of the Cielo Noche
13 subdivision and has held a seat on the Association's Board as Treasurer since August
14 of 2018. Mr. Hibler clarified that he is employed as an engineer and is not a licensed
15 attorney.

16 48. Mr. Hibler testified that on November 15, 2017, the Board went from an
17 open session to a closed session to discuss employee performance and negotiations
18 with KHOV. The Board continued to hold meetings in executive session to discuss the
19 KHOV negotiations through May 30, 2018. Per Mr. Hibler, the Board was not advised by
20 Trestle not to go into closed session for these discussions.

21 49. Per Mr. Hibler, the Association did not secure its own legal counsel until
22 either December 2017 or January 2018.

23 **CONCLUSIONS OF LAW**

24 1. This matter lies within the Department's jurisdiction. Pursuant to ARIZ. REV.
25 STAT. §§ 32-2102 and 32-2199 et al., regarding a dispute between an owner and a
26 planned community association, the owner or association may petition the department
27 for a hearing concerning violations of community documents or violations of the statutes
28 that regulate planned communities as long as the petitioner has filed a petition with the
29 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

30

²⁷ See Petitioner Exhibit 22.

1 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(D), 32-2199.02,
2 and 41-1092, OAH has the authority to hear and decide the contested case at bar.

3 3. In this proceeding, Petitioner bears the burden of proving by a
4 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1804.²⁸

5 4. “A preponderance of the evidence is such proof as convinces the trier of
6 fact that the contention is more probably true than not.”²⁹ A preponderance of the
7 evidence is “[t]he greater weight of the evidence, not necessarily established by the
8 greater number of witnesses testifying to a fact but by evidence that has the most
9 convincing force; superior evidentiary weight that, though not sufficient to free the mind
10 wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one
11 side of the issue rather than the other.”³⁰

12 5. ARIZ. REV. STAT. § 33-1804 provides, in relevant part, as follows:

13 A. Notwithstanding any provision in the declaration, bylaws or other
14 documents to the contrary, all meetings of the members' association and
15 the board of directors, and any regularly scheduled committee meetings,
16 are open to all members of the association or any person designated by a
17 member in writing as the member's representative and all members or
18 designated representatives so desiring shall be permitted to attend and
19 speak at an appropriate time during the deliberations and proceedings.
20 **Any portion of a meeting may be closed only if that closed portion of
21 the meeting is limited to consideration of one or more of the
22 following:**

23 1. **Legal advice from an attorney** for the board or the association.
24 On final resolution of any matter for which the board received legal
25 advice or that concerned pending or contemplated litigation, the board
26 may disclose information about that matter in an open meeting except
27 for matters that are required to remain confidential by the terms of a
28 settlement agreement or judgment.

29 2. **Pending or contemplated litigation.**

30 * * * *

²⁸ See ARIZ. ADMIN. CODE R2-19-119.

²⁹ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

³⁰ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

1 **4. Matters relating to the job performance of** an individual employee
2 of the association or an **individual employee of a contractor of the**
3 **association** who works under the direction of the association.

4 * * * *

5 C. Before entering into any closed portion of a meeting of the board of
6 directors, or on notice of a meeting under subsection D of this section that
7 will be closed, the board shall identify the paragraph under subsection A of
8 this section that authorizes the board to close the meeting.

9 * * * *

10 E. Notwithstanding any provision in the declaration, bylaws or other
11 community documents, for meetings of the board of directors that are held
12 after the termination of declarant control of the association, all of the
13 following apply:

14 1. The agenda shall be available to all members attending.

15 **2. An emergency meeting of the board of directors may be called**
16 **to discuss business or take action that cannot be delayed for the**
17 **forty-eight hours required for notice.** At any emergency meeting
18 called by the board of directors, **the board of directors may act only**
19 **on emergency matters. The minutes of the emergency meeting**
20 **shall state the reason necessitating the emergency meeting. The**
21 **minutes of the emergency meeting shall be read and approved at**
22 **the next regularly scheduled meeting of the board of directors.**

23 * * * *

24 4. Any quorum of the board of directors that meets informally to
25 discuss association business, including workshops, shall comply with
26 the open meeting and notice provisions of this section without regard
27 to whether the board votes or takes any action on any matter at that
28 informal meeting.

29 F. It is the policy of this state as reflected in this section that all meetings
30 of a planned community, whether meetings of the members' association or
meetings of the board of directors of the association, be conducted openly
and that notices and agendas be provided for those meetings that contain
the information that is reasonably necessary to inform the members of the
matters to be discussed or decided and to ensure that members have the
ability to speak after discussion of agenda items, but before a vote of the
board of directors or members is taken. Toward this end, **any person or**

1 **entity that is charged with the interpretation of these provisions,**
2 including members of the board of directors and any community manager,
3 shall take into account this declaration of policy and **shall construe any**
4 **provision of this section in favor of open meetings.**

5 *(Emphasis added.)*

6 6. Here, although Petitioner only paid for one issue to be adjudicated he
7 raised a multitude of arguments during the course of the presentation of his case. The
8 Tribunal will only address Petitioner's primary point of contention, as outlined in his
9 petition: Whether the Association violated ARIZ. REV. STAT. § 33-1804 by failing to
10 provide notice of meetings held between November 2017 and May 2018.

11 7. Based on a review of the credible and relevant evidence in the record the
12 Tribunal holds that Respondent held at least one closed meeting which should have
13 been held either partly or entirely in open session. Because Petitioner has established
14 by a preponderance of the evidence that said meeting(s) were not properly noticed to
15 the community, he has also established that the Association violated the Arizona Open
16 Meeting Law.

17 8. Therefore, the Administrative Law Judge concludes that the Board's
18 conduct, as outlined above, violated the charged provisions of ARIZ. REV. STAT. § 33-
19 1804.

20 9. Notably the Tribunal declines to assess a civil penalty against Respondent
21 as the record does not reflect that its conduct was intentional, negligent, or otherwise in
22 bad faith.

23 **ORDER**

24 **IT IS ORDERED** that Petitioner's petition in this matter be granted.

25 **IT IS FURTHER ORDERED** pursuant to ARIZ. REV. STAT. § 32-2199.02(A), the
26 Respondent shall pay to the Petitioner the filing fee required by ARIZ. REV. STAT. § 32-
27 2199.01.

28 **NOTICE**

29 **Pursuant to ARIZ. REV. STAT. §32-2199.02(B), this ORDER is binding on the**
30 **parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. § 32-2199.04.**

1 Pursuant to ARIZ. REV. STAT. § 41-1092.09, a request for rehearing in this matter
2 must be filed with the Commissioner of the Department of Real Estate within
3 thirty (30) days of the service of this ORDER upon the parties.
4

5 Done this day, April 05, 2019.
6

7 OFFICE OF ADMINISTRATIVE HEARINGS
8

9 /s/ Jenna Clark
10 Administrative Law Judge
11

12 Transmitted electronically to:

13 Judy Lowe, Commissioner
14 Arizona Department of Real Estate

15 Transmitted US Mail to:

16 James Dutton
17 19907 E Strawberry Dr.
18 Queen Creek, AZ 85142

19 Steven Walter Cheifetz
20 Cheifetz Law PLLC
21 3442 N. 53rd Street
22 Phoenix, Arizona 85018

23 Cielo Noche Community Association
24 c/o Tri-City Property Management Services
25 760 S Stapley Dr.
26 Mesa, AZ 85204

27 Lydia Linsmeier
28 Nicholas Nogami
29 Carpenter, Hazlewood, Delgado & Bolen PLC
30 1400 E. Southern Ave., Suite 400
Tempe, Arizona 85282-5691