

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 R.L. Whitmer
Petitioner

No. 22F-H2222043-REL

4 v.
5 Hilton Casitas HOA
Respondent

**ADMINISTRATIVE LAW JUDGE
DECISION**

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8 Pending before the Office of Administrative Hearings is Petitioner’s Motion for
9 Summary Judgment and Request for Order to Comply with Section 8.2 of the Declaration
10 of Horizontal Property Regime for Hilton Casitas (Motion). Having reviewed the Motion,
11 Respondent’s Response to Petitioner’s “Motion for Summary Judgment” (Response), and
12 Petitioner’s Reply in Support of the Petitioner’s Motion for Summary Judgment (Reply),
13 the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law,
14 and Order.

15 **FINDINGS OF FACT**

16 Through their filings, the parties agreed that there are no genuine issues of material
17 fact and the issue presented is a question of law. The following reflects the facts as
18 agreed upon by the parties and/or as determined by the Administrative Law Judge:

19 **THE PARTIES AND GOVERNING DOCUMENTS**

20 1. Respondent, an association of 29 condominium owners in Scottsdale,
21 Arizona, is an Arizona non-profit corporation governed under the Condominium Act and
22 the Nonprofit Corporation Act.

23 2. Respondent and its members are governed by Respondent’s Declaration
24 for Horizontal Property Regime (Declaration) recorded in 1972, the Bylaws for Hilton
25 Casitas Council of Co-Owners (Bylaws), and the Articles of Incorporation.

26 3. Section 1.4 of the Declaration provides as follows:

27 “Council” shall mean the Council of Co-owners as defined in the Horizontal
28 Property Regime Act, *and consists of all of the Owners of the Casitas.*

29 Emphasis added.

1 4. Section 1.8 of the Declaration provides as follows: “‘Owner’ shall mean the
2 record owner of a Casita.”

3 5. Section 6.6 of the Declaration provides, in pertinent part, as follows:

4 Council’s Rights and Powers as Set Forth in Bylaws: In addition to the rights
5 and powers of the Council set forth in this Declaration, the Council shall
6 have such rights and powers as are set forth in its Bylaws and any Articles of
7 Incorporation which may be adopted.

8 6. Section 8.2 of the Declaration provides, in pertinent part, as follows:

9 Establishment and Basis of Common Expenses: The Owner of each
10 Casita, for himself, his heirs, executors, administrators, successors and
11 assigns covenants and agrees that each Casita shall be subject to an
12 annual assessment *in an amount to be determined by the Council*, which
13 shall be such Casita’s pro rata share (as determined in Section 3.6 hereof)
14 of the following aggregate costs:

15 Emphasis added.

16 7. Pursuant to the Declaration, the Council was authorized to enact Bylaws
17 that would be binding on the Owners.

18 8. With respect to voting, the Declaration provides as follows:

19 Section 6.4. Voting: Each Owner of a Casita shall have one vote. In the
20 event any Casita is owned by two or more persons, whether by joint
21 tenancy, tenancy in common, community property, or otherwise, the
22 membership as to such Casita shall be joint and a single membership for
23 such Casita shall be in the names of all, and they shall designate to the
24 Council, in writing, one of the number who shall hold the membership and
25 have the power to vote said membership, and, in the absence of such
26 designation and until such designation is made, the Board at any time, or
27 from time to time, shall make such designation.

28 Section 6.5. Suspension of Voting Rights: In the event any Owner shall be
29 in arrears in the payment of any amount due under any of the provisions in
30 this Declaration or any amount legally imposed by the Council upon the
Owners for a period of fifteen (15) days, or shall be in default in the
performance of any of the terms of this Declaration for a period of fifteen (15)
days, said *Owner’s right to vote as a member of the Council shall be
suspended* and shall remain suspended until all payments are brought
current and all defaults cured.

Emphasis added.

1 15. On or about November 25, 2021, Respondent's board noticed a November
2 29, 2021 board meeting with an agenda that the board would be discussing the 2022
3 proposed budget, and the "process for Owner Ratification of 2022 budget."

4 16. On or about November 29, 2021, the Respondent's board canceled the
5 November 29, 2021 board meeting.

6 17. On or about December 2, 2021, Respondent's board noticed a December 6,
7 2021 board meeting with an agenda that the board would be discussing the 2022
8 proposed budget and the "process for Owner Ratification of 2022 budget."

9 18. On or about December 30, 2021, Petitioner emailed Respondent's treasurer
10 regarding the lack of an approved budget and the need to comply with Section 8.2 of the
11 Declaration.

12 19. On or about January 12, 2022, Petitioner received an email from
13 Respondent's president regarding whether Petitioner had received the 2022 budget.

14 20. On or about January 13, 2022, Petitioner emailed Respondent's president
15 affirming that he and several homeowners had not received the 2022 budget and
16 reminding Respondent's president that Respondent's board needed to comply with
17 Section 8.2 of the Declaration.

18 21. On or about January 16, 2022, Petitioner emailed Respondent's treasurer in
19 response to the treasurer's email stating he had received his 2022 budget packaged by
20 USPS mail. Petitioner affirmed that he and several homeowners had not received the
21 2022 budget and reminded Respondent's treasurer that Respondent's board needed to
22 comply with section 8.2 of the Declaration.

23 22. On or about January 18, 2022, Respondent's president emailed a meeting
24 notice to the homeowners that Respondent's board would be holding a closed board
25 meeting with its attorney.

26 23. On or about January 19, 2022, Petitioner emailed Respondent's board
27 about incurring expenses prior to an approved budget and assessment, and once again
28 reminded Respondent's president that Respondent's board needed to comply with
29 Section 8.2 of the Declaration.

1 determined by the Council” throughout the Section, results in a duty for
2 Respondent to obtain Owner approval in determining the assessment
3 amounts collected each year and incorporating the same into an annual
4 budget.

5 3. An association’s governing documents constitute a contract between the
6 association and the owners. When interpreting contractual provisions, the Office of
7 Administrative Hearings should not construe or interpret a contract if the intent of the
8 parties is clear and unambiguous from its plain language.²

9 4. A contract is interpreted with the purpose of determining and enforcing the
10 intent of the parties.³

11 5. “Intent is interpreted by examining the plain meaning of the words in the
12 context of the contract as a whole”⁴ and “in the context of the surrounding
13 circumstances.”⁵

14 6. “Language in a contract is ambiguous only when it can reasonably be
15 construed to have more than one meaning.”⁶

16 7. The Horizontal Property Regime Act was in effect at the time the Declaration
17 was recorded. The Arizona legislature repealed the Horizontal Property Regime Act in
18 1985, and adopted the Condominium Act with an effective date of January 1, 1986.

19 8. In 2008, the Arizona legislature amended ARIZ. REV. STAT. § 33-1201 to
20 clarify that the Condominium Act applied to all condominiums “without regard to the date
21 the condominium was created.”

22 9. The Horizontal Property Regime Act included a definition of “Council of co-
23 owners” to mean “all of the co-owners of the building.” ARIZ. REV. STAT. § 38-551(5)
24 (1962).

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² *Mining Inv. Group v. Roberts*, 217 Ariz. 635, 639 ¶ 16 (App. 2008).

28 ³ *US West Commc'ns, Inc. v. Ariz. Corp. Comm'n*, 185 Ariz. 277, 280 (App. 1996).

29 ⁴ *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 259 (App. 1983).

30 ⁵ *Potter v. U.S. Specialty Ins.*, 209 Ariz. 122, 124 ¶ 7 (App. 2004).

⁶ *Id.*

1 10. The Condominium Act does not include a definition of “Council of Co-
2 Owners.” Rather, in ARIZ. REV. STAT. § 33-1202, the Condominium Act includes, in
3 pertinent part, the following definitions:

4 In the condominium documents, unless specifically provided otherwise or
5 the context otherwise requires, and in this chapter:

6

7 4. “Association” or “unit owners’ association” means the unit owners’
8 association organized under section 33-1241.

9 5. “Board of directors” means the body, regardless of its name, designated
10 in the declaration and given general management powers to act on behalf of
11 the association.

12 11. ARIZ. REV. STAT. § 33-1241 provides, in pertinent part, as follows:

13 The membership of the association at all times shall consist exclusively of
14 all the unit owners or, following termination of the condominium, of all former
15 unit owners entitled to distributions of proceeds under section 33-1228, or
16 their heirs, successors or assigns.

17 12. Respondent asserted that, based on its reading of ARIZ. REV. STAT. § 33-
18 1201 and § 33-1241, “[t]he language within these statutory provisions clearly suggests the
19 Legislature intended that the previously defined ‘Council,’ is now an ‘Association’ made up
20 of all Owners within a condominium.” Respondent concluded that its “interpretation of
21 ‘Council’ to represent the ‘Association’ within the Declaration is corroborated by the
22 binding statutory provisions.”

23 13. ARIZ. REV. STAT. § 33-1243 provides, in pertinent part, as follows:

24 A. Except as provided in the declaration, the bylaws, subsection B of this
25 section or other provisions of this chapter, the board of directors may act in
26 all instances on behalf of the association.

27 B. The board of directors shall not act on behalf of the association to amend
28 the declaration, terminate the condominium, elect members of the board of
29 directors or determine the qualifications, powers and duties or terms of
30 office of board of directors members. Except as provided in subsection H of
this section, the board of directors may fill vacancies in its membership for
the unexpired portion of any term.

 14. Respondent argued that, because adopting a budget was not included in
the list of actions a board of directors may not take without membership approval,

1 Respondent in this matter acted within its authority to adopt the 2022 budget, including
2 setting the annual assessment, without the approval of the members.

3 15. Respondent pointed out provisions in the Declaration that specifically
4 require a vote of the Owners, rather than the Council, as evidence that the two were not
5 intended to be synonymous at the time the Declaration was recorded.

6 16. Section 23.3 of the Declaration provides, in pertinent part, as follows:

7 Amendment or Termination: These Restrictions may be amended at any
8 time during the term hereof by recording in the office of the County Recorder
9 of Maricopa County, Arizona, an instrument in writing reciting said
10 amendments bearing the signed and acknowledged concurrence of the
11 then Owners of fifty-one percent (51%) of the Casitas within the
12 Property

13 These Restrictions may be terminated under the same conditions above set
14 forth except that the Owners of one hundred percent (100%) of the Casitas,
15 and the Corporation, must sign such instrument

16 17. Section 6.9 of the Declaration provides, in pertinent part, as follows:

17 Construction of Additional General Common Elements: Upon the
18 affirmative vote of 75% or more of the Owners, the Council may erect and
19 construct on the General Common Elements of the Property . . . such
20 additional buildings and structures as are desired and contemplated by the
21 Council.

22 18. The cited provisions do require a specific percentage of the Owners, rather
23 than the Council, voting to approve these measures. However, the nature of these
24 actions, amending or terminating the Declaration and the construction of new buildings or
25 structures, are inherently different than other actions commonly taken by associations in
26 their day-to-day operations. As such, the fact that these three actions detailed in the
27 Declaration reference a percentage of Owners' votes is not evidence that Petitioner's
28 interpretation of Section 8.2 of the Declaration is incorrect.

29 19. Respondent pointed out numerous provisions in the Declaration that require
30 an act of the Council in arguing that Petitioner's interpretation of the Declaration was
incorrect. Specifically, Respondent addressed Section 9.2 (the Council may enforce
payment of sums assessed by the Council); Section 6.8 (operation and maintenance of
the common elements are the responsibility and expense of the Council); and Section 8.3

1 (the Council has the authority to collect the costs and expenses related to insurance
2 policies as common expenses) in support of its assertion. Respondent concluded that,
3 should that Administrative Law Judge accept Petitioner’s interpretation of “Council”, then
4 each of these would require “a majority of Owners to approve” before the Board could act.

5 20. Respondent’s conclusion fails to account for the matter of a quorum as set
6 forth in Article III, Section 6 of the Bylaws, which details that at any meeting with a majority
7 of members participating, either in person or by proxy, the decision of the majority of the
8 members participating “shall be the acts of the Council” unless otherwise provided in the
9 governing documents. Accordingly, for those examples set forth above, 8 votes would be
10 the minimum votes needed to approve an act. That is, 15 members present to constitute
11 a quorum, and 8 of the 15 constituting a majority of those present.

12 21. Of note, the Horizontal Property Regime Act was repealed in 1985. As
13 such, Respondent has had in excess of 36 years to amend the Declaration and/or Bylaws
14 to clarify that the interpretation set forth by Petitioner in this matter is incorrect.

15 22. The Administrative Law Judge concludes that, the plain language of the
16 Declaration requires a majority of a quorum of all owners vote to set the annual
17 assessments for Respondent. Because a quorum did not vote during the February 9,
18 2022 meeting, Respondent failed to comply with Section 8.2 of the Declaration.

19 **ORDER**

20 **IT IS ORDERED** that Petitioner’s petition is affirmed.

21 **IT IS FURTHER ORDERED** that Respondent reimburse Petitioner his \$500.00
22 filing fee.

23 **IT IS FURTHER ORDERED** Respondent is directed to comply with the
24 requirements of Section 8.2 of the Declaration going forward.

25 Done this day, October 13, 2022.

26 /s/ Tammy L. Eigenheer
27 Administrative Law Judge

28 **NOTICE**

29 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties
30 unless a rehearing is granted pursuant to A.R.S. § 32-2199.04.**

1 **Pursuant to A.R.S. § 41-1092.09, a request for rehearing in this matter**
2 **must be filed with the Commissioner of the Department of Real Estate**
3 **within 30 days of the service of this Order upon the parties.**

4 Transmitted by either mail, e-mail, or facsimile October 13, 2022 to:

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6 Commissioner
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