

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of
4 R.L. Whitmer
5 Petitioner
6 vs
7 Hilton Casitas Council of Homeowners
8 Respondent

No. 23F-H036-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

9 Pending before the Office of Administrative Hearings is Respondent's Motion to
10 Dismiss (Motion to Dismiss), Petitioner's Response to Respondent's Motion to Dismiss
11 (Response to Motion to Dismiss), and Respondent's Reply in Support of Motion to
12 Dismiss and Motion to Strike Certain Allegations and Arguments of Petitioner's Response
13 Thereto (Reply in Support of Motion to Dismiss).

14 Also pending before the Office of Administrative Hearings is Petitioner's Motion for
15 Summary Judgment and Request for Order to Comply with Section 17.1 of the
16 Declaration of Horizontal Property Regime for Hilton Casitas (Motion for Summary
17 Judgment), Respondent's Response to Petitioner's Motion for Summary Judgment and
18 Request for Order to Comply with Section 17.1 of the Declaration of Horizontal Property
19 Regime for Hilton Casitas (Response to Motion for Summary Judgment), and Petitioner's
20 Reply in Support of to Petitioner's Motion for Summary Judgment (Reply in Support of
21 Motion for Summary Judgment).

22 Having reviewed the filings, the Administrative Law Judge makes the following
23 Findings of Fact, Conclusions of Law, and Order.

24 **FINDINGS OF FACT**

25 **THE PARTIES AND GOVERNING DOCUMENTS**

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

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

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

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

4 Emphasis added.

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

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

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

12 6. Section 17.1 of the Declaration provides, in pertinent part, as follows:

13 Employment: The Council may employ a responsible individual,
14 corporation, partnership or other entity as Manager to manage and control
15 the General Common Elements, with all the administrative functions and
16 such other powers and duties and for such fees as the Council may
17 establish, *subject to prior approval of any such management contract by a
18 majority of the Owners. . . .*

19 Emphasis added.

20 7. With respect to voting, the Declaration provides as follows:

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

30 Section 6.5. Suspension of Voting Rights: In the event any Owner shall be
 in arrears in the payment of any amount due under any of the provisions in
 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*

1 three board members voted unanimously to approve the contract with a start date of
2 December 1, 2020.

3 14. AZCMS continued to serve as the management company for Respondent
4 through the filing of the instant petition.

5 15. On or about December 27, 2022, Petitioner filed the instant petition
6 asserting that Respondent acted in violation of the Declaration when it failed to make any
7 request for approval by a majority of the Owners of the contract with AZCMS.¹

8 16. On or about January 26, 2023, the Owners ratified Respondent's
9 management contract with AZCMS during an open meeting via absentee ballots.

10 **PARTY ARGUMENTS**

11 17. Petitioner argued that, pursuant to Section 17.1 of the Declaration, a
12 majority of Owners had to give prior approval of a management contract.

13 18. Respondent argued, however, that because the majority of Owners ratified
14 the contract on January 26, 2023, that demonstrated that "the community is content, and
15 always has been content, with the AZCMS management contract and its work."

16 **CONCLUSIONS OF LAW**

17 1. Petitioner is entitled to summary judgment when the pleadings shows the
18 absence of any factual issues to be resolved at hearing.²

19 2. An association's governing documents constitute a contract between the
20 association and the owners. When interpreting contractual provisions, the Office of
21 Administrative Hearings should not construe or interpret a contract if the intent of the
22 parties is clear and unambiguous from its plain language.³

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

25 ¹ In various submissions since the filing of the petition, Petition has asserted that two board members
26 at the time the contract was adopted were not eligible to be board members pursuant to the
27 governing documents. As this was not an issue submitted in the petition, it will not be addressed in
28 this decision.

29 ² *Nielson v. Savoy*, 105 Ariz. 325, (1970).

30 ³ *Mining Inv. Group v. Roberts*, 217 Ariz. 635, 639 ¶ 16 (App. 2008).

⁴ *US West Commc'ns, Inc. v. Ariz. Corp. Comm'n*, 185 Ariz. 277, 280 (App. 1996).

1 4. "Intent is interpreted by examining the plain meaning of the words in the
2 context of the contract as a whole"⁵ and "in the context of the surrounding
3 circumstances."⁶

4 5. "Language in a contract is ambiguous only when it can reasonably be
5 construed to have more than one meaning."⁷

6 6. The Administrative Law Judge concludes that, the plain language of the
7 Declaration requires prior approval of a management contract by a majority of the
8 Owners.

9 7. It is uncontested that a majority of Owners did not provide approval of the
10 AZCMS contract prior to its effective date of December 1, 2020.

11 8. The January 26, 2023 approval of the management contract does not
12 constitute prior approval of a contract that was entered into more than two years before
13 the vote occurred.

14 9. Because a majority of the Owners did not provide prior approval of the
15 AZCMS contract, Respondent failed to comply with Section 17.1 of the Declaration.

16 **ORDER**

17 **IT IS ORDERED** granting Petitioner's Motion for Summary Judgment and
18 Petitioner's petition is affirmed.

19 **IT IS FURTHER ORDERED** denying Respondent's Motion to Dismiss.

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

22 **IT IS FURTHER ORDERED** denying Petitioner's request for a civil penalty.

23 **IT IS FURTHER ORDERED** Respondent is directed to comply with the
24 requirements of Section 17.1 of the Declaration going forward.

25
26
27
28 ⁵ *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 259 (App. 1983).

29 ⁶ *Potter v. U.S. Specialty Ins.*, 209 Ariz. 122, 124 ¶7 (App. 2004).

30 ⁷ *Id.*

NOTICE

Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties unless a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S. § 41-1092.09, a request for rehearing in this matter must be filed with the Commissioner of the Department of Real Estate within 30 days of the service of this Order upon the parties.

Done this day, July 10, 2023.

/s/ Tammy L. Eigenheer
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile July 10, 2023 to:

Susan Nicolson, Commissioner
Arizona Department of Real Estate
100 N. 15th Avenue, Suite 201
Phoenix, Arizona 85007

Attn:
SNicolson@azre.gov
AHansen@azre.gov
vnunez@azre.gov
djones@azre.gov
labril@azre.gov

Edith Rudder
Carpenter, Hazlewood, Delgado & Bolen, PLC
Eadie.Rudder@carpenterhazlewood.com
minuteentries@carpenterhazlewood.com

R.L. Whitmer
rlw@fulcrumgroup.biz

By: OAH Staff