

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

2
3 **ALJFIN ALJ Decision final by statute**

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

6
7 WILLIAM W. KAYSER

8 Petitioner,

9 vs.

10
11 BARCLAY PLACE HOMEOWNERS
12 ASSOCIATION,

13 Respondent.

No. 08F-H088006-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

14
15
16 **HEARING:** May 12, 2008

17 **APPEARANCES:** William Kayser on his own behalf; Heather A. Fazio, Esq. on
18 behalf of Barclay Place Homeowners Association

19 **ADMINISTRATIVE LAW JUDGE:** Lewis D. Kowal

20
21
22 **PROCEDURAL BACKGROUND**

23 **Petition Items Not Addressed**

24
25
26 Items numbered 1, 2 and 9 in the Petition that William Kayser ("Mr. Kayser") filed
27 with the Arizona Department of Fire, Building and Life Safety were ruled to be outside
28 the scope of the hearing:

29 Items 1 and 2- Pertain to a real estate conveyance that occurred prior to the
30 effective date of A.R.S. § 41-2198.01 *et seq.* (the enabling legislation).

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007
(602) 542-9826

Item 9 -Pertain to bank statements because no date was provided by Mr. Kayser. However, Item number 4 subsumed the Items that were not provided to Mr. Kayser as alleged in Item number 9, namely monthly bank statements for Association Accounts #036445634 and 04432149 for October November and December 2004.

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

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

Petition Items Addressed

The other Item in the Petition were limited to those acts that occurred or did not occur when required to occur on or after September 21, 2006, or in 2007 or 2008 as specifically alleged in the Petition: Item 3-Failure to accomplish annual audit of 2006.

Item 4-Failure to retain and provide Association records and present a statement at the annual meeting in 2006 and 2007.

Item 5-Failure to give 30 day notice of assessment and amount of assessment to members in 2006 and 2007.

Item 6- Failure to provide agenda and notice of November 23, 2007 meeting.

Item 7-Failure to provide newsletter or minutes regarding approval of increase of annual assessment and November 23, 2007 meeting in a timely manner.

Item 8-Failure to meet special quorum requirements and procedures for increasing annual dues for 2006, 2007 and 2008.

FINDINGS OF FACT

1. At all times relevant to this matter, William Kayser lived within the Barclay Place Community (“Community”) as an owner of a lot in the Community becomes a member of the Barclay Place Homeowner’s Association (“Association”) and is bound by the governing documents of the Association.

A. Item 3-Annual Audits

2. Kevin Young (“Mr. Young”) with R & R Management Company (“R & R”) testified that R & R has a contractual relationship with the Association whereby R & R is responsible for preparing and maintaining the financial records of the Association.

3. R & R employs an accountant, Denise Lehn, who oversees the financials for the Association.

1 4. Mr. Young testified that R & R compiles financial records of the Association on a
2 monthly basis and that Andrew Carr ("Mr. Carr"), a certified public accountant, reviews
3 and audits the financial records of the Association each month. Mr. Young gave
4 conflicting testimony as to whether Mr. Carr was or was not an in-house accountant.
5 The evidence presented by Mr. Young was inconclusive on that issue.

6 5. Mr. Young testified that he is familiar with the provisions of the Association's By-
7 Laws regarding the Association's obligation to conduct annual audits and believes that
8 the process followed by R & R complies with such provisions as well as applicable law.
9 However, Mr. Young also testified that R & R, on behalf of the Association, does not
10 have annual audits performed by a public accounting firm.

11 6. Mr. Kayser maintained that the Association is required to have an outside
12 certified public accounting firm conduct annual audits and that he has requested and not
13 received annual audits. However, Mr. Kayser acknowledged that he has received the
14 monthly audits maintained by R & R.

15
16 B. Item 4-Failure to Maintain and Provide documents and Failure to provide a Statement
17 at the Annual Meetings of 2006 and 2007.

18
19 7. Mr. Kayser sought copies of certain financial records from R & R but, at that time,
20 were not provided to Mr. Kayser because the Board had not yet approved them. The
21 evidence of record established that the documents were not provided within ten
22 business days of Mr. Kayser's request. Although unclear as to why, it appears that on
23 or about November 12, 2007, Mr. Young provided Mr. Kayser unapproved copies of the
24 financial documents of the Association.

25 8. The evidence of record established that in 2007 and 2008, Mr. Kayser contacted
26 R & R on numerous occasions requesting certain records of the Association.
27 Particularly, Mr. Kayser sought the October, November, and December bank
28 statements for two Association accounts, copies of the annual audit of the financials of
29 the Association from 2003 through 2006, and other corporate documents. Mr. Kayser
30 acknowledged that the accounts may have been closed by December 2004

1 and he was seeking the monthly statements for the accounts for October and November
2 2004.

3 9. According to Mr. Young, while R & R may have some Association documents
4 other than financial records, it is not contractually obligated to keep complete set of
5 Association activity other than the financial records. When requests made by members
6 of the Association for documents come to R & R that deal with items other than the
7 Association's financial records, as a courtesy, R & R attempts to assist the Community
8 homeowner to the extent possible.

9 10. Mr. Young testified that R & R has given Mr. Kayser copies of the documents that
10 it has in its possession on several occasions and that Mr. Kayser is now duplicating his
11 request.

12 11. Mr. Young also testified that on January 3, 2008, when R & R made all of its files
13 pertaining to the Association available to Mr. Kayser, he provided Mr. Kayser a copy of
14 the minutes of the November 23, 2007 meeting.

15 12. The evidence of record established that the Association, through R & R provided
16 Mr. Kayser copies of bank statements for the above-mentioned two accounts for the
17 months of October and November 2004. The bank statements that were provided were
18 summaries. The Association produced a letter that R & R sent to Mr. Kayser dated
19 March 27, 2007, which contained copies of the summaries of the accounts for the
20 months of October and November 2004 as well as copies of checks. Mr. Young
21 testified that to his knowledge the bank statements in R & R's possession were provided
22 to Mr. Kayser.

23 13. The Association admitted during the hearing that it did not provide to Mr. Kayser
24 all of the documents that Mr. Kayser had requested and that Mr. Kayser had made such
25 requests on numerous occasions.

26 14. Jack Van Royen ("Mr. Van Royen"), a member of the Association's Board of
27 Directors, testified that the previous president of the Association had boxed up
28 documents and that the Association has not been able to locate all of the boxes. The
29 Association, through its counsel, represented that the Association will make a concerted
30

1 effort to review all of the documents it has and will provide, at no cost to Mr. Kayser,
2 copies of requested information.

3 15. Neither Mr. Kayser nor the Association provided a detailed list as to the
4 documents that Mr. Kayser sought and that have not been provided to him (other than
5 the annual audits and above-mentioned bank statements) or those documents that have
6 already been provided to Mr. Kayser.

7 16. Mr. Young testified that at the 2006 and 2007 annual meeting of members, the
8 Association provided to the homeowners in attendance a copy of the
9 statement at those annual meetings.

10 Item 5-Failure to give 30 day Notice of Annual Assessment in 2006 and 2007

11 17. Mr. Young testified that a review of R & R's records revealed that R & R sent a
12 notice of assessment in 2006 and 2007 to the members of the Association.

13 18. Mr. Kayser testified that he did not receive any notice of increase of assessment.
14

15
16 C. Items 6, 7 and 8- Failure to Provide Agenda and Notice of November 23, 2007
17 Meeting; Failure to Provide Newsletter or Minutes of Board Meeting of November 23,
18 2007 meeting or of the Increase of Annual Assessment; Failure to Meet Special
19 Quorum Requirements and Procedures for increasing Annual Dues for 2007 and 2008.
20
21

22
23 19. On November 12, 2007 a regular meeting of the members of the Association,
24 regular monthly meeting, took place. At that time, only two members appeared.
25 Because there was no quorum, the meeting was rescheduled to November 23, 2007.

26 20. Mr. Van Royen testified that on November 23, 2007, he, Bonnie Braun, and
27 Pamela Nicita, who are also members of the Association's Board of Directors, were
28 present at the meeting that was held at Robb & Stucky.¹

29
30 ¹ The documentary evidence presented by the Association indicates that the Association met at Robb & Stucky's conference room located in Scottsdale, Arizona.

1 21. At the November 23, 2007 meeting, the Association's Board of Directors took
2 action to increase the annual assessment to an amount that was not more than 5%.

3 22. Mr. Van Royen characterized the November 12 and 23, 2007 meetings as
4 "board" meetings, meaning regular meeting of the members of the Association that
5 occur every other month. However, Mr. Van Royen also characterized the November
6 23, 2007 meeting as a "special " meeting because the November 12, 2007 meeting was
7 a regular meeting at which a quorum was not present causing the meeting to be
8 rescheduled to November 23, 2007. According to Mr. Van Royen, while at the
9 November 23, 2007 meeting, because there was a quorum, the Board of Directors
10 decided to raise the annual assessment.

11 23. Mr. Van Royen testified that there was posting of the November 12 and 23, 2007
12 meetings at each of the four mailboxes at least 48 hours in advance of the meeting.

13 24. According to Mr. Van Royen, no notice of a meeting is required for a meeting of
14 the Board of Directors and no notice is needed for action to increase the annual
15 assessment if the increase is not more than 5%

16 25. Mr. Kayser testified that the Wednesday before the meeting he saw a posting of
17 the November 23, 2007 meeting by the mailbox.

18 26. On the day of the meeting, Mr. Kayser testified that the posting was not there.
19 Mr. Kayser went to Robb & Stucky on the date and time of the meeting and did not
20 observe a meeting being held and stated that Robb & Stucky had no record of such a
21 meeting being held. However, Mr. Van Royen testified that a meeting was held at Robb
22 & Stucky as per the posting of the notice.

23 **CONCLUSIONS OF LAW**

24
25 1. At this proceeding, Mr. Kayser bears the burden of proving by a preponderance
26 of the evidence that the allegations set forth in the Petition violated the specific
27 provisions of the Association's Declaration of Covenants, Conditions and Restrictions
28 ("CC&Rs") and By-Laws and statutes cited in the Petition. See A.A.C. R2-19-119.
29
30

1 2. A preponderance of the evidence is "evidence which is of greater weight or more
2 convincing than the evidence which is offered in opposition to it; that is, evidence which as
3 a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW
4 DICTIONARY 1182 (6th ed. 1990).

5 3. With respect the Item 3, annual audit of 2006, the weight of the evidence of
6 record established that the Petitioner failed to prove by a preponderance of the
7 evidence that the Association violated the provisions of A.R.S. § 33-1810 requiring
8 monthly financial compilation. However, Petitioner proved by a preponderance of the
9 evidence that the Association violated the provisions of Bylaws, Article VII, Section 8
10 (d), requiring an annual audit be done by an outside public accounting firm.

11 4. With respect to Item 4 of the Petition, failing to retain and provide documents and
12 present a statement at the annual meeting in 2006 and 2007, Petitioner failed to prove
13 by a preponderance of the evidence that the Association did not present a statement at
14 those annual meetings and no violation of By-Laws Article VII, Section 2(a) is found to
15 that effect. Petitioner proved by a preponderance of the evidence that the Association
16 failed to provide certain documents to Petitioner within ten business days as required
17 under A.R.S. § 33-1805. However, the evidence of record established that Petitioner
18 received bank statements for the above-mentioned accounts for the months of October
19 and November 2004 and received a copy of the minutes of the November 23, 2007
20 meeting. Petitioner also proved by a preponderance of the evidence that the
21 Association failed to maintain a complete record of the Association's acts and corporate
22 affairs and make those records available for inspection and copying as required by By-
23 Laws Article VII, Section 2(a) and Article X.

24 5. With respect to Item 5, 30 day notice of assessment, Petitioner failed to prove by
25 a preponderance of the evidence that the Association violated the provisions of A. R.S.
26 § 33-1805 (make association financial and other records available) and no violation is
27 found of CC&Rs Article IV, Sections 3 (maximum annual assessment) and 6 (notice and
28 quorum requirement) or By-Laws Article VII, Section 2(a) (complete records of its acts
29 and corporate affairs)and (c) parts 1 (amount of assessment) and 2 (30 day
30 assessment notice). The weight of the evidence of record established that the

1 Association provided the requested 30 day notice of assessment for 2006 and 2007 to
2 Petitioner.

3 6. With respect to Items, 6, 7, and 8 pertaining to quorum requirements and notice
4 and agenda requirements for annual meeting, while Mr. Van Royen testified that the
5 meeting held on November 23, 2007 was a regular meeting of members wherein action
6 taken by the Association's Board of Directors occurred, the Association's counsel
7 characterized the meeting as a Board of Directors meeting. Despite the confusion as to
8 the actual nature of the meeting, it is undisputed as to who showed up at the meeting or
9 what occurred.

10 7. The evidence of record established that the November 12, 2007 meeting was a
11 meeting that was held by membership every other month and there was no credible
12 evidence presented that showed the meeting on November 12, 2007 was an annual
13 meeting of the members. The November 23, 2007 meeting was held because there was
14 no quorum of members at the November 12, 2007 meeting. It is concluded that the
15 November 23, 2007 meeting was a special meeting of members and there was no
16 credible evidence that showed it to be an annual meeting of members.

17 8. The weight of the evidence of record established that the annual assessment
18 was not increased by more than 5%. Therefore, the Association's Board of Directors
19 had the authority to set the increase as it did not exceed 5% and no vote of the
20 members of the Association was required.

21 9. With respect to Item 6, there is no violation found as to CC&R Article IV,
22 Sections 3((maximum annual assessment) or 6 (notice and quorum requirements).
23 However, the posting at mailboxes does not satisfy the notice requirements of a special
24 meeting of members as set forth in the By-Laws, Article III, Section 3. Because, the
25 action taken at the November 23, 2007 meeting was accomplished by a quorum of the
26 Board of Directors, no violation of By-Laws, Article III, Section 4 (quorum of members) is
27 found to exist. Parenthetically, it is noted that there are notice requirements for a
28 Special Board of Directors meeting. However, Petitioner did not cite those provisions
29 within his Petition and the Administrative Law Judge does not have the authority to
30

1 address violations of statutes or of the Association's governing documents other than
2 those specifically cited in the Petition.

3 10. With respect to Item 7, there is no requirement that newsletters or minutes of an
4 increase of annual assessment be provided pursuant to CC&Rs Article IV section 3(a)
5 or 3(b) (both referencing maximum annual assessments) or 6, or By-Laws Article III
6 sections 3 and 4. However, under A.R.S. § 33-1805 there is a duty to maintain and
7 provide the minutes of the November 23, 2007 meeting and newsletter, though there
8 was no credible evidence that such a newsletter exists. The weight of the evidence of
9 record established that the R & R, on behalf of the Association, provided copies of
10 minutes of the November 23, 2007 meeting to Petitioner. Therefore, there is no violation
11 found regarding A.R.S. § 33-1805. There is no violation found regarding A.R.S. § 33-
12 1804 (open meeting) as Petitioner complained of a failure of the Association to provide
13 newsletter or minutes of the November 23, 2007 meeting rather than holding the
14 November 23, 2007 meeting in a closed session.

15 11. With respect to Item 8, the requirement as to quorum of Directors was met at the
16 meetings for the 2007 and 2008 annual assessment increases and no violation of
17 CC&Rs, Article IV, Sections 3 and 6 or By-Laws , Article III Sections 3 and 4 are found.
18 Mr. Kayser did not present persuasive legal argument or facts to establish how A.R.S. §
19 33-1804 was violated. Consequently, Mr. Kayser did not prove by a preponderance of
20 the evidence that A.R.S. § 33-1804 was violated by the Association. The issue
21 regarding quorum requirements and procedures for increasing dues for 2006 is
22 concluded to be an issue that is prior to the effective date of the enabling legislation that
23 provides for the instant hearing process and is therefore outside the scope of this
24 hearing.

25 12. Numerically, Mr. Kayser did not prevail on a majority of the items raised in the
26 Petition. However, based on the amount of time expended during the hearing and the
27 concerns raised by Mr. Kayser with respect to the annual audit of the financial records
28 of the Association, the need to comply with the notice requirement of a special meeting
29 of members, and the failure of the Association to maintain complete Association
30 documents and provide Mr. Kayser with access to such documents, Mr. Kayser is

1 determined to have prevailed on the most substantial issues. Consequently, Mr. Kayser
2 is concluded to be the prevailing party and is entitled to reimbursement of his \$2,000.00
3 filing fee pursuant to A.R.S. § 41-2198.02.

4 13. Mr. Kayser requested specific relief in the nature of specific direction made to the
5 Association as to what action it should take and how it should be taken. Other than a
6 civil penalty, the nature of the relief requested is outside the scope of the Administrative
7 Law Judge's authority. The Administrative law Judge concludes that based on the
8 particular facts presented and the nature of the violations, a civil penalty is not
9 warranted.

10 **ORDER**

11 Based on the above, the Association is ordered to comply with the above-
12 mentioned provisions of the CC&Rs, By-Laws and statutes that were found to have
13 been violated.

14 **IT IS ORDERED** that within ten days of the effective date of this Order the
15 Association is to provide at no expense to Mr. Kayser copies of all existing documents
16 that Mr. Kayser has previously requested as set forth in Mr. Kayser's exhibits, other
17 than those that the Administrative Law Judge found to have been provided; and .

18 **IT IS FURTHER ORDERED** that within forty days of this Order the Association
19 shall reimburse Mr. Kayser his \$2,000.00 filing fee.²
20

21 Done this day, May 30, 2008.
22
23
24

25 _____
26 Lewis D. Kowal
27 Administrative Law Judge
28

29 _____
30 ² Pursuant to A.R.S. § 41-2198.04 A, this Order is the final administrative decision and is not subject to a
request for rehearing. It is enforceable through contempt of court proceedings. A.R.S. § 41-2198.02 B.

Original transmitted by mail this
____ day of _____, 2008, to:

Department of Fire Building and Life Safety - H/C
Robert Barger, Director
ATTN: Debra Blake
1110 W. Washington, Suite 100
Phoenix, AZ 85007

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

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

William Kayser
6754 East Kelton Lane
Scottsdale, AZ 85254

Heather A. Fazio, Esq.
Doyle, Berman, Murdy, P.C.
1313 East Osborn Road, Suite 100
Phoenix, AZ 85014

By _____