

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Kenneth E Kassa,
4 Petitioner,

No. 20F-H2019035-REL

5 vs.

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 Queen Creek Ranchettes Homeowners
7 Association, Inc.,
8 Respondent.

9 **HEARING:** April 08, 2020 at 1:30 PM.

10 **APPEARANCES:** Kenneth Kassa (“Petitioner”) appeared on his own behalf.
11 Queen Creek Ranchettes Homeowners Association Inc. (“Respondent” and
12 “Association”) was represented by Jody Augustin. Dean McDaniels, Kelly Kassa,
13 Kimberly Timm, Sonya Foster, and Colleen Kaul observed.

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

15
16 After review of the hearing record in this matter, the undersigned Administrative
17 Law Judge makes the following Findings of Fact and Conclusions of Law, and issues this
18 DECISION AND FINAL ORDER to the Commissioner of the Arizona Department of Real
19 Estate (“Department”).

20 **FINDINGS OF FACT**

21 **BACKGROUND AND PROCEDURE**

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

25 2. On December 16, 2019, Petitioner filed a single-issue petition against the
26 Association with the Department.¹ Petitioner tendered \$500.00 to the Department with his
27 petition.²

28
29 ¹ See Agency File.

30 ² *Id.*

1 3. On January 10, 2020, the Association filed its ANSWER with the Department
2 whereby it denied all complaint items in the petition.³

3 4. Per the NOTICE OF HEARING, the Department referred this matter to the
4 Office of Administrative Hearings (“OAH”), an independent state agency, for an
5 evidentiary hearing on March 12, 2020, regarding the following issues based on
6 Petitioner’s petition:

7 **Petitioner alleges in the petition that Queen Creek Ranchettes**
8 **Homeowners’ Association, Inc. is in violation of A.R.S. § 33-1804.**

9 5. On March 25, 2020, the undersigned Administrative Law Judge issued an
10 ORDER SETTING TELEPHONIC HEARING to the parties pursuant to Arizona Supreme Court
11 Administrative Order No. 2020–48.

12 **THE PARTIES AND GOVERNING DOCUMENTS**

13 6. Respondent is a homeowners’ association whose members own properties
14 in a residential real estate development located in Queen Creek, Arizona. Membership for
15 the Association is comprised of the Queen Creek Ranchettes Phase I subdivision.

16 7. Petitioner is a Queen Creek Ranchettes Phase I subdivision property owner
17 and a member of the Association.

18 8. The Association is governed by its Covenants, Conditions, and Restrictions
19 (“CC&Rs”), and overseen by a Board of Directors (“the Board”). The Association is also
20 regulated by Title 33, Chapter 16, Article 1 of the Arizona Revised Statutes (“ARIZ. REV.
21 STAT.”)

22 9. The Association’s CC&Rs were rerecorded with the Pima County
23 Recorder’s Office on January 20, 1989.⁴ The CC&Rs empower the Association to control
24 certain aspects of property used within the development. When a party buys a residential
25 unit in the development, the party receives a copy of the CC&Rs and agrees to be bound
26 by their terms. Thus, the CC&Rs form an enforceable contract between the Association
27 and each property owner.

28 _____
29 ³ *Id.*

30 ⁴ See Respondent Exhibit 1.

1 10. Bylaws Article IV, Meetings of Members, Section 4.01 states “the first
2 annual meeting of the Members shall be held within one (1) year from the date of
3 incorporation of the Association, and each subsequent regular annual meeting shall be
4 held on the same day of the same month of each calendar year thereafter at the hour of
5 10:00 a.m. (Mountain Standard Time). The Board may fix a different date and time for the
6 meeting. If the scheduled day for any annual meeting of the Association is a legal holiday
7 (either federal or State of Arizona), the meeting shall be held at the same hour on the first
8 day following which is not a legal holiday. Any business of the Association may be
9 transacted at the annual meeting.”⁵

10 11. Bylaws Article IV, Meetings of Members, Section 4.02 states “Meetings of
11 the Members shall be held at the principal office of the Association or at any other place
12 within the State of Arizona, County of Maricopa, that the Board may from time to time
13 select.”⁶

14 12. Bylaws Article IV, Meetings of Members, Section 4.03 states “Special
15 meetings of the Association maybe called at any time by the President of the Association
16 or by the Board upon written request of either (i) the Members who are entitled to cast
17 one-fourth (1/4) of all the votes of the Class A membership, or (ii) the Blass B Member, if
18 any.”⁷

19 13. Bylaws Article IV, Meetings of Members, Section 4.04 states “Written notice
20 of each meeting of the Association shall be given by, or at the direction of, the Secretary or
21 person authorized to call the meeting by mailing a copy of the notice, postage prepaid, at
22 least five (5) days but not more than thirty (30) days before the meeting to the ownership
23 role of the Association or to such other address as may have been supplied in writing by
24 such Member to the Association for the purpose of notice. Such notice shall specify the
25 place, day and hour of the meeting. Duplicates of notices need not be given to Voting
26 Representatives.”⁸

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28 ⁵ See Respondent Exhibit 3.

29 ⁶ *Id.*

30 ⁷ *Id.*

⁸ *Id.*

1 14. Bylaws Article VI, Meetings of the Board, Section 6.01 states "Regular
2 meetings of the Board shall be held at least annually at such place and hour as may be
3 fixed from time to time by the Board. Meetings may be held by conference telephone or
4 similar communications equipment by means of which all participants can hear each
5 other."⁹

6 15. Bylaws Article VI, Meetings of the Board, Section 6.02 states "Special
7 meetings of the Board shall be held when called by the President of the Association or by
8 any two Directors after not less than three (3) days' notice to each Director. A call or notice
9 of a special meeting shall state the purpose or purposes for which the meeting is being
10 called or noticed, and only business affecting or related to such purpose or purposes may
11 be conducted at such meeting."¹⁰

12 16. Bylaws Article VII, Powers and Duties, Section 7.01 states "The Board shall
13 be vested with all the rights, powers and privileges and charged with all the duties and
14 responsibilities of the Association."¹¹

15 17. Bylaws Article XI, Miscellaneous, Section 11.02 states "In the case of any
16 conflict between the Declaration and these Bylaws, the Declaration shall control. All of the
17 terms and provisions of the Declaration are incorporated herein by this reference and
18 made a part hereof as if set forth in full herein."¹²

19 **HEARING EVIDENCE**

20 18. Petitioner testified on his own behalf and admitted Exhibits A-E into the
21 record. The Association called Jody Augustin as a witness and submitted Exhibits 1-4 into
22 the record. The NOTICE OF HEARING and Department's agency file were also admitted into
23 the record as their own exhibits.

24 19. At all times relevant to the matter at bar, Ms. Augustin was a member of the
25 Association's Board. Petitioner was not a member during this period of time.
26
27

28 ⁹ *Id.*

29 ¹⁰ *Id.*

30 ¹¹ *Id.*

¹² *Id.*

1 1. This matter lies within the Department’s jurisdiction. Pursuant to ARIZ. REV.
2 STAT. §§ 32-2102 and 32-2199 et al., regarding a dispute between an owner and a
3 planned community association, the owner or association may petition the department for
4 a hearing concerning violations of condominium documents or violations of the statutes
5 that regulate condominiums as long as the petitioner has filed a petition with the
6 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

7 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(D), 32-2199.02,
8 and 41-1092, OAH has the authority to hear and decide the contested case at bar. OAH
9 has the authority to interpret the contract between the parties.¹⁴

10 3. In this proceeding, Petitioner bears the burden of proving by a
11 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1804.¹⁵

12 4. “A preponderance of the evidence is such proof as convinces the trier of fact
13 that the contention is more probably true than not.”¹⁶ A preponderance of the evidence is
14 “[t]he greater weight of the evidence, not necessarily established by the greater number of
15 witnesses testifying to a fact but by evidence that has the most convincing force; superior
16 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
17 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
18 the other.”¹⁷

19 5. ARIZ. REV. STAT. § 33-1804(A) provides, in pertinent part, as follows:

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

29 1. Legal advice from an attorney for the board or the association.

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¹⁴ See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

¹⁵ See ARIZ. ADMIN. CODE R2-19-119.

¹⁶ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

¹⁷ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

- 1 2. Pending or contemplated litigation.
- 2 3. Personal, health or financial information about an individual member of the
- 3 association, an individual employee of the association or an individual
- 4 employee of a contractor for the association.
- 5 4. Matters relating to the job performance of, compensation of, health
- 6 records of or specific complaints against an individual employee of the
- 7 association or an individual employee of a contractor of the association who
- 8 works under the direction of the association.
- 9 5. Discussion of a member's appeal of any violation cited or penalty imposed
- 10 by the association except on request of the affected member that the
- 11 meeting be held in an open session.

12 6. ARIZ. REV. STAT. § 33-1804(B) provides, in pertinent part, "Not fewer than

13 ten nor more than fifty days in advance of any meeting of the members the secretary shall

14 cause notice to be hand-delivered or sent prepaid by United States mail to the mailing

15 address for each lot, parcel or unit owner or to any other mailing address designated in

16 writing by a member. The notice shall state the date, time and place of the meeting. A

17 notice of any annual, regular or special meeting of the members shall also state the

18 purpose for which the meeting is called, including the general nature of any proposed

19 amendment to the declaration or bylaws, changes in assessments that require approval of

20 the members and any proposal to remove a director or an officer."

21 7. ARIZ. REV. STAT. § 33-1804(C) provides, in pertinent part, "Before entering

22 into any closed portion of a meeting of the board of directors, or on notice of a meeting

23 under subsection D of this section that will be closed, the board shall identify the

24 paragraph under subsection A of this section that authorizes the board to close the

25 meeting."

26 8. "In applying a statute . . . its words are to be given their ordinary meaning

27 unless the legislature has offered its own definition of the words or it appears from the

28 context that a special meaning was intended."¹⁸ Each word, phrase, clause, and

29 sentence must be given meaning so that no part of the legislation will be void, inert, or

30 trivial.¹⁹ Legislation must also be given a sensible construction that avoids absurd

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

¹⁹ *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 204, ¶ 17 (App. 2007).

1 results.²⁰ If the words do not disclose the legislative intent, the court will scrutinize the
2 statute as a whole and give it a fair and sensible meaning.²¹

3 9. The material facts in the record are clear.

4 10. It is undisputed that the Association held at least one public annual meeting
5 for Members between 2017 and 2019.

6 11. The crux of Petitioner's dispute stems from his belief that many of the
7 Board's private meetings, if not all, should have been public, and that none of the Board's
8 private meeting were noticed to Members. However, Petitioner provided no evidence to
9 suggest that the Association was in violation of ARIZ. REV. STAT. § 33-1804 based on what
10 was discussed in private Board meetings held between 2017 and 2019. Moreover,
11 Petitioner's secondary argument is a separate and distinct issue. Neither the
12 appropriateness nor lawfulness of the Board's noticed private meetings, or lack thereof as
13 alleged, may be addressed by this Tribunal.

14 12. Therefore, based on a review of the relevant and credible evidence in the
15 record, the undersigned Administrative Law Judge concludes that Petitioner has not
16 sustained his burden of proof in this matter. Thus, no violation of ARIZ. REV. STAT. § 33-
17 1804 exists in this case.

18 **FINAL ORDER**

19 Based on the foregoing,

20 **IT IS ORDERED THAT** Petitioner's petition be denied.

21 **NOTICE**

22 **This Administrative Law Judge ORDER, having been issued as a result of a**
23 **rehearing, is binding on the parties. ARIZ. REV. STAT. § 32-2199.02(B). A party**
24 **wishing to appeal this order must seek judicial review as prescribed by ARIZ. REV.**
25 **STAT. § 41-1092.08(H) and title 12, chapter 7, article 6. Any such appeal must be**
26 **filed with the superior court within thirty-five days from the date when a copy of this**
27 **order was served upon the parties. ARIZ. REV. STAT. § 12-904(A).**

28 Done this day, April 28, 2020.

29 ²⁰ *State v. Gonzales*, 206 Ariz. 469, 471, ¶12 (App. 2003).

30 ²¹ *Luchanski v. Congrove*, 193 Ariz. 176, 178, ¶ 9.

/s/ Jenna Clark
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile April 28, 2020 to:

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