

1                                   **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2  
3 In the Matter of  
4 John W. Gray

5                   PETITIONER.

6 v.

7 Mesa Coronado III Condominium  
8 Association

9                   RESPONDENT.

**No. 23F-H063-REL**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

10                   **HEARING:** August 31, 2023

11                   **APPEARANCES:** John W. Gray appeared on behalf of himself. Chad M.  
12 Gallacher, Esq. appeared on behalf of the Respondent Mesa Coronado III  
13 Condominium Association.

14                   **ADMINISTRATIVE LAW JUDGE:** Velva Moses-Thompson

15  
16                                   **FINDINGS OF FACT**

17                   1.     The Arizona Department of Real Estate (Department) is authorized by  
18 statute to receive and to decide Petitions for Hearings from members of condominium  
19 unit owners' associations and from unit owners' associations in Arizona.

20                   2.     Respondent Mesa Coronado III Condominium Association (Respondent or  
21 Association) is a condominium unit owners' association whose members own the  
22 condominiums in Mesa Coronado III in Gilbert, Arizona.

23                   3.     Petitioner John W. Gray is a member of Respondent.

24                   4.     On or about May 15, 2023, Mr. Gray filed a three-issue petition with the  
25 Department alleging that Respondent violated Arizona Revised Statutes (A.R.S.) §§ 33-  
26 1248(B), 33-1243(B), and 33-1258(B). Petitioner also alleged that Respondent violated  
27 sections 1.6, 2.1, and 3.2 of its Bylaws. The petition provided, in relevant part, as  
28 follows:  
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30

1 No meeting of the HOA at Mesa Coronado III was held in  
2 2020, 2021, or 2022. Violation of ARS 33-1248 paragraph B,  
3 and bylaws Article 2.1.

4 The people claiming to be the Board of MC III are not  
5 legitimate, not duly elected, and have appointed themselves  
6 to successive terms of office. Violation of ARS 33-1243  
7 paragraph B, and Bylaws Article 3.2.

8 I have received no response to multiple requests for  
9 information, violation of ARS 33-1258.

10 5. Respondent filed a response to the petition.

11 6. The matter was referred to the Office of Administrative Hearings for an  
12 evidentiary hearing.

13 7. On July 14, 2023, the Department issued a Notice of Hearing (NOH)  
14 setting the Mr. Gray's Petition for hearing on August 31, 2023. The NOH provided that  
15 the issues set for determination were:

- 16 • ARS § 33-1248(B) and Bylaw Article 2.1 by stating, No  
17 meeting was held in 2020, 2021, or 2022 (Issue 1).
- 18 • ARS § 33-1258 and Bylaw Article 1.6 by stating,  
19 Petitioner has received no response to multiple requests  
20 for information (Issue 2).
- 21 • ARS § 33-1243(B) and Bylaw Article 3.2 by stating the  
22 people claiming to be the Board of [Respondent] are not  
23 legitimate, not duly elected, and have appointed  
24 themselves to successive terms of office (Issue 3).

25 8. A hearing was held on August 31, 2023. At hearing, Petitioner testified on  
26 behalf of himself. Respondent presented the testimony of Adriana Lacombe, the  
27 Association's community manager.

#### 28 **HEARING EVIDENCE**

29 9. In the years of 2020, 2021, and 2022, Respondent's Board of Directors  
30 (Board) did not hold an annual board meeting due to health concerns related to the  
COVID-19 pandemic.<sup>1</sup> Respondent presented evidence at hearing that in May of 2023,

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<sup>1</sup> See the testimony of Mr. Gray and Ms. Lacombe on the Hearing Audio Record; Exhibit 2, pgs. 4 and 5.

1 the Director-General of the World Health Organization determined that COVID-19 was  
2 “an established and ongoing health issue which no longer constitutes a public health  
3 emergency of international concern [ ].”<sup>2</sup>

4 10. From 2020 to July 2022, the Board members held successive terms each  
5 year because no board meeting was held during that time period.<sup>3</sup>

6 11. On September 28, 2021, Mr. Gray requested a copy of the following from  
7 the Board: “Respondent’s 2019, 2020, and 2021 budgets, Notice of Annual meeting and  
8 Board of Directors election 2020, results of directors election 2020, Notice of Annual  
9 Meeting and Board of Directors election 2021.”<sup>4</sup>

10 12. On September 28, 2021, the Board provided copies of the 2019 and 2020  
11 budgets. Ms. Lacombe explained to Mr. Gray that the 2021 budget was not yet  
12 approved.<sup>5</sup> Ms. Lacombe further explained that no meetings were held in 2020 and that  
13 no meeting was held in 2021.<sup>6</sup>

14 13. On October 13, 2022, Mr. Gray requested from the Board the names and  
15 unit numbers of the current board of directors and the dates the board of directors were  
16 elected or appointed (hereinafter October 13, 2022 request) .<sup>7</sup> Mr. Gray did not request  
17 to examine Board records nor copies of records through the October 13, 2022 request.

18 14. On February of 2023, Mr. Gray’s attorney sent a letter to Respondent  
19 regarding Mr. Gray’s concerns and complaints related to the Association.<sup>8</sup> Mr. Gray’s  
20 attorney also notified Respondent that Mr. Gray was unaware of the current members of  
21 the Board and how to direct a complaint, grievance, or inquiry. Mr. Gray’s attorney  
22 requested that the Board respond in within 30 days of receipt of the letter. However, the  
23 letter did not include a request to examine records or to make copies of records.<sup>9</sup>

24 15. On March 20, 2023, Mr. Gray requested the following records:<sup>10</sup>

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25 <sup>2</sup> See Respondent’s Exhibit A.

26 <sup>3</sup> See Exhibit 2.

27 <sup>4</sup> See Exhibit 7.

28 <sup>5</sup> See Exhibit 8.

29 <sup>6</sup> See Exhibit 7.

30 <sup>7</sup> See Exhibit 11.

<sup>8</sup> See Exhibit 9.

<sup>9</sup> See id.

<sup>10</sup> See Exhibit 10.

Copies of all invoices from Metro fire Equipment or any other vendor for all work performed at MC III related to the fire suppression/sprinkler systems, including inspection reports, any and all repairs for the time period beginning Jan 1 2014 and ending March 1, 2023.

Copies of invoices for the stucco repair from 2022, at the sprinkler control boxes on all buildings made necessary by the replacement of main control valves.

16. On March 15, 2023, the Board appointed Cassandra Miller to the Board due to a vacancy.<sup>11</sup>

17. On April 11, 2023, Mr. Gray requested from the Board copies of the minutes “for all HOA meetings for Mesa Coronado III beginning January 1, 2018 to April 11, 2023”.<sup>12</sup>

18. On July 18, 2023, Respondent conducted an annual board meeting and new board of directors were elected.<sup>13</sup>

19. Respondent’s attorney responded to Mr. Gray’s October 13, 2022 request and provided the names of the board members from 2018 to 2023.<sup>14</sup> Mr. Gray alleged at hearing that he was present for the board meeting 2018 and a quorum was not met. Mr. Gray also state that a person named Andrea West was present, however, she was not reflected on the response from Respondent’s attorney. Mr. Gray also stated that quorum was not present for the 2019 board meeting. Mr. Gray contended that the board members were not properly elected under the law.

20. At hearing, Ms. Lacombe explained that while board meetings were held in 2018 and 2019, an insufficient number of persons attended the hearing and a quorum was not met. Because no quorum was met, the existing board members continued to serve for an additional year.

21. Ms. Lacombe stated that she did not provide the records requested by Mr. Gray related to the fire sprinkler system because it is time consuming and she was

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<sup>11</sup> See Exhibit 2, pg. 3.

<sup>12</sup> See Exhibit 12.

<sup>13</sup> See Exhibit B.

<sup>14</sup> See Exhibit 17.

1 unsure whether all of the requested records existed. Ms. Lacombe explained that an  
2 annual inspection of the sprinkler system is required by law. After required the annual  
3 inspection, she is provide with a list of repairs. The repairs are then scheduled. Some  
4 years there were no required corrections. In the past two years there were necessary  
5 repairs. Ms. Lacombe explained that she is still working on Mr. Gray's request for the  
6 records related the sprinkler system.

7 22. At hearing, Respondent's counsel contended that the Board was required  
8 under A.R.S. § 33-1250(C) to allow homeowners to vote in person. Therefore, it was  
9 reasonable for the Association to believe that the annual board meetings must be  
10 conducted in person.

11 23. Article 1.6 of the Respondent's Bylaws provides:

12 Books and Records. The Condominium Documents and all  
13 other books, records, financial statements, and papers of the  
14 Association shall be available for inspection by any Member of  
15 First Mortgagee during reasonable business hours at the  
16 principal office of the Association where copies may be  
17 purchased at reasonable cost. The Association may withhold  
18 from inspection those books, records and papers designated  
19 in A.R.S. § 33-1258.

20 24. Article 2.1 of the Respondent's Bylaws provides:

21 Annual Meeting. The first annual meeting of the Members  
22 shall be held within one (1) year of the date on which the  
23 Association is incorporated, and an annual meeting of the  
24 Members shall be held during each calendar year thereafter.  
25 The date, time and place of each annual meeting of the  
26 Members shall be determined shall be determined by the  
27 Board of Directors.

28 25. Article 3.2 of the Respondent's Bylaws provides:

29 Term of Office. All directors elected by the Unit Owners shall  
30 be elected for a term of one (1) year or until their successors  
are elected and qualified.

## **CONCLUSIONS OF LAW**

1. A.R.S. § 32-2199(1) permits a condominium unit owner to file a petition with the Department for a hearing concerning the condominium association's alleged violations of the Condominium Act set forth in Title 33, Chapter 9. This matter lies within the Department's jurisdiction.

2. Petitioner bears the burden of proof to establish that Respondent violated the Association's Bylaws and applicable statutes by a preponderance of the evidence.<sup>15</sup> Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.<sup>16</sup>

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

4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give effect to the intent of the parties.<sup>19</sup> "Restrictive covenants must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein."<sup>20</sup>

5. Directors of a non-profit organization may be elected for successive terms, unless otherwise provided for in the articles of incorporation or bylaws. See A.R.S. § 10-3805(B).

6. The preponderance of the evidence shows that there is no current dispute regarding the Board's failure to hold annual board meetings. The weight of the

<sup>15</sup> See A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952).

<sup>16</sup> See A.A.C. R2-19-119(B)(2).

<sup>17</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

<sup>18</sup> BLACK'S LAW DICTIONARY at page 1220 (8<sup>th</sup> ed. 1999).

<sup>19</sup> See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

<sup>20</sup> *Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. App. 1993) (quoted in *Powell*, 211 Ariz. at 557 ¶ 16, 125 P.3d at 377).

evidence shows that the Board failed to hold in person board meetings from 2020 to 2022, due to the pandemic. The Board was required by law to allow members to vote in person. Although the Board could have conducted the meetings virtually, the evidence shows that the Board held an annual board meeting in 2023. Because there is no current dispute regarding the failure to hold an annual board meeting, the issue is now moot.

7. The preponderance of the evidence shows that Respondent failed to provide copies of records requested by Mr. Gray on March 20, 2023 and April 11, 2023. The weight of the evidence shows that Mr. Gray requested copies of the minutes of the Association meetings from 2018 through April of 2023. Although there were no board meetings from 2020-2022, Respondent provide no evidence to justify its failure to provide copies of the minutes of Association meetings from 2018 to 2019.

8. Mr. Gray provided insufficient evidence to establish that Board members were not legitimate and or duly elected. Mr. Gray failed to establish by a preponderance of the evidence that Respondent violated A.R.S. § 1243(B) and Bylaw Article 3.2.

#### **ORDER**

**IT IS ORDERED** that Petitioner be deemed the prevailing party in this matter regarding Petition Issue 2.

**IT IS FURTHER ORDERED** that Respondent be deemed the prevailing party in this matter regarding Petition Issues 1 and 3.

**IT IS FURTHER ORDERED** that Respondent pay Petitioner his filing fee of \$500.00, to be paid directly to Petitioner within thirty (30) days of this Order.

**IT IS FURTHER ORDERED** Respondent is directed to comply with the requirements of A.R.S. § 33-1258 and Bylaw Article 1.6 going forward.

No Civil Penalty is found to be appropriate in this matter.

#### **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.**

1 Done this day, September 20, 2023.

2  
3 /s/ Velva Moses-Thompson  
4 Administrative Law Judge

5 Transmitted by either mail, e-mail, or facsimile September 20, 2023 to:

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8 Commissioner  
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