

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of
4 John R. Ashley

No. 23F-H058-REL

5 PETITIONER,
6 V.

**ADMINISTRATIVE LAW JUDGE
DECISION**

7 Rancho Reyes II Community Association,
8 Inc.

9 RESPONDENT.

10 **HEARING:** September 14, 2023

11 **APPEARANCES:** Petitioner John R. Ashley represented himself. James Brewer,
12 Esq. represented Respondent Rancho Reyes II Community Association.

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

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15 **FINDINGS OF FACT**

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17 1. The Arizona Department of Real Estate (Department) is authorized by statute
18 to receive and to decide Petitions for Hearings from members of homeowners'
19 associations and from homeowners' associations in Arizona. Homeowners'
20 associations and their members are governed by the Chapter 16 of Title 33, the
21 Planned Communities Act, A.R.S. §§ 33-1801 to 33-1818.

22 2. Respondent Rancho Reyes II Community Association is a homeowners'
23 association whose members own single-family houses or lots in the Rancho Reyes II
24 development in Tucson, Arizona.

25 3. Petitioner is a member of Respondent.

26 4. In 2022, Respondent had two board members: Sherry Ortega and Maria
27 Ruelas.

28 5. In January of 2023, five board members were elected.

1 6. Respondent's community manager suspected that the election was not a fair
2 process and that certain individuals used fraudulent tactics to influence the election.
3 After consulting with Respondent's attorney, the community manager along with
4 Ms. Ortega decided to hold a new election in March of 2023.

5 7. In March of 2023, five board members were elected to the Board.

6 8. On or about May 2, 2023, Petitioner John R. Ashley filed a single-issue
7 Petition with the Department. Through the Petition, Petitioner alleged that Respondent
8 violated Article IV, Section 1 of Respondent's Bylaws. The Petition provided, in relevant
9 part, as follows "The violation of Article IV, Section 1: Number, was conducted by 2
10 Board Directors of RRII HOA (on or about 1/19/2023) dismissing and ordering a redo of
11 the 1/9/2023 Annual Membership Meeting for 3/7/2023; instead of the required 3
12 Directors to properly handle the Association's affairs."

13 9. The matter was referred to the Office of Administrative Hearings for an
14 evidentiary hearing.

15 10. On June 15, 2023, the Department issued a Notice of Hearing setting the
16 Petition for hearing on July 27, 2023. ¹The Notice of Hearing provided that the dispute
17 was as follows:

18 Petitioner alleges Respondent violated Article IV Section 1 of the Community
19 Bylaws by "dismissing and ordering a redo of the 1/9/2023 Annual Membership
20 Meeting for 3/7/2023."

21 11. A hearing was held on September 14, 2023.

22 12. At hearing, Petitioner testified on behalf of himself.² Respondent presented
23 the testimony of Kimberly Schone, the chief operating officer of Respondent's
24 community manager, and Sherry Ortega, Vice President of the Board.

25 13. Section 4.1 of Respondent's Bylaws provides:

26 The affairs of the Association will be managed by not less than
27 three (3) no more than nine (9) directors.

28 ¹ The hearing was continued to September 14, 2023.

1 14. Petitioner contended that Respondent violated Section 4.1 of the Bylaws
2 because the March election was managed by less than three board members. Petitioner
3 also alleged that there were no duly elected Board members in 2022. Petitioner alleged
4 that Sherry Ortega and Maria Ruelas were not duly elected. Petitioner also stated that
5 three of Respondents members wanted to serve on the Board but were not given the
6 opportunity. Petitioner did not dispute that there are currently at least three duly elected
7 members of the Board.

8 15. Ms. Schone stated that Petitioner was not allowed to serve on the Board for
9 several years pursuant to a court order.

10 16. Ms. Ortega has been the Vice President of the Board since March of 2023.
11 Prior to March of 2023, Ms. Ortega served as the President of the Board since
12 December of 2021. Prior to December of 2021, Ms. Ortega served as the Secretary for
13 the Board. Ms. Ortega explained that there were only two people on the Board from
14 2020 to March of 2023 because Respondent's homeowners were not interested in
15 serving on the Board by. Ms. Ortega explained that she would ask her neighbors to
16 serve the Board. Ms. Ortega explained that the Board would ask if anyone was willing to
17 serve on the Board at the board meetings. See Ms. Ortega's testimony on the Hearing
18 Audio Record and Respondent's Exhibit 2. However, the homeowners did not express
19 interest in serving on the Board. See id.

20 **CONCLUSIONS OF LAW**

21 1. A.R.S. § 32-2199(B) permits an owner or a planned community organization
22 to file a petition with the Department for a hearing concerning violations of planned
23 community documents under the authority Title 33, Chapter 16.³ Such petitions will be
24 heard before the Office of Administrative Hearings, an independent state agency.
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27
28

29 ³ See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce
30 the development's CC&Rs.

2. Petitioners bear the burden of proof to establish that Respondent violated Article IV, Section 1 of its Bylaws, by a preponderance of the evidence.⁴ Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.⁵

3. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."⁶ 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."⁷

4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give effect to the intent of the parties.⁸ "Restrictive covenants must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein."⁹

5. "It is well settled that when, due to circumstances beyond the control of the parties the performance of a contract is rendered impossible, the party failing to perform is exonerated." See *Garner v. Ellingson*, 18 Ariz. 181, 182 (App. 1972) citing *Whelan v. Griffith Consumers Company*, 170 A.2d 229, 230 (D.C. App., 1961).

6. It is undisputed Article IV, Section 1 of the Bylaws requires that Respondent's affairs be managed by no less than 3 board members. However, the preponderance of the evidence shows that Respondent actively sought the participation of a third board member. However, there was no interest by any of the members. Despite the Board's efforts, it was unable to comply with Article IV, Section 1 of the Bylaws. Petitioner failed to provide sufficient evidence to rebut Respondent's claim that it actively sought a third board member. Moreover, it is undisputed that Respondent

⁴ See A.R.S. § 41-1092.07(G)(2); 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).

⁵ See A.A.C. R2-19-119(B)(2).

⁶ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁷ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

⁸ See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

⁹ *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).

1 currently has at least three board members and there is no longer a dispute regarding
2 the Board's compliance with Article IV, Section 1 of the Bylaws.

3 7. Accordingly, because the preponderance of the evidence has shown that
4 Respondent was unable to comply with Article IV, Section 1 of the Bylaws and
5 compliance with Article IV, Section 1 of the Bylaws is no longer in dispute, the Petition
6 must be dismissed.

7 **RECOMMENDED ORDER**

8 **IT IS ORDERED** that Petitioner John R. Ashley's petition against Respondent
9 Rancho Reyes II Community Association, Inc. is dismissed.

10 **NOTICE**

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

16 Done this day, October 4, 2023.

17 /s/ Velva Moses-Thompson
18 Administrative Law Judge

19 Transmitted by either mail, e-mail, or facsimile October 4, 2023 to:

20 Susan Nicolson
21 Commissioner
22 Arizona Department of Real Estate
23 100 N. 15th Avenue, Suite 201
24 Phoenix, Arizona 85007
25 Attn:
26 SNicolson@azre.gov
27 AHansen@azre.gov
28 vnunez@azre.gov
29 djones@azre.gov

labril@azre.gov
John R. Ashley
jrrashley@yahoo.com

Lynn M. Allen, Esq.
Leah M. McKeever, Esq.
James Brewer, Esq.
Tyson & Mendes, LLP
lmckeeper@tysonmendes.com
jbrewer@tysonmendes.com

30 By: OAH Staff