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No. 24F-H012-REL

ADMINISTRATIVE LAW JUDGE DECISION

PRESCOTT LAKES COMMUNITY
ASSOCIATION, INC.,
Respondent.

APPEARANCES: Adrienne A. Speas, Esq. appeared on behalf of Prescott Lakes Community Association, Inc. (“Respondent” and “Association”) with Robert Sisley and Bryn Black as witnesses. Robert Garing (“Petitioner”) appeared on his own behalf. James Joannes as a witness.

After review of the hearing record in this matter, the undersigned Administrative Law Judge makes the following Findings of Fact and Conclusions of Law, and issues this ORDER to the Commissioner of the Arizona Department of Real Estate ("Department").

BACKGROUND AND PROCEDURE

2. On August 22, 2023, Petitioner filed a single-issue petition with the Department which essentially alleged that Voting Members, or their Alternates, in each of the Association's 16 neighborhoods vote in elections on behalf of Members in violation of ARIZ. REV. STAT. §§ 33-1812.¹ Specifically, the petition states that "In Prescott Lakes HOA

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1 elections, PLCA typically receives about 30% participation by owners. The HOA then has
2 each of the Voting Members or Alternate Voting Members for each of the 16
3 neighborhoods vote for those owners of their respective neighborhoods who did not vote.
4 Voting Members and Alternate [sic] are elected from their respective neighborhoods every
5 two years using the process stated above. Voting Members can vote any way they wish.”

6 a. Regarding relief, Petitioner requested an Order for Respondent to abide by
7 the referenced statute.

8 3. On August 30, 2023, the Department issued notice of the underlying petition
9 to Respondent.²

10 4. On September 14, 2023, Respondent returned its ANSWER to the
11 Department whereby it denied the merits of Petitioner’s allegation(s).³

12 5. Per the NOTICE OF HEARING, the Department referred this matter to the
13 Office of Administrative Hearings (“OAH”), an independent state agency, for an
14 evidentiary hearing on November 09, 2023, regarding the following issue:

15 **Whether Respondent is in violation of ARIZ. REV. STAT. § 33-1812 by**
16 **allowing, “Voting Members or Alternate Voting Members for each of**
17 **the 16 neighborhoods vote for those owners of their respective**
18 **neighborhoods who did not vote.”⁴**

19 THE PARTIES AND GOVERNING DOCUMENTS

20 6. Respondent is a nonprofit homeowners’ association⁵ whose members own
21 properties in the Prescott Lakes Community residential real estate development located in
22 Prescott, Arizona. Membership for the Association is comprised of Prescott Lakes
23 Community homeowners.

24 7. Petitioner is a Prescott Lakes Community homeowner and a member of the
25 Association.

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27
28 ² See Department’s electronic file at Notice of Petition.pdf.

29 ³ See Department’s electronic file at Response re Case No 24F-H012.pdf.

30 ⁴ See Department’s electronic file at Notice of Hearing.pdf.

⁵ See Department’s electronic file at Arizona Corporations Commission.pdf; see also Respondent Exhibit C.

1 8. The Association is governed by its Covenants, Conditions, and Restrictions
2 ("CC&Rs") and Bylaws, and overseen by a Board of Directors ("the Board").⁶ The CC&Rs
3 empower the Association to control certain aspects of property use within the
4 development. When a party buys a residential unit in the development, the party receives
5 copies of the CC&Rs and Bylaws⁷ and agrees to be bound by their terms. Thus, the
6 CC&Rs form an enforceable contract between the Association and each property owner,
7 and the Bylaws outline how the Association is permitted to operate.

8 9. The Association is managed by Homeowners Association Management
9 Company ("HOAMCO"), also located in Prescott, Arizona.

10 10. CC&R Article 6.4(b) states the following, in pertinent parts:

11 Each Neighborhood shall elect a Voting Member who shall be responsible for
12 casting all votes attributable to Units owned by Member in the Neighborhood on all
13 Association matters requiring a membership vote, except as otherwise specified I
14 this Declaration of the By-Laws. The Voting Member shall poll the Units comprising
15 the Neighborhood which he or she represents prior to any vote and shall case the
16 votes attributable to any Units not responding to the poll in his or her discretion. In
addition, each Neighborhood shall elect an alternate Voting Member who shall be
responsible for casting such votes in the absence of the Voting Member.

17 Each Member who owns a Unit within the Neighborhood shall be entitled to cast
18 one voter per Unit owned. The candidate who receives the greatest number of
19 voted [sic] shall be elected as the Alternate Voting Member. The Voting Member
20 and the Alternate Voting Member shall serve a term of two years or until their
successors are elected.

21 The presence, in person or by absentee ballots of Members representing at least
22 25% of the total votes attributable to Units in the Neighborhood shall constitute a
23 quorum at any Neighborhood meeting or election. In the event of a failure to obtain
24 a quorum or vacancy in such positions for any Neighborhood, the Board may
appoint a Voting Member or alternate Voting Member to represent such
Neighborhood until a successor is elected.

25 **THE ASSOCIATION'S HISTORICAL VOTING SCHEME**

26 11. There are 1,534 separately held assessment paying residential Units
27 subject to the Declaration within the Association. Every Unit is located in a Neighborhood.
28

29 ⁶ See Respondent Exhibit A.

30 ⁷ See Respondent Exhibit B.

1 There are sixteen (16) Neighborhoods in the Prescott Lakes Community.⁸ In the
2 Association, votes are not cast directly by Members. Instead, votes are cast by voting
3 delegates.

4 12. The method for election of Association Directors is set forth in the
5 Declaration, Bylaws, and in the Prescott Lakes Community Association Election Policy &
6 Procedure Manual.⁹

7 13. Voting Members are elected by Neighborhoods. Each Unit owner receives a
8 ballot and may vote. Association Directors are elected by the Voting Members, who cast
9 all votes assigned to the Units in the Neighborhood which the Voting Member represents.
10 The vote of the Voting Members is preceded by a poll of the Units in the Neighborhood.

11 14. Thusly, the Voting Members elected by Members act as their
12 representatives. As such, the Members cannot vote individually in the election of
13 directors; rather, the Voting Members, as voting delegates for the Members, represent the
14 interests of the Members in the election of the Directors.

15 15. In the matters upon which Members are personally entitled to vote,
16 Members are provided the opportunity to cast votes allocated to their unit by absentee
17 ballots. For elections of Voting Members, the Members are provided with absentee ballots
18 to cast the votes allocated to their Units.

19 **HEARING EVIDENCE**

20 16. Petitioner testified on his own behalf, called James Joannes, and submitted
21 Exhibit 1-2(a-b) into the record. Respondent called Robert Sisley and Katheryn Black as
22 witnesses, and submitted its PREHEARING MEMORANDUM and Exhibits A-I into the record.
23 The Department's electronic file, including the NOTICE OF HEARING, was also admitted into
24 the record. The substantive evidence of record is as follows:

- 25 a. Petitioner is a 3 year member of the Association. He previously served as an
26 alternate Voting Member for 2 years, though he has never served on the
27 Board.

28
29 ⁸ See Respondent Exhibit D.

30 ⁹ See Respondent Exhibits A-B and E.

- 1 b. On August 16, 2023, the Association held a vote for a Board of Directors
2 election. Three (3) spots were available, and four (4) candidates ran for
3 election; one of whom was Petitioner.
4 c. On August 20, 2023, Petitioner submitted a Records Request to HOAMCO
5 for the election results.¹⁰ Petitioner came in 4th overall.¹¹

6 **ADDITIONAL EVIDENCE**

- 7 a. Voting Members do not have complete discretion when casting votes. They
8 only have discretion to cast unreceived votes.
9 b. Mr. Joannes resides in the Parkside Neighborhood of the Association.
10 During the 2019-20 Board of Directors election, Mr. Sisley, Board President,
11 asked him to serve as a Voting Member. At that time, Mr. Sisley strongly
12 encouraged Mr. Joannes to cast his available votes in correlation with
13 Parkside's poll, which he did.
14 c. Per Mr. Sisley, during the last eight (8) years of his Board presidency he had
15 never approved, observed, or heard of proxy voting occurring during a
16 Board election.

17 **CLOSING STATEMENTS**

18 *Respondent's closing*

19 17. In closing, Respondent analogized its voting system to the representative
20 form of government in the U.S. Congress and argued that like Congress, whose district
21 voters elect a Representative by district to represent their interests, whereby the
22 Representative in turn acts as a delegate for the voters they represent; casting votes in
23 matters that come before it, Voting Members as voting delegates for the Members,
24 represent the interest of the Members in the election of the directors.

25 18. Respondent also argued that because planned communities have not been
26 excluded from the rights of nonprofit corporations to use voting delegate systems, the
27 Association, as a nonprofit corporation, may use the voting delegate system identified in
28 the Nonprofit Corporation Act. Respondent further argued that votes allocated to the Units

29 ¹⁰ See Petitioner Exhibit 1.

30 ¹¹ See Petitioner Exhibit 1a.

are not cast pursuant to a proxy, and that its voting system neither utilized nor constituted proxy voting. Per Respondent, Voting Members are elected by the Association Members rather than appointed, and election of a Voting Member is a collective action by a group of Members in a Neighborhood, rather than an individual action by an individual Member.

19. Ultimately, Respondent denied that a violation of ARIZ. REV. STAT. § 33-1812 existed, and opined that its voting system is a permissible voting delegate system under the law.

Petitioner's closing

20. In closing, Petitioner argued that Respondent's voting system is tantamount to voting by proxy in violation of ARIZ. REV. STAT. § 33-1812. Petitioner also argued that Respondent's nonprofit status did not supplant its requirement to adhere to the Planned Community Act over the Nonprofit Act.¹²

CONCLUSIONS OF LAW

1. This matter lies within the Department's jurisdiction pursuant to ARIZ. REV. STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a planned community association. The owner or association may petition the department for a hearing concerning violations of community documents or violations of the statutes that regulate planned communities as long as the petitioner has filed a petition with the department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D), 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested case at bar. OAH has the authority to interpret the contract between the parties.¹³

3. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1812. Respondent bears the burden to establish factors in mitigation and affirmative defenses by the same evidentiary standard.¹⁴

¹² See ARIZ. REV. STAT. § 10-3101 et seq.

¹³ See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

¹⁴ See ARIZ. ADMIN. CODE R2-19-119(B)(2).

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

8 5. A fundamental rule of statutory construction requires that every word or term
9 in a statute be given meaning so that construction of certain terms in a statute does not
10 render any of its other terms superfluous.¹⁷ Statutes shall be liberally construed to affect
11 their objects and to promote justice.¹⁸ In interpreting a statute, “[w]e first consider the
12 language of the statute and, if it is unclear, turn to other factors, including ‘the statute’s
13 context, subject matter, historical background, effects, consequences, spirit, and
14 purpose.’”¹⁹

15 6. Statutes should be interpreted to provide a fair and sensible result.²⁰ “In
16 applying a statute its words are to be given their ordinary meaning unless the legislature
17 has offered its own definition of the words or it appears from the context that a special
18 meaning was intended.”²¹

19 7. ARIZ. REV. STAT. § 33-1812(A)(7) provides, in pertinent parts, as follows:

20 A. Notwithstanding any provision in the community documents, after
21 termination of the period of declarant control, votes allocated to a unit may
22 not be cast pursuant to a proxy.²² The association shall provide for votes to

23 ¹⁵ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

24 ¹⁶ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

25 ¹⁷ See, e.g., *State v. Hoggatt*, 199 Ariz. 440, 443 ¶ 10, 18 P.3d 1239, 1242 (App. 2001).

26 ¹⁸ See ARIZ. REV. STAT. § 1-211(B).

27 ¹⁹ *McMurren v. JMC Builders, Inc.*, 204 Ariz. 345, 350 ¶ 12, 63 P.3d 1082, 1087 (App. 2003) (citing *Norgord*
28 *v. State ex rel. Berning*, 201 Ariz. 228, P7, 33 P.3d 1166, ¶ 7 (App. 2001), quoting *Hobson v. Mid-Century*
29 *Ins. Co.*, 199 Ariz. 525, P8, 19 P.3d 1241, ¶ 8 (App. 2001)).

30 ²⁰ See *Gutierrez v. Industrial Commission of Arizona*, 226 Ariz. 395, 249 P.3d 1095 (2011)(citation omitted);
State v. McFall, 103 Ariz. 234, 238, 439 P.2d 805, 809 (1968) (“Courts will not place an absurd and
unreasonable construction on statutes.”).

²¹ *Mid Kansas Federal Savings and Loan Ass’n of Wichita v. Dynamic Development Corp.*, 167 Ariz. 122,
128, 804 P.2d 1310, 1316 (1991).

²² Black’s Law Dictionary defines “proxy” as a person who is substituted or deputed by another to represent
and/or act for them; particularly in a meeting or public body. Also the instrument containing

1 be cast in person and by absentee ballot and, in addition, the association
2 may provide for voting by some other form of delivery, including the use of e-
3 mail and fax delivery. Notwithstanding section 10-3708 or the provisions of
4 the community documents, any action taken at an annual, regular or special
5 meeting of the members shall comply with all of the following if absentee
6 ballots or ballots provided by some other form of delivery are used:

7 5. The ballot does not authorize another person to cast votes on behalf of
8 the member.

9 B. Votes cast by absentee ballot or other form of delivery, including the use of e-
10 mail and fax delivery, are valid for the purpose of establishing a quorum.

11 8. Based upon a review of the credible and relevant evidence in the record,
12 Petitioner has not sustained his burden of proof.

13 9. Here, the relevant and credible evidence of record establishes that while
14 proxy voting is explicitly prohibited under the Planned Community Act, the legislature
15 made no such bar regarding delegate voting as a form of HOA governance. In fact, the
16 legislature specifically exempted planned communities from certain enumerated
17 provisions of the Nonprofit Act, but did not address delegate voting within the Planned
18 Community Act in any capacity.

19 10. The Planned Community Act does not regulate who is authorized to vote in
20 planned community elections. Instead, it prohibits proxy voting when votes have been
21 "allocated to a unit." Regarding the election of Board Directors, there are no votes
22 "allocated to a unit." Instead, all votes are allocated to Neighborhood Voting Members as
23 delegates under the voting system governed by the Association's Declaration, Bylaws,
24 and Election Policy & Procedure Manual.

25 11. Thusly, a violation of ARIZ. REV. STAT. § 33-1812 has not been established.

26 12. Therefore, the undersigned Administrative Law Judge concludes that,
27 because Petitioner did not establish a violation of ARIZ. REV. STAT. § 33-1812, his petition
28 must be denied.

29 ORDER

30 Based on the foregoing,

the appointment of such person.

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By: OAH Staff