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No. 24F-H045-REL

ADMINISTRATIVE LAW JUDGE DECISION

Eagle Crest Ranch
Homeowners Association,
Respondent.

APPEARANCES: Petitioner Kenneth M. Halal appeared on his own behalf with witnesses. Margot Castro and Patricia Schell. Alexandra M. Kurtyka, Esq. and Mark Sahl, Esq. represented Respondent Eagle Crest Ranch Homeowners Association. Donald Morris appeared as a witness for Respondent Eagle Crest Ranch Homeowners Association.

EXHIBITS ADMITTED INTO EVIDENCE: Petitioner's Exhibits 12, 13, and 31;
Respondent's Exhibits A, C, D, and H.

1. On or about March 26, 2024, Kenneth M. Halal (“Petitioner”) filed a Homeowners Association (HOA) Dispute Process Petition (“Petition”) with the Arizona Department of Real Estate (“Department”) alleging a violation of Planned Community Statutes and Bylaws by Eagle Crest Ranch Homeowners Association (“Respondent”). Petitioner indicated a single issue would be presented, paid the appropriate \$500.00 filing fee, and asserted a violation of A.R.S. §§ 33-1803 and 33-1804, and the Bylaws, Sections 2.3 and 5.2.

1

Petitioner alleges that Respondent "did not provide due process when removing the Petitioner Kenneth M. Halal, an Association member in good standing from the HOA website's forum (aka Townsquare Forum)," in violation of A.R.S. § 33-1803, A.R.S. § 33-1804, HOA's Bylaws Article 2.3 and 5.2.

3. At hearing, Petitioner testified on his own behalf and called witnesses Margot Castro and Patricia Schell. Respondent presented the testimony of Donald Morris.

4. The governing CC&Rs define "Project Documents" in Article 1, Section 1.36 as "this Replacement Declaration, the Articles, the Bylaws, the Association Rules and the Architectural Committee Rules."¹

5. Article 2.3 of the Bylaws sets forth the following:

Notice of Meetings. Written notice of each meeting of the Members shall be given by, or at the direction of, the Secretary or person authorized to call the meeting by mailing a copy of each notice, postage prepaid, at least fifteen (15) days before such meeting to each Member entitled to vote thereat addressed to the Member's address last appearing on the books of the Association or supplied by such Member to the Association for the purpose of notice. Such notice shall specify the place, day and hour of the meeting, and, in the case of a special meeting, the purpose of the meeting. When a meeting is adjourned to another time or place, notice need not be given of the adjourned meeting if the time and place of the meeting are announced at the meeting at which the adjournment is taken. At the adjourned meeting, the Association may transact any business which might have been transacted at the original meeting. If the adjournment is for more than thirty (30) days, a notice of the adjourned meeting shall be given to each member entitled to vote at the meeting. By attending a meeting, a Member waives any right he may have had to object to the meeting on the basis that the proper notice of the meeting was not given in accordance with these Bylaws or the statutes of the State of Arizona.

6. Article 5.2 of the Bylaws sets forth the following:

5.2 Notice of Violation.

5.2.1 The Board, or any person designated by the Board, may serve a "Notice of Violation against an Owner for a violation of any provision of the

¹ See Respondent's Exhibit D.

1 Project Documents by the Owner, his family, tenants or guests. A Notice of
2 Violation shall contain (i) a description of the violation, (ii) the approximate
3 time and place at which the violation was observed, (iii) the amount of the
4 fine to be paid by the Owner for such violation, (iv) the name of the person
5 issuing the Notice of Violation, and (v) a statement advising the Owner of
6 the Owners right to request a hearing pursuant to Section 5.2.4 of the
7 Bylaws.

8 7. Donald Morris, a member of Respondent and former President of the Board,
9 testified that Associa Arizona ("Associa") is Respondent's community manager and
10 provides access to Respondent's online platform, Townsquare. Townsquare is a
11 separate legal entity from Respondent and is not owned or managed by Respondent.
12 Townsquare has its own Terms of Use and Respondent's Board does not have the ability
13 to remove a community member from the platform, as only Townsquare itself can remove
14 a user.

15 8. Mr. Morris explained that residents of the community can utilize
16 Townsquare to communicate with the community managers and Board members, and to
17 pay fees, and access community documents. Users of Townsquare can also add posts
18 and comment on others' posts, similar to Facebook. Respondent does not pay for the use
19 of Townsquare, and there is no requirement that residents utilize Townsquare.

20 9. Mr. Morris testified that Petitioner was restricted from posting and
21 commenting on posts on Townsquare because Petitioner did not comply with
22 Townsquare's Terms of Use.

23 10. Townsquare's Terms of Use, effective June 23, 2017, and which were in
24 effect at all times relevant herein, sets forth the rules to which users are required to adhere
25 in order to use the platform. Those Terms of Use set forth the following in pertinent part:

26 Content that is defamatory, infringing, illegal or otherwise tortious is
27 not permitted on the Site and App. It is not our responsibility to
28 monitor Content posted by members. If you violate this Agreement or
29 our other policies, infringe a third party's intellectual property rights or
30 otherwise engage in harmful behavior, **we reserve the right, in our
sole discretion, to remove your Content, and suspend, delete or
deactivate your account or other privileges, or otherwise refuse
service to you.** You are solely responsible for your Content that you
post on the Services or transmit to other users and agree and

acknowledge that neither Company nor any applicable homeowners' association, community management company or any other party whatsoever shall be liable or responsible for your Content. **Without limitation, you agree that your Content that you post or transmit to other users using the Services will not include any Content that:**

- **is defamatory, abusive, obscene, profane or offensive;**

....

- violates anyone's right of publicity or right of privacy; • **is threatening or harassing, or that promotes racism, bigotry, hatred or physical harm of any kind against any group or individual;**²

11. Those Terms of Use also set forth the following in pertinent part:

Acceptable Use

When using the Services, **you are expected to be respectful of others**. This means that whether you are being complimentary or critical, whether you are agreeing or disagreeing with the subject of any Content or another user's comment, **you should act in a civil manner and refrain from personal attacks**. Company is under no obligation to enforce the Agreement on your behalf or based on a claim by you that another user has breached any part of this Agreement. We encourage you to let us know if you believe that another user has breached this Agreement or has engaged in other unacceptable behavior by reporting it to abuse@townsq.io. **Company will make the sole determination, in our sole discretion, as to whether your Content or any other content is acceptable for the Services**. It is not Company's policy to remove comments or reviews in response to requests from users. Our role is not to arbitrate disagreements between community members and local businesses, or among community members. A neighborhood or community moderator may be appointed for your community or neighborhood. Such moderator may have the ability to remove comments or reviews, but not the obligation to do so. By using the Services, you agree that you will not hold Company, your applicable homeowners' association or community management company, responsible or liable for any content or information from other users that you access on or through the Services.³

² See Respondent's Exhibit H. Emphasis added.

³ *Id.* Emphasis added.

1 12. Mr. Morris credibly testified that Townsquare made the sole determination
2 that Petitioner misused the platform based upon his postings and comments which
3 included profanity, defamatory tone, using terms to reference members including
4 referencing female genitalia, and generally made certain members of the community
5 uncomfortable. Mr. Morris referenced several of Petitioner's posts illustrating his
6 interactions with members of the community.⁴ These posts were forwarded to Associa
7 and Associa forwarded the posts to Townsquare for review. Townsquare thereafter made
8 the decision to restrict Petitioner's use of the platform.

9 13. Mr. Morris testified that neither Respondent nor Associa have the authority
10 or ability to remove or restrict Petitioner's use of Townsquare. Mr. Morris further testified
11 that Townsquare's Terms of Use is not a Project Document as that term is defined in the
12 governing CC&Rs.

13 14. Petitioner called Margot Castro to testify on his behalf. Ms. Castro testified
14 that she was not aware as to why Petitioner's access to Townsquare was restricted, as his
15 "behavior was no different than others."

16 15. Patricia Schell testified that both she and her husband have been "bounced
17 out" of Townsquare and she has "no idea why." Ms. Schell testified that she did not know
18 whether any of Petitioner's posts violated Townsquare's Terms of Use and she "has no
19 idea why he was removed."

20 16. Petitioner acknowledged that Townsquare is not owned by Respondent.

21 17. Petitioner asserted that CC&Rs Section 5.2, applies to this matter.
22 However, Petitioner did not cite a violation of this provision in his Petition. CC&Rs Section
23 5.2 sets forth the following:

24 Board of Directors and Officers The affairs of the Association shall be
25 conducted by the Board and such officers as the Board may elect or appoint
26 in accordance with the Articles and the Bylaws. Unless the Project
27 Documents specifically require the vote or written consent of the Members,
28 approvals or actions to be given or taken by the Association shall be valid if
given or taken by the Board. The Board shall have the power to levy
reasonable fines against an Owner for a violation of the Project Documents

29 ⁴ See Respondent's Exhibit A.

1 by the Owner, a Lessee of the Owner or by the Resident of the Owner's Lot.
2 Notwithstanding any provisions contained in this Replacement Declaration
3 or the Project Documents to the contrary, the Board shall be appointed by
4 Declarant so long as the Declarant(s) or Developer(s) own any Lot within
5 the Project.⁵

6 18. Even assuming arguendo that Petitioner had cited a violation of this
7 provision, the Administrative Law Judge finds that this section is inapplicable to this matter
8 as the Board has not levied a fine against Petitioner, nor has the Board alleged a violation
9 of the Project Documents by Petitioner. Townsquare's Terms of Use is not a Project
10 Document as that term is defined in the CC&Rs Article 1, Section 1.36.

11 19. Petitioner further alleged at hearing that he did not agree to the Terms of
12 Use of Townsquare. The Administrative Law Judge finds Petitioner's testimony in this
13 regard to be disingenuous.

14 20. Petitioner alleged that Respondent violated the cited statutes because there
15 is no record that the Board met and voted on the matter.

16 **CONCLUSIONS OF LAW**

17 1. Arizona statute permits an owner or a planned community organization to
18 file a petition with the Department for a hearing concerning violations of planned
19 community documents or violations of statutes that regulate planned communities.
20 A.R.S. § 32-2199. That statute provides that such petitions will be heard before the Office
21 of Administrative Hearings.

22 2. Petitioner bears the burden of proof to establish that Respondent committed
23 the alleged violation by a preponderance of the evidence.⁶ Respondent bears the burden to
24 establish affirmative defenses by the same evidentiary standard.⁷

25 3. "A preponderance of the evidence is such proof as convinces the trier of fact
26 that the contention is more probably true than not."⁸ A preponderance of the evidence is
27 "[t]he greater weight of the evidence, not necessarily established by the greater number of

28 ⁵ See Respondent's Exhibit D.

29 ⁶ See A.R.S. section 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazzano v. Superior Court*, 74 Ariz.
30 369, 372, 249 P.2d 837 (1952).

⁷ See A.A.C. R2-19-119(B)(2).

⁸ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 witnesses testifying to a fact but by evidence that has the most convincing force; superior
2 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
3 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
4 the other.”⁹

5 4. A.R.S. § 33-1803 sets forth the following in full:

6 A. Unless limitations in the community documents would result in a lower
7 limit for the assessment, the association shall not impose a regular
8 assessment that is more than twenty percent greater than the immediately
9 preceding fiscal year's assessment without the approval of the majority of
10 the members of the association. Unless reserved to the members of the
11 association, the board of directors may impose reasonable charges for the
12 late payment of assessments. A payment by a member is deemed late if it
13 is unpaid fifteen or more days after its due date, unless the community
14 documents provide for a longer period. Charges for the late payment of
15 assessments are limited to the greater of fifteen dollars or ten percent of the
16 amount of the unpaid assessment and may be imposed only after the
17 association has provided notice that the assessment is overdue or provided
18 notice that the assessment is considered overdue after a certain date. Any
19 monies paid by the member for an unpaid assessment shall be applied first
20 to the principal amount unpaid and then to the interest accrued.

21 B. After notice and an opportunity to be heard, the board of directors may
22 impose reasonable monetary penalties on members for violations of the
23 declaration, bylaws and rules of the association. Notwithstanding any
24 provision in the community documents, the board of directors shall not
25 impose a charge for a late payment of a penalty that exceeds the greater of
26 fifteen dollars or ten percent of the amount of the unpaid penalty. A payment
27 is deemed late if it is unpaid fifteen or more days after its due date, unless
28 the declaration, bylaws or rules of the association provide for a longer
29 period. Any monies paid by a member for an unpaid penalty shall be
30 applied first to the principal amount unpaid and then to the interest
accrued. Notice pursuant to this subsection shall include information
pertaining to the manner in which the penalty shall be enforced.

C. A member who receives a written notice that the condition of the property
owned by the member is in violation of the community documents without
regard to whether a monetary penalty is imposed by the notice may provide
the association with a written response by sending the response by certified
mail within twenty-one calendar days after the date of the notice. The
response shall be sent to the address identified in the notice.

⁹ BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

1 D. Within ten business days after receipt of the certified mail containing the
2 response from the member, the association shall respond to the member
3 with a written explanation regarding the notice that shall provide at least the
4 following information unless previously provided in the notice of violation:

5 1. The provision of the community documents that has allegedly been
6 violated.

7 2. The date of the violation or the date the violation was observed.

8 3. The first and last name of the person or persons who observed the
9 violation.

10 4. The process the member must follow to contest the notice.

11 E. Unless the information required in subsection D, paragraph 4 of this
12 section is provided in the notice of violation, the association shall not
13 proceed with any action to enforce the community documents, including the
14 collection of attorney fees, before or during the time prescribed by
15 subsection D of this section regarding the exchange of information between
16 the association and the member and shall give the member written notice of
17 the member's option to petition for an administrative hearing on the matter in
18 the state real estate department pursuant to section 32-2199.01. At any time
19 before or after completion of the exchange of information pursuant to this
20 section, the member may petition for a hearing pursuant to section 32-
21 2199.01 if the dispute is within the jurisdiction of the state real estate
22 department as prescribed in section 32-2199.01.

23 5. A.R.S. § 33-1804 sets forth the following in full:

24 A. Notwithstanding any provision in the declaration, bylaws or other
25 documents to the contrary, all meetings of the members' association and
26 the board of directors, and any regularly scheduled committee meetings,
27 are open to all members of the association or any person designated by a
28 member in writing as the member's representative and all members or
29 designated representatives so desiring shall be permitted to attend and
30 speak at an appropriate time during the deliberations and proceedings. The
board may place reasonable time restrictions on those persons speaking
during the meeting but shall permit a member or member's designated
representative to speak once after the board has discussed a specific
agenda item but before the board takes formal action on that item in addition
to any other opportunities to speak. The board shall provide for a
reasonable number of persons to speak on each side of an issue. Persons

1 attending may audiotape or videotape those portions of the meetings of the
2 board of directors and meetings of the members that are open. The board of
3 directors of the association shall not require advance notice of the
4 audiotaping or videotaping and may adopt reasonable rules governing the
5 audiotaping and videotaping of open portions of the meetings of the board
6 and the membership, but such rules shall not preclude such audiotaping or
7 videotaping by those attending, unless the board audiotapes or videotapes
8 the meeting and makes the unedited audiotapes or videotapes available to
9 members on request without restrictions on its use as evidence in any
10 dispute resolution process. Any portion of a meeting may be closed only if
11 that closed portion of the meeting is limited to consideration of one or more
12 of the following:

13 1. Legal advice from an attorney for the board or the association. On final
14 resolution of any matter for which the board received legal advice or that
15 concerned pending or contemplated litigation, the board may disclose
16 information about that matter in an open meeting except for matters that are
17 required to remain confidential by the terms of a settlement agreement or
18 judgment.

19 2. Pending or contemplated litigation.

20 3. Personal, health or financial information about an individual member of
21 the association, an individual employee of the association or an individual
22 employee of a contractor for the association, including records of the
23 association directly related to the personal, health or financial information
24 about an individual member of the association, an individual employee of
25 the association or an individual employee of a contractor for the association.

26 4. Matters relating to the job performance of, compensation of, health
27 records of or specific complaints against an individual employee of the
28 association or an individual employee of a contractor of the association who
29 works under the direction of the association.

30 5. Discussion of a member's appeal of any violation cited or penalty
imposed by the association except on request of the affected member that
the meeting be held in an open session.

B. Notwithstanding any provision in the community documents, all meetings
of the members' association and the board shall be held in this state. A
meeting of the members' association shall be held at least once each year.
Special meetings of the members' association may be called by the
president, by a majority of the board of directors or by members having at
least twenty-five percent, or any lower percentage specified in the bylaws, of

1 the votes in the association. Not fewer than ten nor more than fifty days in
2 advance of any meeting of the members the secretary shall cause notice to
3 be hand-delivered or sent prepaid by United States mail to the mailing
4 address for each lot, parcel or unit owner or to any other mailing address
5 designated in writing by a member. The notice shall state the date, time and
6 place of the meeting. A notice of any annual, regular or special meeting of
7 the members shall also state the purpose for which the meeting is called,
8 including the general nature of any proposed amendment to the declaration
or bylaws, changes in assessments that require approval of the members
and any proposal to remove a director or an officer. The failure of any
member to receive actual notice of a meeting of the members does not
affect the validity of any action taken at that meeting.

9 C. Before entering into any closed portion of a meeting of the board of
10 directors, or on notice of a meeting under subsection D of this section that
11 will be closed, the board shall identify the paragraph under subsection A of
12 this section that authorizes the board to close the meeting.

13 D. Notwithstanding any provision in the declaration, bylaws or other
14 community documents, for meetings of the board of directors that are held
15 after the termination of declarant control of the association, notice to
16 members of meetings of the board of directors shall be given at least forty-
17 eight hours in advance of the meeting by newsletter, conspicuous posting or
18 any other reasonable means as determined by the board of directors. An
19 affidavit of notice by an officer of the corporation is prima facie evidence that
20 notice was given as prescribed by this section. Notice to members of
21 meetings of the board of directors is not required if emergency
circumstances require action by the board before notice can be given. Any
notice of a board meeting shall state the date, time and place of the meeting.
The failure of any member to receive actual notice of a meeting of the board
of directors does not affect the validity of any action taken at that meeting.

22 E. Notwithstanding any provision in the declaration, bylaws or other
23 community documents, for meetings of the board of directors that are held
24 after the termination of declarant control of the association, all of the
following apply:

25 1. The agenda shall be available to all members attending.

26 2. An emergency meeting of the board of directors may be called to discuss
27 business or take action that cannot be delayed for the forty-eight hours
28 required for notice. At any emergency meeting called by the board of
29 directors, the board of directors may act only on emergency matters. The
30 minutes of the emergency meeting shall state the reason necessitating the

1 emergency meeting. The minutes of the emergency meeting shall be read
2 and approved at the next regularly scheduled meeting of the board of
3 directors.

4 3. A quorum of the board of directors may meet by means of a telephone
5 conference if a speakerphone is available in the meeting room that allows
6 board members and association members to hear all parties who are
7 speaking during the meeting.

8 4. Any quorum of the board of directors that meets informally to discuss
9 association business, including workshops, shall comply with the open
10 meeting and notice provisions of this section without regard to whether the
11 board votes or takes any action on any matter at that informal meeting.

12 F. It is the policy of this state as reflected in this section that all meetings of a
13 planned community, whether meetings of the members' association or
14 meetings of the board of directors of the association, be conducted openly
15 and that notices and agendas be provided for those meetings that contain
16 the information that is reasonably necessary to inform the members of the
17 matters to be discussed or decided and to ensure that members have the
18 ability to speak after discussion of agenda items, but before a vote of the
19 board of directors or members is taken. Toward this end, any person or
20 entity that is charged with the interpretation of these provisions, including
21 members of the board of directors and any community manager, shall take
22 into account this declaration of policy and shall construe any provision of
23 this section in favor of open meetings.

24 6. In this case, Townsquare, a separate legal entity not affiliated with
25 Respondent, made the unilateral decision to restrict Petitioner's use of the platform based
26 upon its sole decision that Petitioner violated its Terms of Use. Townsquare is a separate
27 and distinct legal entity from Respondent and Respondent has no control over
28 Townsquare, its Terms of Use, or its decisions. Townsquare is not governed by
29 Respondent's community documents and its Terms of Use are not Project Documents.

30 7. Petitioner failed to prove by a preponderance of the evidence that
Respondent violated the cited statutes as alleged in the Petition. Petitioner further failed to
prove by a preponderance of the evidence that Respondent violated the Bylaws as cited
herein and alleged in the Petition. The statutes and provisions of the Bylaws cited by
Petitioner in his Petition are inapplicable to the instant matter.

ORDER

IT IS ORDERED that Petitioner's Petition is dismissed.

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.

Done this day, June 26, 2024.

/s/ Sondra J. Vanella
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile June 26, 2024, to:

Susan Nicolson, Commissioner
Arizona Department of Real Estate

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