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ADMINISTRATIVE LAW JUDGE DECISION

1 the Department.² Petitioner paid the appropriate \$500.00 filing fee for a single issue
2 Petition.

3 3. The Department referred the matter to the Office of Administrative
4 Hearings (OAH), an independent state agency, for an evidentiary administrative
5 hearing.

6 4. Respondent is a homeowners' association whose members own
7 properties in a residential real estate development located in Maricopa County, Arizona.

8 5. Petitioner is a property owner and member of HOA.

9 6. HOA is governed by its Covenants, Conditions, and Restrictions (CC&Rs),
10 and Bylaws, and overseen by a Board of Directors (Board). The HOA is also regulated
11 by Title 33, Chapter 16, Article 1 of the Arizona Revised Statutes (ARIZ. REV. STAT.)

12 7. HOA is managed by Ogden & Company; Barbara Bonilla is the
13 Community Manager.³

14 8. On March 24, 2025, the Department issued a Notice of Hearing in this
15 case, with the following dispute:⁴

16 The Petitioner alleges Respondent of violating CC&R 5.3 by having 'two-
17 board appointed members' on the Architectural Committee rather than the
18 required three members.

19 9. At some point prior to November 2024, the HOA, as Declarant, had the
20 right to appoint, at any time, between one (1) and three (3) members of an Architectural
21 Committee (ARC).⁵ Pursuant to CC&R 5.3, after the rights of the Declarant to make
22 such appointments expired or were relinquished, the Board was given the power to
23 appoint members of the ARC.⁶

24 10. In November of 2024, a new Board was elected by the members of the
25 HOA. Dwight Jolivette became President and Steve Gauer became the Treasurer.⁷ In

26 ² See File, Petition.

27 ³ See Exhibit 23.

28 ⁴ See File, Notice of Hearing.

29 ⁵ See Exhibit 1.

30 ⁶ *Id.*

⁷ See Exhibit 20.

November of 2024, the ARC consisted of two (2) members: Steve Gauer and Mike Ackerly.⁸

11. At the time of the Board meeting on November 19, 2024, discussion at the meeting indicated that an ARC member position was open and the Board called for volunteers to submit requests to Barbara Bonilla at the management company.⁹

12. By email dated November 20, 2024, Petitioner submitted his credentials to Ms. Bonilla for consideration for the ARC.¹⁰

13. There is no evidence of any applications to Ms. Bonilla other than Petitioner's application.

14. Petitioner testified that, although Ms. Bonilla forwarded the resume to the Board, he never heard back from the Board.

15. In 2018-2019, Petitioner had served as Architectural Advisory Committee member. In 2019-2021, Petitioner had served as the ARC Chairman.¹¹ In 2019-2021, Petitioner had also served as the Board Secretary.¹²

16. In February of 2022, Mike Ackerly joined Steve Gauer on the ARC. In February 2022, the ARC members were Steve Gauer and Mike Ackerly.¹³ From October 2023 to March 10, 2025, Steve Gauer and Mike Ackerly were ARC members.¹⁴

17. Based on the November 14, 2024 and January 24, 2025, e-mails to "ARC" regarding the Kirkendall paint request, the hearing record appears to indicate that from July 25, 2024 to November 15, 2024, Mr. Jolivet and Kenneth Riley were also ARC members.¹⁵

18. On January 22, 2022, Petitioner sought to attend an ARC meeting remotely, and was informed by Ms. Bonilla that there was no remote access option.¹⁶

⁸ *Id.*

⁹ See Exhibit 20.

¹⁰ See Exhibit 5.

¹¹ The hearing record does not provide the names of other ARC members during this time frame.

¹² See Exhibit 5.

¹³ See Exhibits 25 and 26.

¹⁴ See Exhibit 3.

¹⁵ See Exhibits 16 and 17.

¹⁶ See Exhibit 7.

Further, Petitioner was informed by Ms. Bonilla that the ARC members were Steve Gauer and Mike Ackerly.

19. At an ARC meeting on March 10, 2025, Petitioner questioned the authority of the ARC to make any decisions, positing that the ARC was not properly constituted with only two members and, therefore, could not make any decisions.¹⁷

20. At the March 17, 2025 Board meeting, Steve Gauer gave the ARC committee report and indicated that Alan Damon would join the ARC.¹⁸

21. At that meeting, President Jolivet indicated that Mr. Damon had agreed to join the ARC in the Fall of 2024 but, due to the holidays, he had not been able to fully participate. President proposed that, if the Board agreed, Mr. Damon would be appointed to the ARC.¹⁹

22. At that meeting, Petitioner noted that there had to be a motion for the appointment.²⁰

23. A motion was made and seconded at that time.²¹ During discussion of the motion, Petitioner objected to the appointment of Mr. Damon, arguing to the Board that there were people in the community who were “more qualified.”²² Petitioner further argued that Mr. Damon’s home was not in compliance with the Design Guidelines. When the President indicated that the Damon home was in compliance per the Community Manager, Petitioner continued to protest that it was not.

24. At the March 17, 2025 Board meeting, the Board voted to appoint Mr. Damon to the ARC.²³

25. Pursuant to the Petition, Petitioner’s stated position is that the ARC consisted of only 2 Board-appointed members in violation of CC&R 5.3 which mandated that the ARC consist of 3 members.²⁴ Petitioner argued that the Board had had the opportunity to comply with CC&R 5.3 but had “rejected” applicants, implying that the

¹⁷ See Exhibit 6.

¹⁸ See Exhibit 4. Petitioner prepared a partial transcript of the March 17, 2025 Board meeting.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² At the meeting, Petitioner did not present any names to the Board. *Id.* Further, neither party presented any CC&R provision setting forth “qualifications” for ARC members.

²³ *Id.*

1 Board could have appointed but had rejected Petitioner and, instead, purposely chose
2 to operate in violation of CC&R 5.3.

3 26. Petitioner presented historical information regarding his argument that the
4 ARC had not contained 3 members for an “extended” period of time.²⁵ However, there
5 were time frames during which no specific ARC membership information was
6 presented.

7 27. At the last moment, for the hearing, and based on his Amended Exhibits,
8 Petitioner argued that Mike Ackerly was never Board-appointed. Petitioner did not
9 amend his Petition to include a second issue regarding “appointment” to a committee.

10 28. HOA’s position is that the Board does not need to hold a vote to appoint
11 someone to a committee unless the governing documents require a vote, which Mr.
12 Jolivette argued did not so require. Further, Mr. Jolivette argued that, pursuant to ARIZ.
13 REV. STAT. § 33-1817, one Board member is always the Chairperson of the ARC and
14 the ARC requirements for 3 members were thus fulfilled. Mr. Jolivette did not provide
15 more specific information, such as who else on the Board was a third ARC member.

16 29. Mr. Jolivette argued that, during the time that Petitioner was on the Board,
17 the ARC did not have three members.

18 **CONCLUSIONS OF LAW**

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

25 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(D), 32-2199.02,
26 and 41-1092, OAH has the authority to hear and decide the contested case at bar.
27

28 ²⁴ In his Petition, Petitioner specifically noted that there were 2 ARC members: Steve Gauer (designated
29 to be ARC Chairman and Board Member) and Mike Ackerly.

30 ²⁵ At hearing, Petitioner argued that the HOA was not in compliance for 42 months.

1 3. In this proceeding, Petitioner bears the burden of proving by a
2 preponderance of the evidence that Respondent violated CC&R 5.3.²⁶

3 4. “A preponderance of the evidence is such proof as convinces the trier of
4 fact that the contention is more probably true than not.”²⁷ A preponderance of the
5 evidence is “[t]he greater weight of the evidence, not necessarily established by the
6 greater number of witnesses testifying to a fact but by evidence that has the most
7 convincing force; superior evidentiary weight that, though not sufficient to free the mind
8 wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one
9 side of the issue rather than the other.”²⁸

10 5. CC&R 5.3 provides, in pertinent part:

11 **Architectural Committee.** The Architectural Committee shall initially
12 consist of between one (1) and three (3) regular members, as
13 determined and appointed by Declarant. Members of the Architectural
14 Committee need not be Owners or Residents of the Property. Declarant
15 may replace any member of the Architectural Committee which it has
16 appointed at any time with or without cause. The rights of Declarant to
17 appoint Architectural Committee members shall cease and the Board
18 shall be vested with that right and all rights of the Declarant pertaining to
19 the Architectural Committee when the last Lot within the Property has
20 been sold to an Owner who is not a Builder. After such time as the rights
21 of Declarant to appoint the members of the Architectural Committee
22 expire or are relinquished by the Declarant, the Architectural Committee
23 shall consist of three (3) regular members, each of whom shall be
24 appointed by the Board. In the event the Board does not appoint an
25 Architectural Committee for any reason, the Board shall exercise the
26 authority granted to the Architectural Committee under this Declaration.

27 . . .

28 6. ARIZ. REV. STAT. § 33-1817(B)(1) provides as follows:

29 B. Notwithstanding any provision in the community documents,

30 1. Membership on a design review committee, an architectural committee or a
committee that performs similar functions, however denominated, for the
planned community shall include at least one member of the board of directors
who shall serve as chairperson of the committee.

²⁶ See ARIZ. ADMIN. CODE R2-19-119.

²⁷ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

²⁸ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

7. After review of the relevant testimony and evidence, the Tribunal finds that the evidence is inconsistent with regard to the ARC and ARC membership over an extended time.

8. The issue in Petitioner's Petition stands as of February 5, 2025. Based on the Petition, Petitioner apparently considered Mr. Gauer to be the Board representative, stating him to be Chairman of the ARC, and Petitioner also considered Mr. Ackerly to be the second ARC member. Mr. Jolivette did not provide the name of a third member as of February 5, 2025.

9. Petitioner filed a single issue Petition, which was not amended prior to the administrative hearing. Therefore, other than setting forth the historical information that was presented regarding ARC membership, Petitioner's arguments regarding the appointment process are not addressed.

10. The Tribunal concludes that that Petitioner has met his burden to demonstrate that, as of February 5, 2025, the newly elected HOA Board had not yet appointed a third member to the ARC after the November 19, 2024 Board meeting. The hearing record demonstrates that, prior to March 17, 2025, Mr. Jolivette had discussed the ARC with Mr. Damon. However, Mr. Damon was not appointed to ARC until March 17, 2025.

ORDER

IT IS ORDERED that Petitioner's petition in 25F-H036-REL be granted because the newly elected HOA Board had yet appointed a third member to the ARC in order to comply with CC&R 5.3 until March 17, 2025.

IT IS FURTHER ORDERED that Respondent shall reimburse Petitioner's \$500.00 filing fee as required by ARIZ. REV. STAT. § 32-2199.01.

IT IS FURTHER ORDERED that no civil penalty is awarded.

NOTICE

Pursuant to ARIZ. REV. STAT. § 32-2199.02(B), this Order is binding on the parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. § 32-2199.04. Pursuant to ARIZ. REV. STAT. § 41-1092.09, a request for rehearing in this matter must be filed with the Commissioner of the

1 **Department of Real Estate within 30 days of the service of this Order**
2 **upon the parties.**

3 Done this day, June 8, 2025.

4
5 /s/ Kay Abramsohn
6 Administrative Law Judge

7
8 **Transmitted electronically to:**

9 Susan Nicolson, Commissioner
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29 By: OAH Staff
30