BEFORE THE DEPARTMENT OF REAL ESTATE

OFFICE OF ADMINISTRATION

IN AND FOR THE STATE OF ARIZONA

Jay Janicek, **Petitioner,** **vs.** **Sycamore Vista No. 8 HOA,** **Respondent.**	**CASE NO. HO 17-16/019** **DOCKET NO. 17F-H1716019-REL** **FINAL ORDER**

Pursuant to Arizona Revised Statutes ("A.R.S.") § 41-1092.08, the attached Administrative Law Judge ("ALJ") Decision is adopted by the Commissioner of the Department of Real Estate ("Commissioner") and is accepted as follows:

ORDER

The Commissioner accepts the Recommended Order that Respondent shall comply with the applicable provisions of Arizona Revised Statutes ("A.R.S.") § 33-1817, 33-1811 and CCR's Article 12 (A) in the future and pursuant to § 32-2199.02 (A) the Respondent shall pay to the Petitioner the filing fee of $500.00.

The Commissioner accepts the ALJ decision that the petition in this matter be granted.

Pursuant to A.R.S. § 41-1092.09, a party may file a motion for rehearing or review within thirty (30) days after the service of this final Order. A written request for rehearing should be addressed to Abby Hansen, 2910 N. 44th Street, Suite 100, Phoenix, Arizona, 85018.

This Order is a final administrative action and is effective immediately from the date service is complete. A party may appeal this final administrative decision by filing a complaint for judicial review pursuant to title 12, chapter 7, article 6. The Order will not be stayed unless a stay is obtained from the court in conjunction with the judicial review action.

DATED this 16th day of March, 2017.

Judy Lowe

Judy Lowe, Commissioner
DEPARTMENT OF REAL ESTATE

The foregoing mailed this 16th day of March, 2017,
via certified mail receipt number 7015 1520 0000 8792 1424 to:

Jay Janicek
1098 S Chatfield Pl.
Corona de Tucson AZ 85641

Copy sent via certified mail receipt no. 7015 1520 0000 8792 1417 to:

Sycamore Vista No. 8 HOA
PO Box 57610
c/o Whitney Cunningham
Tucson AZ 85732-7610

Copy sent via certified mail receipt no. 7015 1520 0000 8792 1400 to:

Thompson Kron, P.L.C.
Attn: Dane Dehler
4601 East Ft. Lowell Rd. Suite 109
Tucson AZ 85712

COPY electronically transmitted to:

The Office of Administrative Hearings
1400 W Washington St, Suite 101
Phoenix, AZ 85007

By: ______________________
Abby Hansen
HOA Coordinator

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Jay Janicek, Petitioner, vs. Sycamore Vista No. 8 HOA, Respondent,	**No. 17F-H1716019-REL** **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: March 2, 2017

APPEARANCES: Petitioner Jay Janicek appeared personally. Respondent was represented by its attorney, Evan Thomson, Esq.

ADMINISTRATIVE LAW JUDGE: Suzanne Marwil

Based upon the evidence of record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. Petitioner's position is that Respondent adopted a Declaration of Scrivener's Error that is in realty a substantive Change to the Declaration of Covenants, Conditions Restrictions and Easements (Declaration), which was required to be approved by seventy-five percent of the Respondent's lot owners. Petitioner accuses Respondent of a violation of its fiduciary duty and a conflict of interest, given that three members of the Board have a financial interest in NT Properties, the company that owns the undeveloped lots. Petitioner alleges that this Declaration of Scrivener's Error led to the imposition of a $10.00 annual increase in Respondent's assessment on the developed lots.

2. Respondent argues that the purpose of the Declaration of Scrivener's Error was simply to reinsert the definition of a developed versus undeveloped lot, which was included in the 2005 Declaration but inadvertently deleted from a 2009 revision to the Declaration voted for by seventy-five percent of the lot owners. Respondent contends that it relied on the advice of counsel in adopting the Declaration of Scrivener's Error. Respondent maintains that it had the right to change the assessment on the developed lots based on the 2009 Declaration independent of the Declaration of Scrivener's Error.

3. The record contains the following facts:

A. On July 12, 2015, Respondent adopted the 2005 Amended and Restated Declaration (Exhibit A) and in particular Section 6.8 which provides in pertinent that:

> Uniform Rate of Assessment: Declarant and Developer Exempt: Both Annual and Special Assessments must be fixed at a uniform rate for all Lots and may be collected on a monthly basis. However, and subject to the limitations set forth in Section 6.4(B) hereof, said uniform rate may be revised periodically to reflect revisions in the Annual Assessments based on actual operating costs of the Association.
>
> Notwithstanding anything to the contrary herein neither Declarant nor Developer shall be responsible for payment of any assessments established pursuant to this Declaration or the Articles or Bylaws except that Declarant and Developer shall pay assessments on Completed Lots owned by Declarant or Developer. For purposes of this Section 6.8 "Completed Lots shall mean any Lot with a Dwelling Unit ready for occupancy as a home that is in the condition of any other Dwelling Unit sold to persons living in 1he Properties (e.g., carpet, kitchen countertops and cabinets, plumbing and lighting flxtures, etc,, installed), but shall not include any Lots with improvements thereon used by Declarant or Developer as models or sales offices.

B. Pursuant to Section 12.2(A) of the 2005 Declaration, on December 4, 2008, after a vote of seventy-five percent of the lot owners, Respondent adopted the First Amendment to the 2005 Declaration (Exhibit B). In pertinent part, the First Amendment to the Declaration deleted Section 6.8 in its entirety and replaced it with the following language:

> Uniform Rate of Dues and Assessments. Except as provided for herein, both dues and special assessments will be fixed at a uniform rate for all Lots .However, annual dues may be assessed at one uniform rate for Completed Lots and a different uniform rate for Uncompleted Lots.

C. For seven years following the vote on the First Amendment, the amended of Section 6.8 remained unchanged.

D. In June or July 2016, the Board of Respondent proposed adopting a Declaration of Scrivener's Error regarding the First Amendment to the Declaration.

Steven Russo, President of Respondent testified that the purpose of Exhibit C was to reinsert the definition of a developed versus an undeveloped lot, which was inadvertently omitted from the First Amendment. He noted that when the omission was brought to Respondent's counsel's attention, he recommended addressing the issue via Exhibit C.

E. Exhibit C was adopted by a vote of 3-2 on August 3, 2016, with Petitioner and the other Board member who represented the developed lot owners voting "no." It provided in pertinent part:

> NOW, therefore, IT IS HEREBY DECLARED that the first sentence of the original Section 6.8 of the Declaration shall be deleted and replaced with the two sentences above set forth in the original First Amendment. The remainder of Section 6.8 shall remain unchanged.

F. Thereafter, the Board voted to increase the assessment for the developed lot owners by $10.00 dollars annually and left the assessment for undeveloped lots unchanged.

G. Petitioner objected to the increased assessment and this Petition followed.

4. Petitioner testified consistent with the above facts. He submitted the Declaration of other neighboring homeowner associations that purported to have the same language as section 6.8 and were not corrected via a Declaration of Scrivener's Error.

5. Russo testified as to his belief that the Declaration of Scrivener's Error did nothing more than correct a clerical error and reinsert the definition of developed versus undeveloped lots.

CONCLUSIONS OF LAW

1. Petitioner filed his petition against Respondent with the Department pursuant to A.R.S. § 32-2199 *et seq.*

2. The Department referred this matter to the Office of Administrative Hearings for hearing and the issuance of an Order, pursuant to A.R.S. §§ 32-2199.01(D) and 32-2199.02.

3. Pursuant to A.A.C. R2-19-119(B), Petitioner has the burden of proof in this matter. The standard of proof is preponderance of the evidence. A.A.C. R2-19-119(A).

4. A.R.S. § 33-1817 provides in pertinent part that:

> A. Except during the period of declarant control, or if during the period of declarant control with the written consent of the declarant in each instance, the following apply to an amendment to a declaration:
>
> 1. The declaration may be amended by the association, if any, or, if there is no association or board, the owners of the property that is subject to the declaration, by an affirmative vote or written consent of the number of owners or eligible voters specified in the declaration, including the assent of any individuals or entities that are specified in the declaration.
>
> 2. An amendment to a declaration may apply to fewer than all of the lots or less than all of the property that is bound by the declaration and an amendment is deemed to conform to the general design and plan of the community, if both of the following apply:
>
> (a) The amendment receives the affirmative vote or written consent of the number of owners or eligible voters specified in the declaration, including the assent of any individuals or entities that are specified in the declaration.
>
> (b) The amendment receives the affirmative vote or written consent of all of the owners of the lots or property to which the amendment applies.
>
> 3. Within thirty days after the adoption of any amendment pursuant to this section, the association or, if there is no association or board, an owner that is authorized by the affirmative vote on or the written consent to the amendment shall prepare, execute and record a written instrument setting forth the amendment.
>
> 4. Notwithstanding any provision in the declaration that provides for periodic renewal of the declaration, an amendment to the declaration is effective immediately on recordation of the instrument in the county in which the property is located.

5. The Tribunal finds that the change to the Declaration contained in Exhibit C constitutes an amendment to the Declaration that should have been voted on by the lot owners. This was the procedure followed in 2009 to change the language of section 6.8 and, after a period of seven years, it defies logic to suggest that a further change to section was simply a clerical error. Accordingly, Exhibit C cannot operate to amend the Declaration and Respondent violated A.R.S. §33-1817 by amending the Declaration in this manner.

6. Nevertheless, the mere fact that Exhibit C is invalid does not implicate Respondent's right to impose an increased assessment on the developed lots pursuant to the language of Section 6.8 in the First Amendment to the Declaration which expressly states that "annual dues may be assessed at one uniform rate for Completed Lots and a different uniform rate for Uncompleted Lots." The raised assessment should stand.

7. The Tribunal rejects Petitioner's attempt to utilize A.R.S. § 33-1811 to challenge the make-up of the Board of Respondent. That section provides that:

> If any contract, decision or other action for compensation taken by or on behalf of the board of directors would benefit any member of the board of directors or any person who is a parent, grandparent, spouse, child or sibling of a member of the board of directors or a parent or spouse of any of those persons, that member of the board of directors shall declare a conflict of interest for that issue. The member shall declare the conflict in an open meeting of the board before the board discusses or takes action on that issue and that member may then vote on that issue. Any contract entered into in violation of this section is void and unenforceable.

Petitioner asserts that because Russo and two board members have an interest in NT Properties, they had to declare a conflict of interest. Such an interpretation of the statute is overbroad in that it both ignores that make-up of the Board as outlined in the Declaration and disregards the express language permitting the Board to assess annual dues.

8. The evidence of record supports Petitioner's request for relief outlined in his petition.

ORDER

IT IS ORDERED that Petitioner's petition in this matter be granted.

Pursuant to A.R.S. § 32-2199.02(A), the Respondent shall pay to the Petitioner the filing fee required by section 32-2199.01.

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 based on a petition setting forth the reasons for the request for rehearing, in which case the order issued at the conclusion of the rehearing is binding on the parties.

In the event of certification of the Administrative Law Judge Decision by the Director of the Office of Administrative Hearings, the effective date of the Order will be five days from the date of that certification.

Done this day, March 14, 2017.

/s/ Suzanne Marwil
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate