

1                                   **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2  
3 Tom Pyron,

4                   Petitioner,

5 vs.

6 Cliffs at North Mountain Condominium  
7 Association, Inc.,

8                   Respondent.

**No. 17F-H1717026-REL**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

9  
10 **HEARING:** June 12, 2017, at 8:30 a.m.

11 **APPEARANCES:** Tom Pyron ("Petitioner") appeared on his own behalf; Cliffs at  
12 North Mountain Condominium Association, Inc. ("Respondent") was represented by B.  
13 Austin Baillio, Esq., Maxwell & Morgan, P.C.

14 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky  
15

16                                   **FINDINGS OF FACT**

17                                   **BACKGROUND AND PROCEDURE**

18                   1. The Arizona Department of Real Estate ("the Department") is authorized by  
19 statute to receive and to decide Petitions for Hearings from members of homeowners'  
20 associations and from homeowners' associations in Arizona.

21                   2. Respondent is a homeowners' association whose members own the  
22 condominiums in the Cliffs at North Mountain development.

23                   3. Petitioner owns a condominium in and is a member of Respondent.

24                   4. On or about March 16, 2017, Petitioner filed a single-issue petition with the  
25 Department that alleged that Respondent had violated Respondent's Bylaws, Article III,  
26 §§ 3.02 and 3.06, and Article IV, § 4.06, by informing Respondent's members in  
27 January and February 2017, that only one Board of Director's position was up for  
28 election for a one-year term when, in fact, two positions on the Board were up for  
29 election for, respectively, a one-year term and a two-year term.

30                   5. In response to the concerns and petition, Respondent twice rescheduled the  
2017 annual meeting and re-issued ballots for the meeting to include all of its members

1 who had submitted a completed Board of Directors Candidate Application for the one  
2 open position. Because the ballots did not include all candidates who had completed a  
3 candidate application, Respondent offered to pay Petitioner's \$500 single-issue filing  
4 fee if he was satisfied with the proposed resolution.

5 6. Respondent also submitted a written answer to the petition, denying that it  
6 had violated any Bylaws. The Department referred the petition to the Office of  
7 Administrative Hearings, an independent state agency, for an evidentiary hearing.

8 7. Because Petitioner believed that two positions should have been up for  
9 election in 2017, not one, he did not withdraw his petition. A hearing was held on June  
10 12, 2017. Petitioner submitted sixteen exhibits and presented the testimony of four  
11 witnesses: (1) Anne Fugate, who had been elected to the Board in 2012; (2) Barbara  
12 Ahlstrand, who was elected to the Board in 2015; (3) Kevin Downey, who had  
13 completed a candidate application for the 2017 election but was not included on the first  
14 two ballots that Respondent issued; and (4) Himself. Respondent submitted three  
15 exhibits and presented the testimony of Cynthia Quillen, the Community Manager  
16 current employed by Respondent's management company, Associated Property  
17 Management.

18 8. The parties agreed that, due to the pending petition, no general membership  
19 meeting or election had yet been held in 2017.

#### 20 REFERENCED BYLAWS

21 9. Article III, § 3.01 of the Bylaws provides in relevant part as follows:

22 **Number of Directors.** The affairs of this Association will be  
23 managed by a Board of Directors. Except for the initial  
24 members of the Board of Directors that are designated under  
25 the Articles, the Board of Directors will be elected by the  
26 Members. . . . [T]he Board will be comprised of three  
27 Directors or any greater, odd number as may be determined  
28 by the Board in accordance with the Articles.<sup>1</sup>

29 10. Section 3.02 of the Bylaws provides in relevant part as follows:

30 **Board Term of Office.** So long as the Board of Directors is  
comprised of three persons, the Directors will hold office in  
staggered terms for one year, two years, and three years,

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<sup>1</sup> Petitioner's Exhibit B at 4-5.

1 respectively, and until their successors are appointed and  
2 qualified. The first term of the Director with a one year term  
3 will end as of the date of the first annual meeting of the  
4 Members, and each subsequent term will end on the date of  
5 each subsequent annual meeting of the Members. The first  
6 term of the Director with a two year term will end as of the  
7 date of the second annual meeting of the members, and all  
8 subsequent terms will end on the date of the fourth, sixth,  
9 eighth, tenth, etc. annual meeting of the Members. The first  
10 term of the Director with a three year terms will end on the  
11 date of the third annual meeting of the Members, and all  
12 subsequent terms will end on the date of the sixth, ninth,  
13 twelfth, fifteenth, etc. annual meeting of the Members. At  
14 any meeting where multiple Directors are elected, the person  
15 receiving the most votes will become the Director with the  
16 longest term and so on until all vacant spots are elected. . . .<sup>2</sup>

- 12 11. Section 3.3 of the Bylaws provides in relevant part as follows:

13 **Removal and Resignation.** . . . Any Director may resign at  
14 any time by giving written notice to the Board, the President,  
15 or the Secretary . . . .<sup>3</sup>

- 16 12. Section 3.6 of the Bylaws provides in relevant part as follows:

17 **Vacancies on the Board.** Vacancies on the Board . . . will  
18 be filled by a majority vote of the remaining Directors at the  
19 first regular or special meeting of the Board held after the  
20 occurrence of the vacancy . . . . Each person so elected will  
21 serve the unexpired portion of the prior Director's term.<sup>4</sup>

- 22 13. Article IV, § 4.06 of the Bylaws provides in relevant part as follows:

23 **Vacancies in Offices.** A vacancy in any office may be filled  
24 by appointment by the Board. The officer appointed to the  
25 vacancy will serve for the remainder of the term of the officer  
26 replaced.<sup>5</sup>

#### 27 ADDITIONAL HEARING EVIDENCE

- 28 14. The parties agreed that the Board has never been expanded beyond three  
29 members.

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30 <sup>2</sup> *Id.* at 5.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 6.

<sup>5</sup> *Id.* at 10.

1           15. The parties also agreed that in the 2012 election, Ms. Fugate was elected  
2 to a three-year term, John Haunschild was elected to a two-year term, and Ron Cadaret  
3 was elected to a one-year term.<sup>6</sup>

4           16. The parties also agreed that in the 2013 election, Mr. Cadaret was re-  
5 elected to a one-year term.<sup>7</sup>

6           17. Respondent submitted a chart that showed that under Bylaw § 3.02, the  
7 one-year and two-year positions should have been up for election in 2014.<sup>8</sup>  
8 Respondent submitted the ballot for the 2014 election, which showed Mr. Haunschild's  
9 and Sandra Singer's names, as well as space for write-in candidates.<sup>9</sup>

10          18. Petitioner submitted minutes from the March 19, 2014 general meeting that  
11 stated that "[t]he election of Sandra Singer was unanimously passed by acclamation."<sup>10</sup>  
12 Petitioner took the position that in 2014, Ms. Singer was elected to a one-year term, but  
13 that no other officers were elected at the 2014 election.<sup>11</sup>

14          19. Respondent submitted the minutes of the February 18, 2015 annual  
15 meeting, showing that at that time, Ms. Fugate was president, Mr. Haunschild was  
16 treasurer, and Ms. Singer was a director.<sup>12</sup> Ms. Quillen testified that based on the  
17 composition of the Board in 2015 and Bylaw § 3.02, in 2014, Mr. Haunschild must have  
18 been re-elected to a two-year term, which would expire in 2016, and Ms. Singer was  
19 elected to a one-year term, which would expire in 2015.

20          20. The parties agreed that Ms. Singer and Ms. Ahlstrand were elected to the  
21 Board in the 2015 election and that because she got the most votes, Ms. Singer was  
22 elected to a three-year term.<sup>13</sup>

23          21. Ms. Ahlstrand testified that, based on the number of votes and the fact that  
24 the two-year term was open, she believed that she had been elected to a two-year term.  
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26 <sup>6</sup> See Petitioner's Exhibits A and 1.

27 <sup>7</sup> See Petitioner's Exhibit 1.

28 <sup>8</sup> See Respondent's Exhibit 1.

29 <sup>9</sup> See Respondent's Exhibit 2.

30 <sup>10</sup> Petitioner's Exhibit C at 2.

<sup>11</sup> See Petitioner's Exhibit 1.

<sup>12</sup> See Respondent's Exhibit 3.

<sup>13</sup> See Petitioner's Exhibit 2 at 3. The minutes note Ms. Singer's and Ms. Ahlstrand's election, but not their term of office.

22. Ms. Ahlstrand resigned from the Board on August 3, 2015,<sup>14</sup> and the Board appointed Jeff Oursland to serve the remainder of her term.

23. Petitioner took the position that since Ms. Ahlstrand was elected to a two-year term, Mr. Oursland's term would expire in 2017.

24. Respondent took the position that under Bylaw § 3.02, Ms. Ahlstrand was elected to a one-year term in 2015. Therefore, Mr. Oursland would serve the remainder of the term, which would expire in 2016.

25. Petitioner acknowledged that at the 2016 election, Mr. Oursland was elected to a two-year term and Steve Molever was elected to a one-year term.<sup>15</sup>

26. Respondent took the position that under Bylaw § 3.02, in 2017, there was only one Board position up for election, the one-year term that Mr. Molever had completed.

27. Petitioner took the position that, since Mr. Oursland assumed Ms. Ahlstrand's two-year term, he should not have been on the ballot in 2016, because his two-year term would not expire until 2017.<sup>16</sup> Petitioner argued that in 2017, the Board should have noticed that two Board positions were up for election, the two-year term and the one-year term.

## CONCLUSIONS OF LAW

1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of planned community documents or violations of statutes that regulate planned communities. That statute provides that such petitions will be heard before the Office of Administrative Hearings.

2. Petitioner bears the burden of proof to establish that Respondent violated Bylaw §§ 3.02, 3.06, or 4.06 by a preponderance of the evidence.<sup>17</sup> Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.<sup>18</sup>

<sup>14</sup> See Petitioner's Exhibit 3.

<sup>15</sup> See Petitioner's Exhibit 1.

<sup>16</sup> Petitioner also argued that Ms. Singer's name should not have been on the ballot since her 3-year term would not expire until 2018. However, because this is a single issue petition, the Administrative Law Judge only addresses the single issue set forth in the Petition.

<sup>17</sup> 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).

<sup>18</sup> See A.A.C. R2-19-119(B)(2).

1 3. "A preponderance of the evidence is such proof as convinces the trier of fact  
2 that the contention is more probably true than not."<sup>19</sup> 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  
7 than the other."<sup>20</sup>

8 4. In applying a bylaw, its words are to be given their ordinary meaning unless  
9 the bylaws provide a different definition. The Bylaws provide that if a Board member  
10 resigns, the remaining Board members may appoint someone else to fill out the  
11 remainder of the term of the member who resigned. No evidence was offered that the  
12 Board ever appointed anyone other than Mr. Oursland to fill a vacancy. Mr. Oursland  
13 was only appointed to serve the remainder of Ms. Ahlstrand's term.

14 5. Under the plain language of Bylaw § 3.02, only the one-year and three-year  
15 terms were up for election in 2015. The Bylaws do not allow their plain language to be  
16 modified or amended by a member's understanding. Because the parties agree that  
17 Ms. Singer was elected to a three-year term in 2015, Ms. Ahlstrand must have been  
18 elected to the one-year term. After Ms. Ahlstrand resigned and the Board appointed Mr.  
19 Oursland to serve the remainder of her term, his term expired in 2016, and he was  
20 properly elected to a two-year term at that time, which will expire in 2018.

21 6. Because only the one-year term on the Board was up for election in 2017,  
22 Petitioner's petition should be dismissed.

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#### 25 **RECOMMENDED ORDER**

26 In view of the foregoing, it is ORDERED that Petitioner's petition in this matter is  
27 denied. Pursuant to A.R.S. § 32-2199.02(B), this Order is binding on the parties unless  
28 a rehearing is granted pursuant to A.R.S. § 32-2199.04 based on a petition setting forth  
29

30 <sup>19</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

<sup>20</sup> BLACK'S LAW DICTIONARY at page 1220 (8<sup>th</sup> ed. 1999).

1 the reasons for the request for rehearing, in which case the order issued at the  
2 conclusion of the rehearing would be binding on the parties.

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

6 Done this day, June 19, 2017.

7 /s/ Diane Mihalsky  
8 Administrative Law Judge

9 Transmitted electronically to:

10 Judy Lowe, Commissioner  
11 Arizona Department of Real Estate  
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