

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Jason West,

4 Petitioner,

5 Vs.

6 Desert Sage Two Homeowners
7 Association,

8 Respondent.

No. 17F-H1716031-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

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HEARING: June 21, 2017, at 8:30 a.m.

11 **APPEARANCES:** Jason West ("Petitioner") appeared on his own behalf; Desert
12 Sage Two Homeowners Association ("Respondent") was represented by Stewart F.
13 Salwin, Esq., Carpenter, Hazlewood, Delgado & Bolen, PLC.

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 Desert Sage Two development. The development is small and is
23 comprised of only approximately 40 homes.

24 3. Petitioner owns a home in and is a member of Respondent.

25 4. On or about April 10, 2017, Petitioner filed a single-issue petition with the
26 Department that alleged that Respondent had violated Bylaw § 3.6 by refusing to fill
27 vacancies on Respondent's Board of Directors.

28 5. Respondent filed a written answer to the petition, denying that it had violated
29 any Bylaws. The Department referred the petition to the Office of Administrative
30 Hearings, an independent state agency, for an evidentiary hearing.

1 6. A hearing was held on June 21, 2017. Petitioner submitted two exhibits,
2 testified on his own behalf, and for his rebuttal case, called two of Respondent's former
3 Board members, Korey Hjelmeir and Debra Epstein, to testify. Respondent submitted
4 25 exhibits and presented the testimony of two witnesses: (1) Eugenia ("Gina") Murray,
5 Respondent's Board's president and the only current member of the Board; and (2)
6 Edward ("Eddie") Padilla, the Community Manager currently employed by Respondent's
7 management company, National Property Service ("NPC").

8 **REFERENCED BYLAW**

9 7. Section 3.6 of the Bylaws provides in relevant part as follows:

10 **Vacancies.** Vacancies on the Board caused by any reason
11 other than the removal of a director in accordance with the
12 provisions of Section 3.3 of these Bylaws shall be filled by a
13 majority vote of the remaining directors at the first regular or
14 special meeting of the Board held after the occurrence of
15 such vacancy, even though the directors present at such
16 meeting may constitute less than a quorum. Each person so
17 elected shall serve the unexpired portion of the prior
18 director's term.¹

19 **ADDITIONAL HEARING EVIDENCE**

20 8. On or about March 8, 2016, Adrian ("Tony") Justiniano, Debra Epstein, and
21 Korey Hjelmeir were elected to the Board.²

22 9. Petitioner filed recall petitions against Mr. Justiniano, Ms. Epstein, and Ms.
23 Hjelmeir. On or about June 23, 2016, Mr. Justiniano, Ms. Epstein, and Ms. Hjelmeir
24 resigned from the Board. Ms. Murray testified that they resigned to avoid unnecessary
25 fees and that they planned to run again for a Board position.

26 10. At an election meeting held on or about August 3, 2016, Respondent's
27 members elected Petitioner, June Thompson, and Christina Van Soest to one-year
28 terms on the Board, with Petitioner serving as president.

29 11. At a Board meeting held on or about August 18, 2016, Petitioner, Ms.
30 Thompson, and Ms. Hjelmeir increased the number of directors from 3 to 5 and
appointed Ms. Murray and Myron ("Ray") Elmer to serve one-year terms as directors.

¹ Respondent's Exhibit 2 at 4.

² Many of the dates are from Petitioner's timeline. See Petitioner's Exhibit B.

12. On or about August 29, 2016, Ms. Thompson resigned from the Board.

13. On or about September 3, 2016, the remaining Board members appointed Elizabeth Mayhew to serve the remainder of Ms. Thompson's term as a director.

14. In December 2016, the Board terminated the previous management company and NPS. Ms. Murray testified that Petitioner had submitted a recall petition of the previous management company, but that she did not sign the recall petition.

15. On or about February 8, 2017, Ms. Van Soest submitted her resignation from the Board, effective immediately. Ms. Van Soest's resignation stated in relevant part as follows:

I have found the direction of some of the board does not appear to be in the best interest of the community as a whole. I do not have the time nor energy any longer to take part in this endeavor. I appreciate having been voted into this group but I envisioned this being much different than what it seems to have become. I have lived in this subdivision for the past 21 years and we have always enjoyed a harmonious friendly neighborhood. I have enjoyed meeting and getting to know some of you and appreciate the hard work you are doing. I also want to thank NPS for the professionalism and patience they have given us.³

16. Ms. Murray testified that Ms. Van Soest said that she was not comfortable with Petitioner, his statements about community members, his research into members' backgrounds and history, and the way he was making Board decisions.

17. On or about February 18, 2017, Petitioner resigned from the Board because he had "more important things to worry about than the management of this dysfunctional community."⁴

18. On or about February 23, 2017, Mr. Padilla on behalf of NPS and the remaining Board members sent a request for "motivated and dedicated individuals" to

³ Respondent's Exhibit 4.

⁴ Respondent's Exhibit 5.

1 serve on the Board. Mr. Padilla requested that interested individuals submit a
2 biography.⁵

3 19. NPS also sent a notice that an open Board Meeting would be held on
4 March 31, 2017.⁶ The third item on the agenda for the March 31, 2017 meeting was
5 "Board appointments."⁷

6 20. Ms. Murray and Mr. Padilla testified that no one responded to Mr.
7 Padilla's February 23, 2017 email or expressed any interest to them in serving on the
8 Board. Ms. Murray testified that at the March 31, 2017 Board meeting, she asked for
9 volunteers or nominations from the floor, but that no one responded to her requests,
10 although there was some discussion between the Board and Petitioner.

11 21. Petitioner testified that Linda Siedler, Teresa Price, Bret Morse, and
12 Bryan Brunatti were interested in serving on the Board, on the condition that the
13 professional errors and omissions policy covering directors was renewed on July 1,
14 2017. Petitioner testified that the petition that he filed in this matter, as well as an earlier
15 petition that he filed, made questionable whether the insurance policy would be
16 renewed. In addition, Petitioner testified that Ms. Siedler, Ms. Price, Mr. Morse, and Mr.
17 Brunatti were concerned about serving on the Board with Ms. Murray, Ms. Hjelmeir, Mr.
18 Justiniano, or Mr. or Ms. Epstein.

19 22. Respondent submitted the sign-in sheet for the March 31, 2017 Board
20 meeting, which showed seven names, including Petitioner's and Ms. Hjelmeir's, but not
21 any of the individuals that Petitioner testified were willing to serve on the Board under
22 certain conditions.⁸

23 23. Respondent submitted the minutes of the March 31, 2017 Board
24 meeting, which showed that Mr. Elmer, Ms. Murray, and Ms. Mayhew were the Board
25 members present, as well as the same members who had signed the sign-up sheet and
26 David and Debra Epstein via Skype.⁹

27 ⁵ See Respondent's Exhibit 6 at 3. Ms. Murray testified that the property manager maintained an email
28 list of all of Respondent's members and that notices were given through email. Petitioner acknowledged
29 that he had received all of the emails submitted and did not allege that any of Respondent's members did
30 not receive adequate notice of the various meetings, candidates, and proposed Bylaw amendment.

⁶ See Respondent's Exhibit 7.

⁷ See Respondent's Exhibit 10.

⁸ See Respondent's Exhibit 8.

⁹ See Respondent's Exhibit 9.

1 24. Petitioner asked Ms. Hjelmeir why she did not volunteer to serve on the
2 Board at the March 31, 2017 meeting. Ms. Hjelmeir stated that she felt the vacancies
3 on the Board should be addressed at an annual meeting, not at a board meeting.

4 25. Petitioner asked Ms. Epstein if she responded to Mr. Padilla's February
5 23, 2017 email seeking volunteers to serve on the Board. Ms. Epstein stated that
6 neither she nor her husband had responded.

7 26. Ms. Murray testified that the remaining Board members decided to hold
8 an annual meeting because the community was due for such a meeting and to let the
9 community decide which five members should serve on the Board.

10 27. On or about April 4, 2017, Mr. Padilla on behalf of NPC and the
11 remaining Board members requested that members who were interested in serving on
12 the Board submit biographies, with a deadline of April 21, 2017, at 4:00 p.m.¹⁰

13 28. On or about April 4, 2017, Petitioner sent an email to Mr. Padilla, asking
14 if April 21, 2017, at 4:00 p.m. was also the deadline to submit proposed amendments to
15 Respondent's Bylaws.¹¹

16 29. On or about April 4, 2017, Ms. Mayhew submitted her resignation from
17 the Board because she had "enough stress daily with my job and cannot handle this or
18 him. It is making me physically ill and he is not worth that." Ms. Mayhew added that
19 "maybe this will make him happy as now we don't have a board."¹²

20 30. Ms. Murray testified that Ms. Mayhew said that she was referring
21 specifically to Petitioner. Although Petitioner had resigned from the Board by that time,
22 Ms. Mayhew said she did not want to deal with Petitioner's verbal assaults, constant
23 lashing out, and personal attacks, and having to spend so much time mediating.

24 31. On or about April 5, 2017, Mr. Elmer submitted his resignation from the
25 Board "[d]ue to continued problems Jason etc."¹³

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29 ¹⁰ See Respondent's Exhibit 12.

¹¹ See Respondent's Exhibit 14.

¹² Respondent's Exhibit 13.

¹³ Respondent's Exhibit 15.

32. On or about April 18, 2017, Mr. Padilla sent out a reminder to Respondent's members that the deadline to submit biographies if they were interested in serving on the Board was April 21, 2017, at 4:00 p.m.¹⁴

33. Mr. Justiniano and Ms. Hjelmeir expressed an interest in serving on the Board and submitted biographies in support of their candidacies.¹⁵ Ms. Murray testified that no one else expressed an interest or submitted a biography.

34. Respondent submitted the ballot that was used at the May 15, 2017 annual meeting, which included Ms. Murray's, Mr. Justiniano's, and Ms. Hjelmeir's names. The ballot also included the amendment to the Bylaws that Petitioner had proposed to add as § 3.12, as follows:

Any director who is removed or resigns from the board before the completion of their term may not again serve as a board director for a period of one year following the date of their removal or resignation. This one year directorship ban also applies to any other individual co-owning an association lot with the former director.¹⁶

On May 5, 2017, Mr. Padilla sent an email explaining the ballots to Respondent's members.

35. Ms. Murray testified that she accepted nominations from the floor at the May 15, 2017 meeting. Ms. Murray testified Debra Epstein was nominated, but no one else. After ballots were counted, Ms. Murray, Ms. Epstein, Mr. Justiniano, and Ms. Hjelmeir were elected to the Board.¹⁷

36. Petitioner's proposed § 3.12 addition to the Bylaws also passed.¹⁸ Because Ms. Epstein, Mr. Justiniano, and Ms. Hjelmeir had resigned from the Board on June 23, 2017, in response to Petitioner's recall petitions, on May 15, 2017, they were no longer eligible to serve on the Board.

37. Ms. Murray testified that Ms. Siedler and Ms. Price may have been at the May 15, 2017 annual meeting, but she does not know what they looked like. Mr. Morse

¹⁴ See the Board's Exhibit 16.

¹⁵ See Respondent's Exhibits 17 and 18.

¹⁶ Respondent's Exhibits 11 and 21, Complainant's Exhibit A.

¹⁷ See Respondent's Exhibit 20.

¹⁸ See *id.*

submitted an absentee ballot and was not at the meeting. Although Mr. Brunatti attended the meeting and counted ballots, he did not ask to be nominated.

38. Ms. Murray testified that she has stated repeatedly that she has no intention of resigning from the Board because it is important to have someone serve the community's interests. If she resigns, there will be no one to negotiate the insurance contract and handle other community affairs.

39. On June 5, 2017, Mr. Padilla sent an email asking volunteers who were willing to serve on the Board to submit their biographies.¹⁹

40. On or about June 12, 2017, Petitioner submitted a petition to remove Ms. Murray from the Board that was signed by eleven members, including Mr. Morse, Ms. Price, Ms. Siedler, and Mr. Brunatti.²⁰

41. Mr. and Ms. Epstein both responded to Mr. Padilla's June 5, 2017 email by expressing an interest in serving on the Board.²¹ Ms. Murray testified that Mr. Justiniano and Ms. Hjelmeir have also expressed an interest. Ms. Murray and Mr. Padilla testified that no one else has expressed an interest in serving on the Board in response to Mr. Padilla's June 5, 2017 email.

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 § 3.06 by a preponderance of the evidence.²² Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.²³

¹⁹ See Respondent's Exhibit 22.

²⁰ See Respondent's Exhibits 23, 24.

²¹ See the Board's Exhibits 25 and 26.

²² 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).

²³ 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."²⁴ 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."²⁵

8 4. Section 3.6 requires the Board to appoint members to fill vacancies, but it
9 does not empower the Board to conscript members who are not willing to serve on the
10 Board.

11 5. Bylaws must be construed to avoid an absurdity.²⁶ Respondent established
12 that the Board has done all it could to fill vacancies, but that at this time, no eligible
13 members are willing to serve, in part due to Petitioner's obstructionist tactics, including
14 Petitioner and his claimed supporters. Because the Board has done all it could to fill
15 vacancies, Petitioner's petition should be dismissed.

16 **RECOMMENDED ORDER**

17 In view of the foregoing, it is ORDERED that Petitioner's petition in this matter is
18 denied. Pursuant to A.R.S. § 32-2199.02(B), this Order is binding on the parties unless
19 a rehearing is granted pursuant to A.R.S. § 32-2199.04 based on a petition setting forth
20 the reasons for the request for rehearing, in which case the order issued at the
21 conclusion of the rehearing would be binding on the parties.

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

25 Done this day, June 28, 2017.

26 /s/ Diane Mihalsky
27 Administrative Law Judge

28 Transmitted electronically to:

29 ²⁴ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

30 ²⁵ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

²⁶ See *Mail Boxes v. Industrial Comm'n of Arizona*, 181 Ariz. 119, 122, 888 P.2d 777, 780 (1995).

Judy Lowe, Commissioner
Arizona Department of Real Estate