

1 **BEFORE THE DEPARTMENT OF REAL ESTATE**

2 **OFFICE OF ADMINISTRATION**

3 **IN AND FOR THE STATE OF ARIZONA**

4
5 **Jason West,**

6 **Petitioner,**

7 **vs.**

8 **Desert Sage Two Homeowners**
9 **Association**

Respondent.

)
) **CASE NO. HO 17-16/031**

)
) **DOCKET NO. 17F-H1716031-REL**

)
) **FINAL ORDER**

10
11 Pursuant to Arizona Revised Statutes ("A.R.S.") § 41-1092.08, the attached
12 Administrative Law Judge ("ALJ") Decision is adopted by the Commissioner of the Department
13 of Real Estate ("Commissioner") and is accepted as follows:

14 **ORDER**

15 The Commissioner accepts the ALJ decision that Petitioner's petition in this
16 matter is denied.

17 Pursuant to A.R.S. § 32-2199.02 (B), this Order is binding on the parties unless a
18 rehearing is granted pursuant to A.R.S. § 32-2199.04 based on a petition setting forth the
19 reasons for the request for rehearing within thirty (30) days after the service of this final Order.
20 Per R4-28-1310 a rehearing or review of the decision may be granted for any one of the
21 following causes that materially affect the moving party's rights:

- 22 1. Irregularity in the proceedings or any order or abuse of discretion by the administrative
23 law judge that deprived a party of a fair hearing.
24 2. Misconduct by the Department, ALJ or the prevailing party.
25 3. Accident or surprise that could not have been prevented by ordinary prudence.
26 4. Newly discovered material evidence that could not with reasonable diligence have been
27 discovered and produced at the original hearing.
28

- 1 5. Excessive or insufficient penalties.
- 2 6. Error in the admission or rejection of evidence or other errors of law occurring during the
- 3 proceeding.
- 4 7. That the findings of fact or decision is arbitrary, capricious, or an abuse of discretion.
- 5 8. That the findings of fact or decision is not supported by the evidence or is contrary to
- 6 law.

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8 A written request for rehearing should be addressed to Abby Hansen, 2910 N. 44th Street, Suite

9 100, Phoenix, Arizona, 85018.

10 This Order is a final administrative action and is effective immediately from the

11 date service is complete. A party may appeal this final administrative decision by filing a

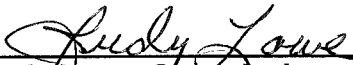
12 complaint for judicial review pursuant to title 12, chapter 7, article 6. The Order will not be

13 stayed unless a stay is obtained from the court in conjunction with the judicial review action.

14

15 **DATED this 12th day of July 2017.**

16

17 
Judy Lowe, Commissioner
DEPARTMENT OF REAL ESTATE

18

19 **The foregoing mailed this 12th day of July 2017,**

20 via certified mail receipt number 91 7199 9991 7037 6594 5073 to:

21 Jason West
22 9365 E Caribbean Lane
Scottsdale AZ 85260

23 Copy sent via certified mail receipt no. 91 7199 9991 7037 6594 5066 to:

24 Desert Sage Two Homeowners Association
25 c/o NPS, LLC
26 16099 N 82nd Street, Suite B-2
Scottsdale AZ 85260

27 Copy sent via certified mail receipt no. 91 7199 9991 7037 6594 5059

28

1 Desert Sage Two Homeowners Association
2 c/o Carpenter, Hazlewood, Delgado & Bolen PLC
3 1400 E. Southern Ave. Suite 400
4 Tempe AZ 85282

5 COPY electronically transmitted to:

6 The Office of Administrative Hearings
7 1400 W Washington St, Suite 101
8 Phoenix, AZ 85007

9 By:


10 Abby Hansen
11 HOA Coordinator
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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Jason West,

Petitioner,

Vs.

Desert Sage Two Homeowners
Association,

Respondent.

No. 17F-H1716031-REL

ADMINISTRATIVE LAW JUDGE
DECISION

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

APPEARANCES: Jason West ("Petitioner")
Desert Sage Two Homeowners Association ("Respondent")
Salwin, Esq., Carpenter, Hazlewood, Delgado

ADMINISTRATIVE LAW JUDGE: Diana

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FINDINGS C

BACKGROUND AND

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

2. Respondent is a homeowners' association whose members own the condominiums in the Desert Sage Two development. The development is small and is comprised of only approximately 40 homes.

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

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

5. Respondent filed a written answer to the petition, denying that it had violated any Bylaws. The Department referred the petition to the Office of Administrative 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 serve on the Board. Mr. Padilla requested that interested individuals submit a biography.⁵

³ Respondent's Exhibit 4.

⁴ Respondent's Exhibit 5.

⁵ See Respondent's Exhibit 6 at 3. Ms. Murray testified that the property manager maintained an email list of all of Respondent's members and that notices were given through email. Petitioner acknowledged

1 19. NPS also sent a notice that an open Board Meeting would be held on March
2 31, 2017.⁶ The third item on the agenda for the March 31, 2017 meeting was "Board
3 appointments."⁷

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

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

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

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

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28 that he had received all of the emails submitted and did not allege that any of Respondent's members did
29 not receive adequate notice of the various meetings, candidates, and proposed Bylaw amendment.

29 ⁶ See Respondent's Exhibit 7.

30 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 23,
5 2017 email seeking volunteers to serve on the Board. Ms. Epstein stated that neither
6 she nor her husband had responded.

7 26. Ms. Murray testified that the remaining Board members decided to hold an
8 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 remaining
11 Board members requested that members who were interested in serving on the Board
12 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 if
14 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 the
17 Board because she had "enough stress daily with my job and cannot handle this or him.
18 It is making me physically ill and he is not worth that." Ms. Mayhew added that "maybe
19 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 specifically
21 to Petitioner. Although Petitioner had resigned from the Board by that time, Ms.
22 Mayhew said she did not want to deal with Petitioner's verbal assaults, constant lashing
23 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.

30 ¹¹ See Respondent's Exhibit 14.

¹² Respondent's Exhibit 13.

¹³ Respondent's Exhibit 15.

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

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

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

11 Any director who is removed or resigns from the board
12 before the completion of their term may not again serve as a
13 board director for a period of one year following the date of
14 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

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

17 35. Ms. Murray testified that she accepted nominations from the floor at the May
18 15, 2017 meeting. Ms. Murray testified Debra Epstein was nominated, but no one else.
19 After ballots were counted, Ms. Murray, Ms. Epstein, Mr. Justiniano, and Ms. Hjelmeir
20 were elected to the Board.¹⁷

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

25 37. Ms. Murray testified that Ms. Siedler and Ms. Price may have been at the
26 May 15, 2017 annual meeting, but she does not know what they looked like. Mr. Morse
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28 ¹⁴ See the Board's Exhibit 16.

29 ¹⁵ See Respondent's Exhibits 17 and 18.

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

¹⁷ See Respondent's Exhibit 20.

¹⁸ See *id.*

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

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

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

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

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

17 CONCLUSIONS OF LAW

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

23 2. Petitioner bears the burden of proof to establish that Respondent violated
24 Bylaw § 3.06 by a preponderance of the evidence.²² Respondent bears the burden to
25 establish affirmative defenses by the same evidentiary standard.²³

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28 ¹⁹ See Respondent's Exhibit 22.

29 ²⁰ See Respondent's Exhibits 23, 24.

30 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).

1 Judy Lowe, Commissioner
2 Arizona Department of Real Estate
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