

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 William Travis,

4 Petitioner

5 vs.

6
7 The Val Vista Lakes Community
8 Association

9 Respondent

No. 18F-H1817017-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

10
11 **HEARING:** January 26, 2018

12 **APPEARANCES:** William Travis on his own behalf; Mark K. Sahl, Esq. and
13 Nicholas C. Nogami, Esq. for Respondent

14 **ADMINISTRATIVE LAW JUDGE:** Thomas Shedden

15
16 **FINDINGS OF FACT**

17 1. On December 16, 2017, the Arizona Department of Real Estate issued a
18 Notice of Hearing setting the above-captioned matter for hearing on January 26, 2018 at
19 the Office of Administrative Hearings in Phoenix, Arizona.

20 2. The Notice of Hearing shows that Petitioner William Travis alleged that
21 Respondent Val Vista Lakes Community Association violated Association Bylaws Article
22 IV, Sections 1, 2 and 3, Bylaws Article VIII, and CC&R Article V, Section 3.

23 3. Mr. Travis appeared and testified on his own behalf. The Association
24 presented the testimony of Simone McGinnis the Association's on-site manager.

25 4. On or about October 29, 2017, Mr. Travis filed with the Department the
26 petition that gave rise to this matter. In his petition, Mr. Travis indicated that there was a
27 single issue and he paid the fee for a single-issue petition.

28 5. Through an Order dated December 15, 2017, the undersigned
29 Administrative Law Judge informed the parties that he read the petition to encompass
30 more than one issue. Mr. Travis subsequently paid to the Department the requisite fee
for three issues and filed with the tribunal a statement of his issues for hearing.

1 6. As amended, Mr. Travis's petition raises three issues all involving a
2 Nominating Committee's actions relating to nominations for the Board election that was
3 held on November 16, 2017: (1) the Committee disregarded a September 29, 2017
4 deadline by which parties were to submit applications to nominate themselves to be
5 placed on the ballot in violation of Bylaws Article VIII;¹ (2) the Committee exceeded its
6 authority by asking candidates questions that had the effect of imposing qualification
7 requirements for the Board's Directors that exceed those set out in the Bylaws in
8 violation of Bylaws Article VIII; and (3) by failing to include on the election-ballot
9 members who had submitted "self-nominations," the Committee violated ARIZ. REV.
10 STAT. sections 33-1812(A), (A)(1), and (A)(2).

11 7. Bylaws Article IV (Board of Directors), Section 3 (Nomination) provides in
12 pertinent part:

13 Nominations for election to the Board of Directors shall be
14 made by a Nominating Committee.... The Nominating
15 Committee shall consist of a Chairperson, who shall be a
16 member of the Board of Directors who is not running for
17 election, and two or more persons The Nominating
18 Committee shall make as many nominations for election to the
19 Board of Directors as it shall in its discretion determine, but not
20 less than the number of vacancies that are to be filled.

21 8. Mr. Travis acknowledged that the Bylaws do not include a provision
22 allowing an association member to "self-nominate" for election to the Board, but he
23 noted that there was no prohibition against it either.

24 9. At a Board meeting on August 17, 2017, the Board voted to appoint Cheryl
25 Peterson-McCoy as the Nominating Committee Chairperson for the November 16th
26 election.

27 10. Through an email dated September 12, 2017, the Association, through its
28 management company, informed residents that there were three openings on the Board
29 that would be filled at the November 16, 2017 election. In that email, the Association
30 informed members that the application deadline was September 29, 2017.

¹ Respondent disputes that a member can nominate themselves and Mr. Travis acknowledged that there is no authority in the Bylaws allowing a member to do so.

1 11. With the email, the Association included a "Board Candidate Questionnaire
2 and Nomination Application" that also shows that the applications were due by
3 September 29, 2017, and added a 5:00 p.m. deadline. The Questionnaire includes the
4 following: "I _____, hereby submit my name for consideration for nomination to the
5 Board of Directors... for the election ... to be held ... on November 16, 2017."

6 12. As of September 29th, the Association had received four applications for
7 consideration for nomination for the Board election. As of that date, the members of the
8 Nominating Committee had not been selected. The Association accepted four
9 applications for nomination after the September 29th deadline, including one from Mr.
10 Travis. No one sent to the Association membership a new or revised notice informing
11 the members that applications were being taken after September 29th.

12 13. Through an email dated October 5, 2017, Mr. Travis, who was a Board
13 member at that time, made a motion calling for the Board to extend until October 16th
14 the deadline for submitting candidate applications. About thirty minutes later Ms. McCoy
15 responded "No," which under the rules for email motions, was sufficient to render it
16 denied.

17 14. At a Board meeting on October 19, 2017, the Board unanimously
18 approved appointing six members to the Nominating Committee. At that meeting, Mr.
19 Travis made a motion for the Board to extend that deadline for submission of candidate
20 applications, but the motion failed for lack of a second (and was not voted on).

21 15. Mr. Travis is of the opinion that because the Association had received four
22 "self-nominations" on or before September 29, 2017, and there were only three spots
23 open on the Board, there was no need for the Nominating Committee to make any
24 nominations (and the Committee should not have even been formed).

25 16. The Nominating Committee considered all the applications that were
26 received, including those received after September 29th. The Committee scheduled
27 interviews with all eight applicants, at which time they asked questions including
28 whether the applicant had ever filed a lawsuit against the Association, whether the
29 applicant was considering filing a lawsuit, and whether the applicant had any
30 compliance violations.

1 17. After the interviews, the Nominating Committee nominated four of the
2 applicants to be placed on the ballot for the November 16, 2017 election. Of these four,
3 two had submitted their applications on or before September 29 and two after that date.

4 18. Bylaws Article VIII (Committees), which provides for the formation of the
5 Nominating Committee, also provides that “no committee may take action which
6 exceeds its responsibilities. Each committee shall operate in accordance with any
7 terms, limitations, or rules adopted by the Board.”

8 19. Mr. Travis argues to the effect that the September 29th deadline was a
9 “term[], limitation[], or rule[] adopted by the Board of Directors,” and as such, the
10 Nominating Committee violated Article VIII by accepting applications after September
11 29th.

12 20. Ms. McGinnis testified that the Board did not impose the September 29th
13 deadline, but rather it was an administrative deadline imposed by the Association
14 management with the intention being to allow sufficient time for the Nominating
15 Committee to act on the applications and to then get the ballots printed.

16 21. Mr. Travis presented no evidence to show that the September 29th
17 deadline was a “term[], limitation[], or rule[] adopted by the Board of Directors.”

18 22. Bylaws Article IV (Board of Directors), Section 1 provides that those
19 serving on the Board of Directors must be members of the Association. There are no
20 other qualifications for the Directors.

21 23. Mr. Travis argues that by asking the applicants questions, the Nominating
22 Committee imposed qualifications for the Board’s Directors that exceed the single
23 qualification of Association membership set out in Article IV.²

24 24. The Association takes the position that asking the applicants questions
25 was an exercise of the Nominating Committee’s discretion in making its nominations.

26 25. During the hearing, Mr. Travis had played a video showing a portion of the
27 Board meeting held on November 16, 2017.³ In that video, the Board (and its attorney)

28 ² It is important to note that Mr. Travis is not arguing that the questions the Nominating Committee asked
29 were improper per se, but rather he asserts that the Committee had no authority to ask any questions.

30 ³ Mr. Travis’s Exhibit Z is a transcript of the video; Respondent’s objection to admission of Exhibit Z was
sustained because the transcript was not certified and because the audio became part of the record as it
was played.

1 responded to questions about why only four of the applicants were on the ballot and
2 under what authority the Nominating Committee had acted. The video shows that the
3 Board's position is that the only way to get on the ballot is to be nominated by the
4 Nominating Committee (although write-ins are allowed during any election). The Board
5 acknowledged that it was only in the last two years that it had been following the
6 requirement to use a Nominating Committee as required by Bylaws Article IV and that
7 for the thirty years prior to that strict adherence to the Bylaws had not been observed.

8 26. During the November 16th meeting, the Board acknowledged that each
9 year the Nominating Committee might apply its discretion differently than in prior years,
10 but it took the position that the solution for that was to amend the bylaws. Similarly, the
11 Board also acknowledged that the Committee's opinion as to the best candidates may
12 not match each member's opinion.

13 27. When asked whether the Committee could decline to nominate an
14 applicant because she had red hair for example, the Board's attorney explained that the
15 Committee members had a duty to act reasonably. In this matter, Mr. Travis has not
16 asserted that the Committee acted unreasonably, but rather that it has no discretion to
17 ask the applicants questions and must nominate (or place on the ballot) all members
18 who applied.

19 28. As pertinent to this matter, by ARIZ. REV. STAT. section 33-1812 provides
20 that:

21 A. Notwithstanding any provision in the community documents,
22 after termination of the period of declarant control, votes
23 allocated to a unit may not be cast pursuant to a proxy. The
24 association shall provide for votes to be cast in person and by
25 absentee ballot and, in addition, the association may provide
26 for voting by some other form of delivery, including the use of e-
27 mail and fax delivery. Notwithstanding section 10-3708 or the
28 provisions of the community documents, any action taken at an
29 annual, regular or special meeting of the members shall comply
30 with all of the following if absentee ballots or ballots provided by
some other form of delivery are used:

1. The ballot shall set forth each proposed action.
2. The ballot shall provide an opportunity to vote for or against each proposed action.

1 29. Mr. Travis asserts that because the members were not allowed to vote for
2 or against the four applicants who the Nominating Committee did not nominate, the
3 Committee engaged in proxy voting.

4 **CONCLUSIONS OF LAW**

5 1. The Department of Real Estate has authority over this matter. ARIZ. REV.
6 STAT. Title 32, Ch. 20, Art. 11.

7 2. Mr. Travis bears the burden of proof, and the standard of proof on all
8 issues in this matter is that of a preponderance of the evidence. ARIZ. ADMIN. CODE § R2-
9 19-119.

10 3. A preponderance of the evidence is:

11 The greater weight of the evidence, not necessarily established
12 by the greater number of witnesses testifying to a fact but by
13 evidence that has the most convincing force; superior
14 evidentiary weight that, though not sufficient to free the mind
15 wholly from all reasonable doubt, is still sufficient to incline a fair
and impartial mind to one side of the issue rather than the other.
BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

16 4. Statutes should be interpreted to provide a fair and sensible result.
17 *Gutierrez v. Industrial Commission of Arizona*, 226 Ariz. 395, 249 P.3d 1095 (2011)
18 (citation omitted).

19 5. The Bylaws are a contract between the parties and the parties are required
20 to comply with its terms. See *McNally v. Sun Lakes Homeowners Ass'n #1, Inc.*, 241
21 Ariz. 1, 382 P.3d 1216 (2016 App.). In exercising its authority under the Bylaws,
22 Respondent must act reasonably. See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*,
23 216 Ariz. 195, 165 P.3d 173 (App. 2007).

24 6. ARIZ. REV. STAT. section 33-1812 provides in pertinent part:

25 A. Notwithstanding any provision in the community documents,
26 after termination of the period of declarant control, votes
27 allocated to a unit may not be cast pursuant to a proxy. The
28 association shall provide for votes to be cast in person and by
29 absentee ballot and, in addition, the association may provide
30 for voting by some other form of delivery, including the use of e-
mail and fax delivery. Notwithstanding section 10-3708 or the
provisions of the community documents, any action taken at an

1 annual, regular or special meeting of the members shall comply
2 with all of the following if absentee ballots or ballots provided by
3 some other form of delivery are used:

- 4 1. The ballot shall set forth each proposed action.
- 5 2. The ballot shall provide an opportunity to vote for or against
6 each proposed action.

7 7. There was no substantial evidence adduced showing that the September
8 29, 2017 deadline for the submission of applications for nomination was a “term[],
9 limitation[], or rule[] adopted by the Board of Directors.” To the contrary, the evidence
10 shows that this was an administrative deadline set by the Association’s management
11 company. As such, the Nominating Committee did not violate Bylaws Article VIII when it
12 accepted applications after September 29th.

13 8. Bylaws Article IV Section 3 requires that nominations for election to the
14 Board of Directors be made by the Nominating Committee and it grants the Committee
15 discretion to make as many nominations as it determines is appropriate. There is no
16 provision in the bylaws or governing documents allowing members to nominate
17 themselves for election to the Board. Mr. Travis’s position that the Committee was
18 required to nominate anyone who applied is not consistent with the plain language of
19 Article IV Section 3. It was not unreasonable for the Nominating Committee to question
20 the applicants while exercising the explicit grant of discretion allowing the Committee to
21 choose the number of nominees.

22 9. Because Bylaws Article IV Section 3 requires that nominations for election
23 to the Board of Directors be made by the Nominating Committee, nominations are not
24 “votes allocated to a unit” and ARIZ. REV. STAT. section 33-1812 is not applicable.

25 10. Mr. Travis’s petition should be dismissed and the Respondent be deemed
26 to be the prevailing party in this matter.

27 **ORDER**

28 **IT IS ORDERED** that Petitioner William Travis’s petition is dismissed.

29 **NOTICE**

30 **Pursuant to ARIZ. REV. STAT. section 32-2199.02(B), this Order is binding on the
parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. section 32-
2199.04. Pursuant to ARIZ. REV. STAT. section 41-1092.09, a request for rehearing**

1 **in this matter must be filed with the Commissioner of the Department of Real**
2 **Estate within 30 days of the service of this Order upon the parties.**

3 Done this day, February 2, 2018

4
5 /s/ Thomas Shedden
6 Thomas Shedden
7 Administrative Law Judge

8 Transmitted by either mail, e-mail, or facsimile _____, 2018 to:

9 Judy Lowe, Commissioner
10 Arizona Department of Real Estate
11 2910 North 44th Street, Room 100
12 Phoenix, AZ 85018

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30 By