

1                                   **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2  
3       Lewis Smith  
4               Petitioner  
5               vs.  
6       Desert Isle Homeowners Association, Inc.  
              Respondent

**No. 18F-H1817020-REL**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

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8               **HEARING:** April 16, 2018, with the record held open until May 9, 2018 for the  
9       purpose of receiving written closing arguments.

10              **APPEARANCES:** Mark J. Bainbridge, Esq. appeared on behalf of Petitioner  
11       Lewis Smith. William D. Condray, Esq. appeared on behalf of Respondent Desert Isle  
12       Homeowners Association, Inc.

13              **ADMINISTRATIVE LAW JUDGE:** Velva Moses-Thompson

14  
15                                   **FINDINGS OF FACT**

16              1.       On October 23, 2017, Petitioner Lewis Smith, William H. Winn, Kevin  
17       Barnett and Chester Jay submitted a request for a special meeting ("Petitioner's  
18       request") to the Desert Isle Home owners Association, Inc.'s board of directors  
19       ("Board").<sup>1</sup> The request provides, in relevant part, as follows:

20                           Per Section 2.5(b) of the Desert Isle CC&R's [sic] the Members hereby  
21                           request the Desert Isle HOA to schedule an all member meeting within 30  
22                           days of the receipt of this request.

23                           The purpose of the meeting is as follows:

- 24                           1. Select an attorney and appropriate the funds needed to said attorney to  
25                           review Desert Isle By-laws [sic] and CC&R's [sic] for the purpose of  
26                           updating them to current AZ laws applicable to planned communities and  
27                           non-profit corporations by drafting amendments to each. Also to provide a  
28                           summary of how to schedule and hold meetings and elections. The  
29                           amendments, once received and approved by the Board, can be voted  
30                           upon by the members. An absentee Ballot shall be provided to all lot  
                             owners in case [sic] they cannot make the Special Meeting  
                             2. Discuss obtaining a reserve study to better determine the associations  
                             capital needs for the common area  
                             3. Discuss attorney letter regarding Desert Isle HOA governance and next  
                             steps

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

1           2.     On October 24, 2017, the Board responded to Petitioner's request. <sup>2</sup> The  
2 response which is signed by the Board President, Doug Robinson, provides, in relevant  
3 part, as follows:<sup>3</sup>

4                   I am in receipt of your letter dated 10/23/17, thank you for your concerns.  
5                   I'm much in favor of having a meeting to discuss our Desert Isle issues.

6                   However, I don't believe that 30 days will be long enough to gather all the  
7 supporting documentation for the meeting. I am not aware of this AZ law  
8 requiring this to be done within 30 days, can you please advise which AZ  
9 Revised Statue [sic] you're quoting?

10                  As soon as possible I will be calling a Board of Directors Meeting to  
11 discuss the supporting materials required to have the requested  
12 Membership Special Meeting.

13                  Again, I'm much in favor of this meeting and I diligently work with the  
14 Board of Directors to get all the material together, prepare an agenda and  
15 ballots to mail to all homeowners.

16           3.     Approximately one week after receiving Petitioner's request, on October  
17 31, 2017, Greg Yacoubian, Doug Robinson, Curt Carlson and Mike Andrews requested  
18 that the Board add the subject of amending the CC&Rs to prohibit short term rentals to  
19 the special meeting agenda. The October 31, 2017 request provides, in relevant part,  
20 as follows:<sup>4</sup>

21                   Per Section 2.5 (b) of the Desert Isle CC&R's [sic], we are entitled to  
22 request that a special meeting be held. However, knowing that a meeting  
23 has already has been requested by another group or homeowners we are  
24 requesting that our subject be added to that meeting agenda and  
25 discussed and voted on just as the other subjects. By combining the two  
26 requests into one meeting will save the board and the association time  
27 and money.

28                  Our request is to amend the CC&Rs by adding a section prohibiting  
29 "Short Term Rentals" and defining minimum time allowed for Rentals.  
30 The meeting notice may be signed in counterparts by the members.

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<sup>2</sup> See Petitioner's Exhibit 2.

<sup>3</sup> See id.

<sup>4</sup> Petitioner's Exhibit 3

1           4.     On November 5, 2017, the Board provided a copy of the agenda for a  
2 special board of directors meeting scheduled for November 8, 2017 to the Desert Isle  
3 Homeowners Association, Inc. ("Desert Isle") homeowners. See Petitioner's Exhibits 4  
4 and 5. The agenda for the November 8, 2017 board meeting provides, in relevant part,  
5 as follows:

6                   **IV.     NEW BUSINESS (Discussion/Action)**

- 7                   A. Condition of the Association  
8                   B. Designation of Officers (Bylaws 5.1).  
9                   C. Removal of Officers (Bylaws 5.3).  
10                  D. Election of Officers/Assistances (Bylaws 5.2)  
11                  E. Calling a Special Meeting (Bylaws 3.4, 3.5 & ARS 33-1804).  
12                  F. Special Meeting Format/Requirement/Reviewed  
                    (Szabo letter of 7-27-16).  
13                  G. Association Insurance (Szabo letter of 11-2-17, Article IX).  
14                  H. Reserve Study (CC&Rs 5.2(b), Article VIII).  
15                  I. 2018 Association Budget

16           5.     The agenda for the November 8, 2017 did not include the subject of  
17 amending CC&Rs to prohibit short term rentals. See Petitioner's Exhibit 5.

18           6.     The minutes from the November 8, 2017 meeting provide, in relevant part,  
19 as follows:<sup>5</sup>

20                   **I.     CALL TO ORDER**

- 21                   A.     The meeting was called to order by the president Doug Robinson at  
22 1:00 P. M.

23                   **II.    ROLL CALL**

- 24                   A.     Board Member - Doug Robinson, Curt Carlson, Mike Andrews  
25 present.  
26                   B.     Officers: Judy Carlson-Treasurer, Terri Robinson-Secretary  
27 present.  
28                   C.     Association Members: Terry Constantino, Lynn Hammond, Lewis  
29 Smith, Mike and Kim Sharp (representatives for Kevin Barrett) in  
30 attendance.  
                    D.     Guest Speaker: Dale Collins introduced by Doug Robinson.

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<sup>5</sup> See Petitioner's Exhibit 6.

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2 **III. REVIEW PREVIOUS MEETING BOARD MEETING**

3 **(dated 10/6/2017)**

4 A. A motion was made by Curt Carlson, seconded by Mike Andrew to  
5 approve the minutes dated 10/06/17 with 2 corrections to change the  
6 board quorum from 5 to 3 and the vote to be changed from 5-0 to 3-0.  
7 Motion passed unanimously.

8 **IV. NEW BUSINESS**

9 A. A motion from Curt Carlson to remove officers (VP, treasurer and  
10 secretary) Mike seconded the motion - no discussion was made. Motion  
11 passed unanimously.

12 B. A motion from the president Doug Robinson to elect Mike Andrews  
13 as VP and treasurer and secretary to Curt Carlson. Curt Carlson  
14 seconded the motion. No discussion was made. Motion passed  
15 unanimously.

16 C. A motion from Curt Carlson to elect an assistant to the treasurer to  
17 Judy Carlson and an assistant to the secretary to Terri Robinson.  
18 Mike Andrews seconded the motion. Motion passed unanimously.

19 D. Curt Carlson put in motion to call a Special Meeting requested by 2  
20 groups of owners, Mike seconded the motion. Discussion: the board will  
21 call the meeting before November 23, 2017. Packages will be prepared by  
22 the board and send [sic] to all owners to vote on items on the special  
23 agenda when prepared, motion passed unanimously.

24 E. A motion was made by Curt Carlson to have Jamie Kelly attorney to  
25 review the packages for the Special Meeting before sending them out and  
26 to hold the ballots until the meeting which has not been schedule [sic] yet .  
27 Mike Andrews seconded the motion. Discussion: Great Idea - Motion  
28 passed unanimously.

29 F. Insurance policy needs to be reviewed and maybe have a local  
30 agent handle the policy.

1 G. Reserve Study was discussed and will be discussed more in a  
2 special meeting that will be sent to all owners.

3 H. Budget discussed and the president will work with the treasurer for  
4 2018. No budget has been done since 2013.

5 V. **HOMEOWNERS INPUT:** Lewis spoke regarding past issues. Mike  
6 Sharp asked about voting at this meeting.

7 VI. **BOARD INPUT:** Curt Carlson spoke of past issues about short  
8 term renting.

9 VII. **SCHEDULE NEXT MEETING:** At this time the board does not have  
10 future meetings scheduled. Further meetings will be called by the  
11 President and an email will be sent to all homeowners.

12 **VIII. MEETING ADJOURNMENT**

13  
14 7. On November 10, 2017, the Board sent an electronic mail message ("e-  
15 mail") to Petitioner. The e-mail provides, in relevant part, as follows:<sup>6</sup>

16 At the 11/8/17 Board meeting your petition for a Special Meeting of  
17 Members was acknowledged by the Board and the need to schedule the  
18 meeting was agreed [*sic*].

19 Now, in order to proceed to prepare the packages of information which will  
20 be sent to all homeowners we need a narrative explanation from you on  
21 each of your subjects. Along with your narrative please include the  
22 attorneys [*sic*] engagement letters you have referred to in your emails. The  
23 way we read your petition item 1 actually included 2 subjects while items 2  
24 and 3 are signal subjects. Therefore we will expect 4 narratives plus any  
25 attachments you have.

26 Upon receipt of your materials we will complete the package which will be  
27 sent to all homeowners. This package will include the agenda, your  
28 material, the Boards [*sic*] material (if any) and a secret ballot.

29 We are eager to get this meeting completed so we would request you get  
30 your materials back to us no later than next Friday 11/17/17. In order that  
we can prepare the needed Special Meeting package. [*sic*]

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<sup>6</sup> See Petitioner's Exhibit 8.

1           8.     On November 18, 2017, the Board sent an agenda for a special board of  
2 directors meeting scheduled for November 20, 2017 to all members. The agenda states  
3 that "Review/approval of special meeting mailing package" will be discussed. However,  
4 the agenda did not provide any details regarding a proposed amendment to the CC&Rs  
5 to prohibit short term rentals.

6           9.     On December 1, 2017, the Board sent an electronic mail message ("e-  
7 mail") to Petitioner and other homeowners.<sup>7</sup> The e-mail provides, in relevant part, as  
8 follows:<sup>8</sup>

9                   To all owners:

10                   I would like to take a minute to explain why we are having a [sic] owners  
11 meeting Dec 16 [sic].

12                   A signed petition hy [sic] Lot 3, 4, 5 8 & 14 was submitted to the board  
13 which required action to be taken. This letter was included in the package  
14 that was sent to all of you.

15                   Then [sic] Lot 6, 7, 11 & 12 owners submitted a petition for no short term  
16 renting and to amend the CC&Rs which was also included in the package  
17 that was sent to all of you.

18                   To avoid cost and time we put both petitions together and are having one  
19 meeting that will required [sic] all owners to vote for or against these two  
20 petitions.

21                   The board has been taking a lot of heat and especially since I became  
22 President October 6 [sic]. What we are trying to do is get the Association  
23 back on track and to [sic] following [sic] our governing documents this is  
24 why we are having several boards [sic] meetings to accomplish this [sic]  
25 We were legally bound to put together a petitioner package for vote and  
26 schedule this upcoming meeting for Dec 16 [sic]. We are trying to settle  
27 the problems so we can all enjoy our homes in Desert Isle.

28                   With that being said, please make sure you mail in your ballot in the blue  
29 pre-stamped envelope or bring the ballot inside the blue  
30 envelope to the meeting or your vote will not count.

                  As I stated before your ballot is secret and will be separated from the blue

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<sup>7</sup> See Petitioner's Exhibit 9.

<sup>8</sup> See id.

1 envelope and left folded to insert in the ballot box. **There will be no**  
2 **ballots handled [sic] out to vote at the meeting.**

3 I would please ask as I have before to stop all this email thread that is  
4 interrupting owners regarding this upcoming meeting as it is  
5 scheduled, ballots will be counted on two items, and the meeting will not  
6 be cancelled.

7 Please feel free to call me direct or send in writing your questions.

8 Thank you for your time!

9 10. The Board attached the agenda for the December 16, 2017 special  
10 meeting for Desert Isle owners to the December 1, 2017 e-mail. The agenda provides,  
11 in relevant part, as follows:<sup>9</sup>

12 **III. REVIEW/DISCUSSION FOR/AGAINST FOR BILL WINN, LEWIS**  
13 **SMITH, KEVIN BARRETT AND CHESTER JAY PETITION DATED 10-**  
14 **23-17 (COPY ENCLOSED).**

- 15 A. Paragraph 1 - Have an attorney review governing  
16 documents, amend and provide summary. Note: Engagement of an  
17 attorney will result in a "Special Assessment" to owners.  
18 B. Paragraph 2- Discussion regarding Reserve Study.  
19 C. Paragraph 3 - Discuss attorneys [sic] letter.

20 **IV. REVIEW/DISCUSSION FOR/AGAINST FOR GREG YACUBIAN,**  
21 **DOUG ROBINSON, CURT CARLSON AND MIKE ANDREWS PETITION**  
22 **DATED 0-31-17 (COPY ENCLOSED).**

- 23 A. Prohibit short term rentals in Desert Isle.

24 **V. APPOINT ELECTION INSPECTOR TO OPEN BALLOT**  
25 **ENVELOPES AND COUNT SECRET BALLOTS.**

26 **VI. ELECTION INSPECTOR ANNOUNCE RESULTS.**

27 **VII. ADJOURN.**

28 11. At the December 16, 2017 special board meeting, six homeowners voted  
29 against a proposed amendment to the CC&Rs to prohibit short term rentals. Nine  
30 homeowners voted in favor of the proposed amendment.

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<sup>9</sup> See Exhibit 10.

12. On or about December 5, 2017, Petitioner Lewis Smith filed a petition with the Arizona Department of Real Estate ("Department") alleging that Desert Isle violated ARIZ. REV. STAT. section 33-1804. The petition provides, in relevant part, as follows:

Desert Isle HOA has three Directors they are Doug Robinson, Mike Andrews and Curt Carlson. note: Greg Yacoubian replaced Mike Andrews on 11/20/17. All Board members have been meeting to discuss and add an amendment to the CC&R's [sic] Prohibiting short term renters. These meetings have not been conducted openly and no notice or agenda were provided containing information necessary to inform members of the association of the matters to be discussed.

.....

At no time was the issue to add an amendment for short term rentals properly noticed or on an agenda for discussion before it became a ballot vote.

13. On January 22, 2018, the Department issued a Notice of Hearing setting the above-captioned matter for hearing on March 8, 2018, at the Office of Administrative Hearings in Phoenix, Arizona.<sup>10</sup>

14. The Notice of Hearing shows that Petitioner Lewis Smith alleged that Respondent Desert Isle violated ARIZ. REV. STAT. section 33-1804.

15. Section 33-1804(B) requires the homeowners association to provide notice of any meeting of the members not fewer than ten nor more than fifty days prior to the meeting. Section 33-1804(B) requires that the "notice of any annual, regular or special meeting of the members shall also state the purpose for which the meeting is called, including the general nature of any proposed amendment to the declaration or bylaws, changes in assessments that require approval of the members and any proposal to remove a director or an officer." Section 33-1804(B) also provides, "the failure of any member to receive actual notice of a meeting of the members does not affect the validity of any action taken at that meeting."

16. Section 33-1804(E)(1) requires that the association make the agenda available to all members attending a board of directors meeting.

17. Section 33-1804(F) provides, "It is the policy of this state as reflected in this section that all meetings of a planned community, whether meetings of the

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<sup>10</sup> The hearing was subsequently continued to April 16, 2018.

members' association or meetings of the board of directors of the association, be conducted openly and that notices and agendas be provided for those meetings that contain the information that is reasonably necessary to inform the members of the matters to be discussed or decided and to ensure that members have the ability to speak after discussion of agenda items, but before a vote of the board of directors or members is taken. Toward this end, any person or entity that is charged with the interpretation of these provisions, including members of the board of directors and any community manager, shall take into account this declaration of policy and shall construe any provision of this section in favor of open meetings.”

### **CONCLUSIONS OF LAW**

1. ARIZ. REV. STAT. section 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 ARIZ. REV. STAT. section 33-1804 by a preponderance of the evidence.<sup>11</sup> Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.<sup>12</sup>

3. “A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not.”<sup>13</sup> A preponderance of the evidence is “[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind 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.”<sup>14</sup>

4. Petitioner established by a preponderance of the evidence that the Board violated ARIZ. REV. STAT. section 33-1804(F) when it failed to provide notice or an

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<sup>11</sup> See ARIZ. REV. STAT. section 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>12</sup> See A.A.C. R2-19-119(B)(2).

<sup>13</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

<sup>14</sup> BLACK'S LAW DICTIONARY at page 1220 (8<sup>th</sup> ed. 1999).

1 agenda to all of its members of information that was reasonably necessary to inform the  
2 members that an amendment to the CC&Rs to prohibit short term members would be  
3 discussed at its special board of directors meetings held on November 8, 2017 and  
4 November 20, 2017.

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

### 7 **ORDER**

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

9 Pursuant to ARIZ. REV. STAT. section 32-2199.02(A), the Respondent shall pay to  
10 Petitioner the filing fee required by ARIZ. REV. STAT. section 32-2199.01.

### 11 **NOTICE**

12 **Pursuant to ARIZ. REV. STAT. section 32-2199.02(B), this Order is binding on**  
13 **the parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. section 32-**  
14 **2199.04. Pursuant to ARIZ. REV. STAT. section 41-1092.09, a request for rehearing**  
15 **in this matter must be filed with the Commissioner of the Department of Real**  
16 **Estate within 30 days of the service of this Order upon the parties.**

17 Done this day, May 29, 2018.

18 Transmitted electronically to:

19 Judy Lowe, Commissioner  
20 Arizona Department of Real Estate

21 Mark J. Bainbridge, Esq.  
22 The Bainbridge Law Firm LLC  
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