

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Peter Biondi, Jr.,

4 Petitioner,

5 vs.

6
7 Lakeshore at Andersen Springs
8 Homeowners Association,

9 Respondent.

No. 18F-H1818048-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

10
11 **HEARING:** August 8, 2018, at 9:00 a.m.

12 **APPEARANCES:** Peter Biondi, Jr. ("Petitioner") appeared on his own behalf;
13 Lakeshore at Andersen Springs Homeowners Association ("Respondent") was
14 represented by Maria R. Kupillas, Esq., Law offices of Farley, Choate & Bergin.

15 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

16
17 **FINDINGS OF FACT**

18 **BACKGROUND AND PROCEDURE**

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

22 2. Respondent is a condominium association whose members own
23 condominiums in the Lakeshore at Andersen Springs development in Phoenix, Arizona.

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

25 4. On or about May 9, 2018, Petitioner filed a single-issue petition with the
26 Department that alleged that Respondent had violated A.R.S. §§ 33-1242 and 33-1243,
27 Respondent's Bylaw Article II, Section 3 and Article III, Sections 2 and 3, and
28 Respondent's Covenants, Conditions and Restrictions ("CC&Rs") Section 8.13.
29 Petitioner stated that the violations occurred when its Board of Directors' ("Board's")
30 sole remaining member, Bonnie Henden, refused to defend a petition that two of
Respondent's former directors on Respondent's Board had filed with the Department

1 contesting their removal from the Board by their fellow directors for allegedly violating
2 Respondent's Bylaws and CC&Rs. Instead, Ms. Henden had reinstated the two
3 directors.¹

4 5. Respondent filed a written answer to the petition, denying any violations. The
5 Department referred the petition to the Office of Administrative Hearings, an
6 independent state agency, for an evidentiary hearing.

7 6. A hearing was held on August 8, 2018. Petitioner submitted three exhibits,
8 testified on his own behalf, and presented the telephonic testimony of Jeffrey
9 Washburn, a former Board member. Respondent submitted five exhibits and presented
10 the testimony of Ms. Henden.

11 HEARING EVIDENCE

12 Respondent's Bylaws and CC&Rs

13 7. Article II of Respondent's Amended and Restated Bylaws concerns Members
14 and provides in relevant part as follows:

15 **SECTION 3. Annual Meetings.** Annual meetings of
16 Members shall be held at the time and on a day other than
17 Sunday, in the month of March of each year, as shall be
18 designated by the Board of Directors and stated in the notice
19 of the meeting. At the annual meeting, Members shall elect
20 a Board of Directors and transact such other business as
21 may properly be brought before the meeting.²

22 8. Article III of the Amendment to Respondent's Amended and Restated Bylaws
23 concerns Directors and provides in relevant part as follows:

24 **Article III, Section 2. Number, Qualification and**
25 **Term of Office.** The number of Directors shall be not less
26 than one (1) person nor more than seven (7) members. The
27 Directors shall be elected at the annual meeting of the
28 Members, except as provided in Section 3 of this Article, and
29 each Director elected shall hold office until his or her
30 successor is elected and qualified. . . . Any member who is
at least sixty (60) days delinquent in the payment of any
Assessment or other charge due to [Respondent], or who is
otherwise deemed by the Board to be in violation of the
Governing Documents, shall not be eligible to serve on the

¹ See Respondent's Exhibit 1 at 1-2.

² Respondent's Exhibit 2 at 1-2.

1 Board. If a Director meets the above criteria at any time
2 during his term, he or she will thereupon cease to be a
3 Director and his or her place on the Board shall be deemed
4 vacant.

5 **Article III, Section 3. Vacancies.** Vacancies in the
6 Board of Directors shall be filled by a vote of a majority of the
7 remaining Directors in office or the sole remaining Director,
8 even though they may constitute less than a quorum. A
9 Director appointed to fill a vacancy shall be appointed until
10 the next annual meeting, at which time the members may
11 elect a successor for the remainder of the term. If there are
12 no Directors in office, then an election of Directors shall be
13 held in the manner provided by statute.³

14 9. Section 8.13 of Respondent's CC&Rs provides in relevant part as follows:

15 **Leasing.** Nothing in the Declaration will be deemed to
16 prevent the leasing of a Unit to a Single Family from time to
17 time by the Owner of the Unit, subject to all of the provisions
18 of the Project Documents. Any Owner who leases his Unit
19 will promptly notify [Respondent] and will advise
20 [Respondent] of the lease period and the name of each
21 lessee. No Owner will be permitted to lease the Owner's
22 Unit for transient, hotel, club, timeshare or similar purposes
23 or on a recurring basis of more than two separate times in
24 any 12 month period. All leases shall be for a minimum of
25 six (6) months, and the Owner shall be obligated to provide
26 to [Respondent] a complete, signed copy of each applicable
27 lease prior to occupancy by such tenant. . . .⁴

28 **Hearing Testimony**

29 10. At some time before January 2018, some of Respondent's members made
30 complaints that Jim Luzzis and Jerry Dubasquier, who both were Directors on
Respondent's Board at the time, were renting their units as short-term Vacation Rental
By Owner ("VRBOs") in violation of CC&R Section 8.13.

11 Respondent's Board met to consider the complaint. The other directors on
Respondent's Board concluded that Messrs. Luzzis and Dubasquier had violated CC&R
Section 8.13, but unanimously voted to allow them fourteen days to remedy their

³ Respondent's Exhibit 2A at 1-2.

⁴ Respondent's Exhibit 1 at 1-2.

1 violation by presenting longer term rental agreements that complied with CC&R Section
2 8.13 to the Board for approval.

3 12. At an executive session of the Board on January 4, 2018, the Board met to
4 consider whether Messrs. Luzzis and Dubasquier had remedied their previous violation
5 of CC&R Section 8.13. Messrs. Luzzis and Dubasquier were asked to step out. The
6 five remaining directors on Respondent's Board held a meeting that lasted about an
7 hour or an hour and a half.

8 13. Ms. Henden testified that the meeting was contentious. She felt that the
9 attempt to remove Messrs. Luzzis and Dubasquier from the Board was a vendetta
10 because they took positions that were opposed to the positions taken by other Board
11 Directors.

12 14. The majority of the Board voted to remove or disqualify Messrs. Luzzis and
13 Dubasquier from serving on the Board.

14 15. An annual meeting of Respondent's members was scheduled in March or
15 April 2018. Some members sent in ballots to elect directors to replace Messrs. Luzzis
16 and Dubasquier on Respondent's Board.

17 16. Messrs. Luzzis and Dubasquier filed a complaint with the Department to
18 protest their removal or disqualification from serving as Directors on Respondent's
19 Board.

20 17. According to the petition that was filed in this matter, Petitioner and another
21 director "decided to resign in order to restore calm in the community." The other
22 director, Mr. Washburn, moved to Florida. Another director failed to pay the
23 assessment that was due to Respondent and either resigned or was removed or
24 disqualified by his fellow directors. By March or April 2018, Ms. Henden was the sole
25 remaining Director on Respondent's Board.

26 18. Ms. Henden consulted Respondent's attorney at the time. After the attorney
27 learned that directors on Respondent's Board other than Messrs. Luzzis and
28 Dubasquier also had used their units as short-term VRBOs, he withdrew from
29 representing Respondent.
30

1 19. Ms. Henden then retained the attorney who represented Respondent at the
2 hearing. Ms. Henden consulted that attorney and another attorney about the petition
3 that Messrs. Luzzis and Dubasquier had filed with the Department against Respondent.

4 20. As a result of the legal advice that she had obtained from three different
5 attorneys, Ms. Henden chose not to file an answer on Respondent's behalf to the
6 petition that Messrs. Luzzis and Dubasquier had filed with the Department. The
7 Department issued a decision in Messrs. Luzzis and Dubasquier's favor on their petition
8 and required Respondent to pay their filing fee.

9 21. Ms. Henden reinstated Messrs. Luzzis and Dubasquier as directors on
10 Respondent's Board to allow them to complete the terms of office to which they had
11 been elected and cancelled the election to allow members to choose their successors.

12 22. Petitioner submitted evidence that arguably showed that Messrs. Luzzis and
13 Dubasquier were continuing to advertise their units as VRBOs⁵ and that Respondent's
14 members had been warned in February 2010, that such practice violated Respondent's
15 CC&Rs.⁶

16 **CONCLUSIONS OF LAW**

17 1. A.R.S. § 32-2199(1) permits a condominium owner or a condominium owners'
18 association to file a petition with the Department for a hearing concerning alleged
19 violations of bylaws, CC&Rs, or Arizona Revised Statutes ("A.R.S.") Title 33, Chapter
20 9.⁷ Such petitions will be heard before the Office of Administrative Hearings, an
21 independent state agency.

22 2. Petitioner bears the burden of proof to establish that Respondent violated the
23 charged Bylaws, CC&Rs, and applicable statutes by a preponderance of the evidence.⁸
24 Respondent bears the burden to establish affirmative defenses by the same evidentiary
25 standard.⁹

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27
28 ⁵ See Petitioner's Exhibits A and B.

29 ⁶ See Petitioner's Exhibit C.

30 ⁷ See A.R.S. § 33-1803.

⁸ 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).

⁹ 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."¹⁰ 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."¹¹

8 4. But the operative facts in this case were not disputed. The dispositive issue is
9 not the factual issue of whether Messrs. Luzzis and Dubasquier violated CC&R Section
10 8.13 by using their units as short-term VRBOs, but the legal issue of whether the other
11 directors on Respondent's Board properly removed them from the Board and whether,
12 as a result, Ms. Henden should have defended Respondent in the petition that Messrs.
13 Luzzis and Dubasquier filed with the Department for their alleged improper removal.
14 Legal issues regarding the construction and application of statutes are determined
15 through *de novo* review, without regard to the burden of proof used to establish the facts
16 underlying a dispute.¹²

17 5. A.R.S. § 33-1243 concerns, among other things, a condominium association's
18 "[b]oard of directors and officers; conflict; powers; limitations; [and] removal" and
19 provides in relevant part as follows:

20 **B. The board of directors shall not act on behalf of the**
21 **association to** amend the declaration, terminate the
22 condominium, elect members of the board of directors or
23 **determine the qualifications, powers and duties or terms**
24 **of office of board of directors members.** Except as
provided in subsection H of this section, the board of
directors may fill vacancies in its membership for the
unexpired portion of any term.

25

26 **H. Notwithstanding any provision of the declaration or**
27 **bylaws to the contrary, all of the following apply to a**

28 ¹⁰ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

29 ¹¹ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

30 ¹² See *Smith v. Arizona Citizens Clean Elections Commission*, 212 Ariz. 407, 412 ¶ 18, 132 P.3d 1187, 1192 (2006).

meeting at which a member of the board of directors . . .
is proposed to be removed from the board of directors:

1. ***The unit owners who are eligible to vote at the time of the meeting may remove any member of the board of directors . . . by a majority vote of those voting on the matter at a meeting of the unit owners.***

. . . .

4. For purposes of calling for removal of a member of the board of directors . . . the following apply:

(a) ***In an association with one thousand or fewer members, on receipt of a petition that calls for removal of a member of the board of directors and that is signed by the number of persons who are eligible to vote in the association*** at the time the person signs the petition equal to at least twenty-five percent of the votes in the association or by the number of persons who are eligible to vote in the association at the time the person signs the petition equal to at least one hundred votes in the association, whichever is less, the board shall call and provide written notice of a special meeting of the association as prescribed by section 33-1248, subsection B.

(b) Notwithstanding section 33-1248, subsection B, ***in an association with more than one thousand members, on receipt of a petition that calls for removal of a member of the board of directors and that is signed by the number of persons who are eligible to vote in the association*** at the time the person signs the petition equal to at least ten percent of the votes in the association or by the number of persons who are eligible to vote in the association at the time the person signs the petition equal to at least one thousand votes in the association, whichever is less, the board shall call and provide written notice of a special meeting of the association. The board shall provide written notice of a special meeting as prescribed by section 33-1248, subsection B.

(c) The special meeting shall be called, noticed and held within thirty days after receipt of the petition.

(Emphasis added.)

1 6. In construing a statute, “we must be guided by the presumption that the
2 legislature did not intend to do a futile act by including a provision which is not operative
3 or that is inert and trivial.”¹³ “When provisions of a general statute are inconsistent with
4 those of a special nature on the same subject, the special statute controls.”¹⁴ “Where
5 we have a general statute and a specific statute that are in conflict, the specific
6 governs.”¹⁵

7 7. Under this well-established common law, A.R.S. § 33-1243(B) specifically
8 prohibits a condominium association’s board of directors from determining the
9 qualifications of other directors. A.R.S. § 33-1243(H) specifically provides that the
10 statute trumps whatever provisions may be contained in a condominium association’s
11 bylaws or CC&Rs. A.R.S. § 33-1243(H)(4)(a), (b), and (c) specifically require that the
12 removal of a director must be initiated by a petition signed by a specified number of
13 members of the association and that the removal must be accomplished at majority vote
14 of members at a special meeting. The referenced provisions of A.R.S. § 33-1243
15 specifically and unequivocally require that the members who elected a director must
16 remove the director. Because Respondent’s Board did not follow any of these specific
17 and unequivocal statutory provisions when it removed Messrs. Luzzis and Dubasquier
18 as directors, Respondent lacked any good legal defense to Messrs. Luzzis and
19 Dubasquier’s challenge to their removal or disqualification by their fellow directors.

20 8. A.R.S. § 33-1242 is entitled, “[p]owers of unit owners’ association; notice to
21 unit owner of violation” and provides in relevant part as follows:

22 A. Subject to the provisions of the declaration, the
23 association **may**:

24

25 4. Institute, **defend** or intervene in litigation or
26 **administrative proceedings** in its own name on behalf of
27 itself or two or more unit owners on matters affecting the
28 condominium.

29 ¹³ *Campbell v. Superior Court*, 105 Ariz. 252, 255, 462 P.2d 801, 804 (1969).

30 ¹⁴ *Arden-Mayfair, Inc. v. Department of Liquor Licenses and Control*, 123 Ariz. 340, 342, 599 P.2d 793, 795 (1979).

¹⁵ *State v. Rice*, 110 Ariz. 210, 213, 516 P.2d 1222, 1225 (1973).

(Emphasis added.) The word “may” in a statute “generally indicates permissive intent.”¹⁶ Although Ms. Henden could have contested the petitions that Messrs. Luzzis and Dubasquier filed with the Department challenging their removal from Respondent’s Board by their fellow Directors, she was not required to do so. Ms. Henden consulted three attorneys who advised her that if it contested Messrs. Luzzis and Dubasquier’s petition, based on A.R.S. § 33-1243(B) and (H), Respondent likely would not prevail and likely would incur unnecessary attorney’s fees, as well as being required to pay Messrs. Luzzis and Dubasquier’s filing fee. No statute requires a condominium association or a director to take an ill-advised act or to mount a defense of a previously taken ill-advised act that likely will fail on its merits.¹⁷ Therefore, Petitioner’s petition must be denied.

ORDER

IT IS ORDERED that Petitioner’s petition is denied.

NOTICE

Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties unless a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S. § 41-1092.09, a request for rehearing in this matter must be filed with the Commissioner of the Department of Real Estate within 30 days of the service of this Order upon the parties.

Done this day, August 21, 2018.

/s/ Diane Mihalsky
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile August 21, 2018 to:

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¹⁶ *Walter v. Wilkinson*, 198 Ariz. 431, 432 ¶ 7, 10 P.3d 1218, 1219 (App. 2000) (citations omitted).

¹⁷ The Administrative Law Judge notes that she reached a result that was adverse to the homeowner’s association in a petition filed with the Department under similar statutes in the Arizona statutes governing planned communities. See OAH Case No. 18F-H1818048-REL (applying A.R.S. § 33-1813).

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