

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Lawrence M. Stewart,
4 Petitioner,
5 vs.
6 Canyon Gate Condominium Association,
7 Inc.,
8 Respondent.

No. 18F-H1818052-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

9 **HEARING:** September 6, 2018

10 **APPEARANCES:** Lawrence M. Stewart on his own behalf; Mark K. Sahl, Esq.
11 and Nichols C. S. Nogami, Esq. for Respondent

12 **ADMINISTRATIVE LAW JUDGE:** Thomas Shedden

13
14 **FINDINGS OF FACT**

15 1. On June 25, 2018, the Arizona Department of Real Estate issued a Notice
16 of Hearing setting the above-captioned matter for hearing on July 27, 2018 at the Office
17 of Administrative Hearings in Phoenix, Arizona. The matter was continued and the
18 hearing was conducted on September 6, 2018.

19 2. The Notice of Hearing shows that Petitioner Lawrence M. Stewart alleges
20 that Respondent Canyon Gate Condominium Association, Inc. violated Association
21 Bylaws section 5.4.

22 3. Mr. Stewart appeared and testified on his own behalf. The Association was
23 represented by counsel but presented no witnesses.

24 4. On or about May 21, 2018, Mr. Stewart filed with the Department the
25 petition that gave rise to this matter.

26 5. Mr. Stewart made changes to the common area and/or limited common
27 area around his unit without getting permission to do so. In a letter dated November 15,
28 2017, the Association, through counsel, informed Mr. Stewart that he was in violation of
29 section 5.1 of the CC&Rs. The letter informed Mr. Stewart that he was required to
30 request in writing that the Board approve the changes he had made and that if he failed
 to do so, the Association could bring a civil lawsuit against him.

1 6. Mr. Stewart did request that the Board approve a variance to allow the
2 changes he had made.

3 7. At the time of his request, Mr. Stewart was on the Board. The other Board
4 members were Sandra Fernandez and David Larson.

5 8. In a letter to Mr. Stewart dated December 27, 2017, the Association's
6 attorney wrote that it was his understanding that Mr. Stewart had recused himself from
7 voting on the matter and that the other two Board members had confirmed that he was
8 required to return the areas in question to the original condition.

9 9. Mr. Stewart had not agreed to recuse himself and he informed the other
10 Board members of that fact in a letter dated January 4, 2018. In that letter, Mr. Stewart
11 also requested that the Board meet to, among other things, consider his request for a
12 variance.

13 10. Mr. Stewart's request was considered during a Board meeting on February
14 18, 2018. At that meeting Mr. Stewart resigned from the Board and the other two
15 members voted to deny his request for a variance and to have Mr. Stewart restore the
16 areas to the original condition.

17 11. Mr. Stewart resigned because he got the sense "right away" that the other
18 Board members' minds were made up and that they would not approve his request.

19 12. According to Mr. Stewart, the Board denied his request on the basis that it
20 would open a Pandora's Box where other unit owners would request variances.

21 13. Mr. Stewart asserts that the Association did not act in good faith when it
22 denied his request for a variance and that Mr. Larson was biased against him. Mr.
23 Stewart also asserts that he has been treated unfairly because there are other units that
24 are not in conformity with the CC&Rs.

25 14. Mr. Stewart presented un rebutted testimony that the Board members were
26 unwilling to look at the changes he had made and to the effect that they took only a
27 cursory look at the photographs he provided them.

28 15. Regarding the allegation that Mr. Larson was biased, Mr. Stewart relied
29 on: (1) a biography of Mr. Larson that was prepared the Association's property manager
30 using information supplied by Mr. Larson; (2) on statements Mr. Larson included in
notes he prepared about the November 28, 2017 Board meeting; and (3) that the other

1 two members had apparently decided the matter without his involvement prior to
2 February 18, 2018 (as evidenced by the letter showing erroneously that he had recused
3 himself from the matter) and his belief that they did not want to look at the specifics of
4 the changes he had made.

5 16. When asked what in Mr. Larson's biography showed bias, Mr. Stewart
6 could not identify any particular information, but he stated that the entire document
7 coupled with the other statements shows a bias.

8 17. The notes from the November 28, 2017 meeting show that Mr. Larson had
9 informed members who were in violation of the CC&Rs that the meeting was "Fair
10 Notice" that actions such as towing vehicles, violations notices and the like would begin
11 at the close of the meeting. In addition, Mr. Larson informed the membership that he
12 was too busy to talk to people about Board business in driveways.

13 18. Mr. Stewart testified to the effect that the changes he had made would not
14 affect any other member because his unit is not in an area that is readily seen by
15 others.

16 19. Bylaws Article V (Indemnification), Section 5.4 (Liability) provides in
17 pertinent part: "So long as he/she has acted in good faith on the basis of information
18 actually possessed, neither the Board nor any member of the Board nor any officer of
19 the ASSOCIATION shall be liable to the ASSOCIATION, any OWNER, or to any other
20 party for any damage, loss, or prejudice suffered or claimed on account of: (i) the
21 approval or disapproval of any plans, drawings, or specifications, whether or not
22 defective...or (v) any act or failure to act by the ASSOCIATION, or Board."

23 20. The Association argues to the effect that Section 5.4 is not applicable to
24 Mr. Stewart's situation because neither the Board nor any member has been charged
25 with an act for which indemnity is required.

26 21. Mr. Stewart appeared to acknowledge that section 5.4 acts as a "shield"
27 and not a "sword," but he testified to the effect that that was the only section that
28 included a "good faith" requirement.

29 **CONCLUSIONS OF LAW**

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

1 2. Mr. Stewart bears the burden of proof, and the standard of proof on all
2 issues in this matter is that of a preponderance of the evidence. ARIZ. ADMIN. CODE § R2-
3 19-119.

4 3. A preponderance of the evidence is:

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

12 4. The Bylaws are a contract between the parties and the parties are required
13 to comply with its terms. *See McNally v. Sun Lakes Homeowners Ass'n #1, Inc.*, 241
14 Ariz. 1, 382 P.3d 1216 (2016 App.). In exercising its authority under the Bylaws,
15 Respondent must act reasonably. *See Tierra Ranchos Homeowners Ass'n v. Kitchukov*,
16 216 Ariz. 195, 165 P.3d 173 (App. 2007).

17 5. Mr. Stewart has not shown that Section 5.4 is applicable to his issue
18 because that section does not impose any duty on the Board members, but rather
19 merely shields them from liability if they act in good faith.

20 6. Even if Section 5.4 is applicable, Mr. Stewart has not shown by a
21 preponderance of the evidence that the Board did not act in good faith, that it had a bias
22 against him, or that it treated him unfairly.

23 7. According to Mr. Stewart, the Board disapproved his changes because
24 they were fearful of opening a Pandora's Box of people requesting changes to the
25 common area. This was not an unreasonable position for the Board of a condominium
26 association. And, given the Board's reason for denying Mr. Stewart's request for a
27 variance, the specifics of the changes Mr. Stewart made would not be germane to the
28 decision.

29 8. Regarding the testimony that others may also be in violation of the
30 CC&Rs, there was no evidence to show that they had requested that the Board grant
variances, so this evidence is not probative of the issue at hand.

 9. Mr. Stewart's petition should be dismissed and the Respondent be
deemed to be the prevailing party in this matter.

ORDER

IT IS ORDERED that Petitioner Lawrence M. Stewart's petition is dismissed.

NOTICE

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 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, September 14, 2018

/s/ Thomas Shedden
Thomas Shedden
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile September 14, 2018 to:

Judy Lowe, Commissioner
Arizona Department of Real Estate
100 N. 15th Avenue, Suite 201
Phoenix, Arizona 85007
Attn: jlowe@azre.gov
LDettorre@azre.gov
AHansen@azre.gov
djones@azre.gov
DGardner@azre.gov
ncano@azre.gov

Lawrence M. Stewart
7887 N. 16th St., #132
Phoenix, AZ 85020

Mark K. Sahl, Esq.
Nichols C. S. Nogami, Esq.
CARPENTER, HAZLEWOOD, DELGADO & BOLEN LLP
1400 E. Southern Ave, Suite 400
Tempe, AZ 85282

By f Del Sol