

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Donna M Bischoff,
4 Petitioner,

5 vs.

6 Country Hills West Condominium
7 Association, Inc.,
8 Respondent.

No. 20F-H2019033-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

9 **HEARING:** March 10, 2020.

10 **APPEARANCES:** Donna M. Bischoff, Petitioner, appeared on her own behalf.
11 Doug Meyer appeared on behalf of Country Hills West Condominium Association, Inc.,
12 Respondent.

13 **ADMINISTRATIVE LAW JUDGE:** Antara Nath Rivera

14 **FINDINGS OF FACT**

15 1. On or about December 11, 2019, Petitioner filed a Homeowners Association
16 (HOA) Dispute Process Petition (Petition) with the Arizona Department of Real Estate
17 (Department). Petitioner asserted a violation of Arizona Revised Statutes (A.R.S.) §§ 33-
18 1250(C), 33-1248(B), and Article 3, Section 2 of the Bylaws of Country Hills West
19 Association, Inc. (Bylaws).

20 2. On or about January 13, 2020, the Department issued a Notice of Hearing in
21 which it set forth the issue for hearing as follows:

22 The Petitioner alleges in the petition that Country Hills West
23 Condominium Association, Inc. is in violation of A.R.S. § 33-1250(C),
24 A.R.S. § 33-1248(B) and community documents Bylaws Article 3.2.

25 All errors in original.

26 3. At the hearing, Petitioner testified on her own behalf. Doug Meyer,
27 President and Director of Respondent, testified on behalf of Respondent.

28 **HEARING EVIDENCE**

29 4. At the hearing, Petitioner testified that she owned her unit for three and a
30 half years. She attended meetings since she purchased her unit.

1 5. She testified that Respondent held two yearly meetings since 2017.
2 Respondent held meetings on August 28, 2017, and October 18, 2018. The scheduled
3 yearly meeting for 2019 was initially scheduled for November 20, 2019. However, that
4 meeting was rescheduled for December 19, 2019. The meeting was again rescheduled
5 for December 30, 2019. Ultimately, the meeting was rescheduled, for a third time, for
6 January 24, 2020. That postponement was a violation of the Bylaws because Respondent
7 did not have a required yearly meeting in 2019. The November 20, 2019, meeting was
8 cancelled because some of the ballots had write in ballots and write in ballots were
9 prohibited even though the Bylaws and Articles of Incorporation are silent on that issue.
10 Petitioner argued that this same board of directors allowed write in ballots in 2017.

11 6. In October 2018, Petitioner requested to see election results from the
12 October 2018 elections. Respondent did not give Petitioner the results. On an unspecified
13 date, Petitioner was ultimately given the voting tallies from that election. However,
14 Petitioner wanted to know which units voted.

15 7. Petitioner opined that the November 20, 2019, election should have taken
16 place with the write in ballots. She argued that the board of directors could not choose how
17 to interpret a silent document.

18 8. At the hearing, Mr. Meyer testified that Petitioner was informed that write in
19 ballots were not valid for the November 20, 2019, election. Mr. Meyer acknowledged that
20 Respondent rescheduled the November 20, 2019, yearly meeting to January 24, 2020.
21 The meeting was rescheduled because there were write in candidates on the ballot and
22 that was prohibited. Because the election was to be held on November 20, 2019,
23 Respondent quickly sent out interest forms to residents who wanted to be on the ballot.
24 Respondent needed time to reprint the ballot and mail them out.

25 9. On or about December 30, 2019, Respondent held a membership meeting
26 to discuss write in ballots. There was no quorum at this meeting. Mr. Meyer stated that
27 Bylaws had a mechanism to protect ballots. The Bylaws allowed "nomination" whereby a
28 member can elect themselves.

29 10. Mr. Meyer testified that there was no quorum at the October 18, 2018,
30 meeting, and thus, no election occurred. Quorum was defined in Article 4, Section 3 of the

1 Bylaws. Therefore, there was no obligation to publish actual ballots. However, a few
2 weeks prior to the hearing at the Office of Administrative Hearings, Respondent gave the
3 vote tallies and a list of unit members who voted to Petitioner. Mr. Meyer acknowledged
4 that Respondent did not have quorum for the last 20 years.

5 11. Mr. Meyer opined that while members, themselves, were not against write in
6 ballots, Respondent needed to figure out how to handle write in ballots because the
7 Bylaws were silent on that issue. As for the November 20, 2019, vote, any ballots with
8 write in ballots would have been thrown out because members were informed that write in
9 ballots were prohibited.

10 **CONCLUSIONS OF LAW**

11 1. Arizona statute permits an owner or a planned community organization to
12 file a petition with the Department for a hearing concerning violations of planned
13 community documents or violations of statutes that regulate planned communities.
14 A.R.S. § 32-2199 et seq. That statute provides that such petitions will be heard before the
15 Office of Administrative Hearings.

16 2. Petitioner bears the burden of proof to establish that Respondent committed
17 the alleged violations by a preponderance of the evidence.¹ Respondent bears the burden
18 to establish affirmative defenses by the same evidentiary standard.²

19 3. “A preponderance of the evidence is such proof as convinces the trier of fact
20 that the contention is more probably true than not.”³ A preponderance of the evidence is
21 “[t]he greater weight of the evidence, not necessarily established by the greater number of
22 witnesses testifying to a fact but by evidence that has the most convincing force; superior
23 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
24 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
25 the other.”⁴

26
27 ¹ 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).

28 ² See A.A.C. R2-19-119(B)(2).

29 ³ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

30 ⁴ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

1 4. A.R.S. § 33-1250(C), Voting; proxies; absentee ballots; applicability;
2 definition provides in part that:

3 Notwithstanding any provision in the condominium
4 documents, after termination of the period of declarant
5 control, votes allocated to a unit may not be cast pursuant to a
6 proxy. The association shall provide for votes to be cast in
7 person and by absentee ballot and, in addition, the
8 association may provide for voting by some other form of
9 delivery, including the use of e-mail and fax delivery.
10 Notwithstanding section 10-3708 or the provisions of the
11 condominium documents, any action taken at an annual,
12 regular or special meeting of the members shall comply with
13 all of the following if absentee ballots or ballots provided by
14 some other form of delivery are used:

- 15 1. The ballot shall set forth each proposed
16 action.
- 17 2. The ballot shall provide an opportunity to
18 vote for or against each proposed action.
- 19 3. The ballot is valid for only one specified
20 election or meeting of the members and
21 expires automatically after the completion of
22 the election or meeting.
- 23 4. The ballot specifies the time and date by
24 which the ballot must be delivered to the
25 board of directors in order to be counted,
26 which shall be at least seven days after the
27 date that the board delivers the unvoted
28 ballot to the member.
- 29 5. The ballot does not authorize another person
30 to cast votes on behalf of the member.
6. The completed ballot shall contain the name,
the address and either the actual or
electronic signature of the person voting,
except that if the condominium documents
permit secret ballots, only the envelope shall
contain the name, the address and either the
actual or electronic signature of the voter.
7. Ballots, envelopes and related materials,
including sign-in sheets if used, shall be
retained in electronic or paper format and
made available for unit owner inspection for
at least one year after completion of the
election.

1 and sign-in sheets. Petitioner would be limited to the information contained in those items.
2 Thus, Respondent was in violation of A.R.S. § 33-1250(C).

3 9. There was undisputed testimony that the Bylaws were silent with respect to
4 the validity of write in ballots. There was evidence that the board of directors prohibited
5 members to write in candidates on the ballots. However, absent any clear language in the
6 A.R.S. or the Bylaws prohibiting write in ballots, Respondent failed to show how the
7 ballots were invalid. Thus, Respondent was in violation of Article 3, Section 2 of the
8 Bylaws.

9 **ORDER**

10 In view of the foregoing,

11 **IT IS ORDERED** that the Petition be upheld on all issues.

12 **IT IS FURTHER ORDERED** Petitioner be deemed the prevailing party in this
13 matter.

14 **IT IS FURTHER ORDERED** that Respondent supply Petitioner with the relevant
15 documents, within ten (10) days of this Order, pursuant to A.R.S. § 33-1250(C).

16 **IT IS FURTHER ORDERED** that Respondent pay Petitioner his filing fee of
17 \$1,500.00, to be paid directly to Petitioner within thirty (30) days of this Order.

18 No Civil Penalty is found to be appropriate in this matter.

19 **NOTICE**

20 Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties
21 unless a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S. §
22 41-1092.09, a request for rehearing in this matter must be filed with the
23 Commissioner of the Department of Real Estate within 30 days of the service of this
24 Order upon the parties.

25 Done this day, March 30, 2020.

26 /s/ Antara Nath Rivera
27 Administrative Law Judge

28 Transmitted electronically to:
29 Judy Lowe, Commissioner

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