

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Susan L. Alandar,
4 Petitioner,
5 vs.
6 Ventana Lakes Property Owners'
7 Association,
8 Respondent.

No. 20F-H2020046-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARING: June 11, 2020

APPEARANCES: Petitioner Susan L. Alandar appeared on her own behalf.
Respondent Ventana Lakes Property Owners' Association was represented by Nicholas
Nogami.

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

13 **FINDINGS OF FACT**

14 1. On or about February 3, 2020, Petitioner Susan L. Alandar filed a
15 Homeowners Association (HOA) Dispute Process Petition (Petition) with the Arizona
16 Department of Real Estate (Department) alleging violations of statute and community
17 documents by Respondent Ventana Lakes Property Owners' Association. Petitioner
18 indicated two issues would be presented, paid the appropriate \$1000.00 filing fee, and
19 asserted violations of A.R.S. § 33-1804; Article IV, Section E of the Bylaws; Article 5,
20 Section C of the Covenants, Conditions & Restrictions (CC&Rs); Article IV.C.23 of the
21 CC&Rs; and Article XII, Section B of the CC&Rs.

22 2. On or about March 10, 2020, the Department issued a Notice of Hearing in
23 which it set forth the issue for hearing as follows:

24 The Petitioner alleges in the petition that Ventana Lakes Property Owners'
25 Association is in violation of:
26 A.R.S. § 33-1804
27 Community Documents Bylaws Article IV, Section E
28 Community documents CC&R's Article V, Section C; Article IV, Section C(23); and
29 Article XII, Section B.
30

1 3. On or about April 28, 2020, the Administrative Law Judge continued the
2 hearing and ordered Petitioner to clarify the issues for hearing. Specifically, Petitioner
3 was instructed as follows:

4 [N]o later than May 8, 2020, Petitioner shall provide the Office of
5 Administrative Hearings with the *clearly identified* issues she wishes to pursue
6 at hearing. Specifically, the second issue presented in the petition is overly
7 vague and does not present a singular issue to be determined. Therefore,
8 Petitioner must provide a singular provision of the governing documents she
9 alleges to have been violated by Respondent. In the alternative, Petitioner
may identify multiple provisions of the governing documents she alleged to
have been violated by Respondent if she also pays the \$500.00 filing fee for
each additional violation.

10 4. In response to the order to clarify the issues, Petitioner identified her issues
11 for hearing as follows:

12 I contend that the Ventana Lakes Board of Directors has:

- 13 1. Interviewed candidates for appointment to the Board in closed executive
session in violation of ARS § 33-1804.
- 14 2. Discriminately penalized homeowners without authorization by rule in
15 violation of the CC&R's Article V Section C. This action is also in conflict with
Bylaws Article IV.E.8 and Ventana Lakes Rule 8.4.A.
- 16 3. Refused homeowners use of facilities without authorization by rule in
17 violation of CC&R's Article III Section A. This action is also in conflict with
18 CC&R's Article IV Section C.23 (and 2020 CC&R's Article IV Section C.25)
and the Bylaws Article IV.E.8 and Ventana Lakes Rule 8.4.A.
- 19 4. Refused homeowners written requests for Board action be placed on the
20 agenda for the next upcoming Board meeting in violation of Ventana Lakes
Rule 8.3.B.1.b.

21 5. Petitioner paid the additional \$1000.00 filing fee to increase the petition from
22 two issues to four issues.

23 Issue 1

24 6. Petitioner alleged Respondent improperly conducted interviews of
25 candidates for appointment to vacancies on the Board during closed sessions in violation
26 of A.R.S. § 33-1804.

27 7. Respondent acknowledged that prior to June 2019, the Board conducted all
28 interviews to fill vacancies on the Board, held their discussions, and voted in executive
29 sessions. The Board would then announce the decision and swear in the new Board
30

1 member in an open meeting. When the Board was questioned about the open meeting
2 law, the Board determined its previous practice was not in accordance with the law.

3 8. Since June 2019, the Board has conducted interviews of candidates in
4 executive sessions to elicit private information that may impact the candidate's ability to
5 perform the duties of a Board member. As an example, one candidate revealed in
6 executive session that his wife had been diagnosed with dementia and her medical needs
7 would come before any Board duties. The Board would then cast its votes on the
8 candidates in open session.

9 9. Respondent also indicated that candidates are invited to participate in an
10 open forum during which time members can ask the candidates questions prior to the
11 vote.

12 10. Petitioner argued that the interviews should be conducted in open session
13 unless the Board was specifically going to ask a question regarding information that
14 constituted an exception to the open meetings law.

15 Issue 2 and Issue 3

16 11. Petitioner argued Respondent wrongfully penalized and denied use of
17 facilities to members of the Italian American Club for purported violations of the
18 Association's rules. Petitioner asserted that the rules were not enforced equally to
19 different groups and that Respondent was not authorized to impose such sanctions.

20 12. In January 2018, the Italian American Club (IAC) met with the Board in an
21 Executive Session regarding the club's non-compliance with different rules and
22 requirements. At that time, the IAC was advised that failure to conform and comply with all
23 requirements would result in the loss of the privilege to use the Yacht Club.

24 13. The IAC used the Yacht Club for its meetings. As part of the process of
25 reserving and using the Yacht Club, the group was required to submit a schematic one
26 week prior to the event, which allowed the maintenance crew to set up the area for the
27 meeting. Respondent indicated the process was required because its insurance policy
28 provided that volunteers were not allowed to move or set up tables.

29 14. On or about March 29, 2019, the IAC submitted a floor plan for an upcoming
30 event on April 4, 2019.

1 15. On or about April 3, 2019, a member of the IAC emailed Respondent
2 requesting that more tables and chairs be set up.

3 16. On or about April 4, 2019, the facilities manager responded that he could not
4 accommodate the requested changes given the last minute nature of the request.

5 17. At or around 12:35 p.m. on April 4, 2019, members of the IAC were observed
6 via security cameras moving additional tables and chairs from the storage area. The
7 facilities manager confronted the members insisting they stop moving the tables and
8 chairs, but they refused to do so. After the situation escalated and became a verbal
9 altercation, Respondent agreed to set up the tables and chairs as requested to prevent
10 any further incidents. Members of the IAC agreed that they would not move any more
11 tables or chairs after the staff left. However, members were again observed on security
12 cameras removing another table and chairs from the storage area.

13 18. In an executive session on April 17, 2019, the Board reviewed the events
14 including watching and listening to the recordings of the incident. The Board determined it
15 would revoke the ability of the IAC to use of all Respondent's facilities for a period of one
16 year beginning on May 1, 2019, and ending on April 30, 2020.

17 19. No evidence was presented that the revocation was still in place at the time
18 of the hearing.

19 Issue 4

20 20. Petitioner argued that the Board improperly refused homeowners' written
21 requests for Board action be placed on the agenda for upcoming Board meetings in
22 violation of Ventana Lakes Rule 8.3.B.1.b.

23 21. Petitioner asserted that if the Board received a written request for an item to
24 be placed on the agenda for an upcoming Board meeting, the Board president was
25 required to place that item on the agenda, regardless of the number of requests received
26 or the nature of the request made, *i.e.* if the matter had previously been addressed and
27 decided.

28 22. The parties were in agreement that the Board president had received written
29 requests for items to be placed on the agenda for upcoming meetings that were not
30 included in the agenda.

23. Petitioner acknowledged that it would not be practical for the Board president to include every written request on the agenda if the Board received hundreds of requests for a single meeting, but offered that such an example was not realistic.

REFERENCED AUTHORITY

1. A.R.S. § 33-1804 provides, in pertinent part, as follows:

A. Notwithstanding any provision in the declaration, bylaws or other documents to the contrary, all meetings of the members' association and the board of directors, and any regularly scheduled committee meetings, are open to all members of the association or any person designated by a member in writing as the member's representative and all members or designated representatives so desiring shall be permitted to attend and speak at an appropriate time during the deliberations and proceedings. . . . Any portion of a meeting may be closed only if that closed portion of the meeting is limited to consideration of one or more of the following:

3. Personal, health or financial information about an individual member of the association, an individual employee of the association or an individual employee of a contractor for the association, including records of the association directly related to the personal, health or financial information about an individual member of the association, an individual employee of the association or an individual employee of a contractor for the association.

2. Article III, Section A of the CC&Rs provides, in pertinent part, as follows:

Easements of Enjoyment. Every Resident shall have a right and easement of enjoyment in and to the Common Areas, subject to any restriction or limitations contained herein or in any instrument conveying to the Association or subjecting to the Declaration such property, and subject further to the reasonable rules of the Association. These rights shall pass with the title to every Lot, subject to the following provisions:

1. the Board of Directors has the right to suspend any Resident from using the recreational facilities and other Common Areas;

2. the Board shall have authority to dedicate or transfer Common Areas to such public agencies, authorities or utilities easements and rights-of-way which are intended to benefit Ventana Lakes and which do not have any substantial adverse affect on the enjoyment of the Common Areas by the Members; and

3. the Board of Directors has the right to regulate the use of the Common Areas through the Ventana Lakes Rules and to prohibit access to those Common Areas, such as landscaped rights-of-way, not intended for use by the Members. The Ventana Lakes Rules shall be intended to enhance the preservation of the Common Areas or the safety and

convenience of the users thereof, or otherwise shall serve to promote the best interests of the Owners and Residents.

3. Article IV, Section C of the CC&Rs provides, in pertinent part, as follows:

Covenants, Conditions, Restrictions and Easements. Unless otherwise noted, the following Covenants, conditions, restrictions and reservations of easements and rights shall apply to all Lots and the Owners thereof, and all Residents. . . .

23. Health, Safety and Welfare. In the event activities and facilities are deemed by the Board to be a nuisance or to adversely affect the health, safety or welfare of Owners and Residents, the Board may make rules restricting or regulating their presence on Ventana Lakes as part of the Ventana Lakes Rules or may direct the Architectural Committee to make rules governing their presence on Lots as part of the architectural guidelines.

4. Article V, Section C of the CC&Rs provides as follows:

The Ventana Lakes Rules. The Association may, from time to time and subject to the provisions of this Declaration, adopt, amend and repeal rules to be known as the Ventana Lakes Rules. The Ventana Lakes Rules may restrict and govern the use of the Common Area facilities by any Member, Resident, or any other person; provided, however, that the Ventana Lakes Rules shall not discriminate among Members and shall not be inconsistent with this Declaration, the Articles of Incorporation, or Bylaws. Upon adoption, the Ventana Lakes Rules shall have the same force and effect as if they were set forth in and were a part of this Declaration.

5. Article IV.E.8 of the Bylaws provides, in pertinent part, as follows:

Section E. *Powers and Duties.* The Board of Directors shall have all powers to responsibly administer the affairs of the Association. They may act on all affairs of the Association provided they are not in conflict with laws, or the Community Documents. The Board of Directors shall have the responsibility of administering and exercising all powers and duties provided for by law or in the Community Documents, except such matters as are reserved to the Voting Members by law or by Community Documents. Without limiting the generality of this section, the Board of Directors shall be responsible for the following:

. . . .

8. To adopt and amend rules and enforce the same covering the operation and use of all of the Property.

6. Ventana Lake Rules 8.3.B provides, in pertinent part, as follows:

1 **B. Board President**

2 1. In addition and pursuant to the Bylaws, Article V, Section E, the Board
3 President shall:

4
5 b. Prepare all monthly Board Meeting Agendas and ensure they are
6 provided for review by other Board members prior to posting and
7 distribution, and that written requests for Board action by Association
8 members are placed on the agenda for the next upcoming meeting.

9 7. Ventana Lake Rules 8.4.A

10 **8.4. Responsibilities for Ventana Lakes Rules**

11 **A. All Board Policies to be in Ventana Lakes Rules**

12 Any policy, rule, regulation, resolution or other action taken by the Board
13 which could be reasonably construed as such, shall be processed pursuant
14 to this Rule, and become part of the Ventana Lakes Rules, as referenced in
15 the CC&R's. See Rule 10, Volunteers and Establishment of Committees.

16 The Board shall ensure that all current Rules for Homeowners are provided
17 to all new homeowners in written form from the Management Office. All
18 current Ventana Lakes Rules are to be available for viewing and
19 downloadable from the VLPOA website, and available from the
20 Management Office in hard copy upon request.

21 A hard copy of the Rules for the Board shall be provided to all new Board
22 Directors at or before the annual Organizational Meeting.

23 A hard copy of the Rules for Volunteers and Committees shall be made
24 available to any volunteer upon request, and provided to all Committee
25 Chairs.

26 **CONCLUSIONS OF LAW**

27 1. Arizona statute permits an owner or a planned community organization to
28 file a petition with the Department for a hearing concerning violations of planned
29 community documents or violations of statutes that regulate planned communities.
30 A.R.S. § 32-2199. 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 committed
 the alleged violations by a preponderance of the evidence. 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). Respondent bears the burden to establish affirmative
 defenses by the same evidentiary standard. 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.” MORRIS K. UDALL, ARIZONA LAW OF
3 EVIDENCE § 5 (1960). A preponderance of the evidence is “[t]he greater weight of the
4 evidence, not necessarily established by the greater number of witnesses testifying to a fact
5 but by evidence that has the most convincing force; superior evidentiary weight that, though
6 not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a
7 fair and impartial mind to one side of the issue rather than the other.” BLACK’S LAW
8 DICTIONARY at page 1220 (8th ed. 1999).

9 Issue 1

10 4. The uncontroverted evidence at hearing established that the Board
11 conducted interviews of potential Board members in closed executive sessions for the
12 purpose of eliciting personal, health, or financial information from the potential candidates.

13 5. It was also established that the potential Board members were invited to
14 participate in a question and answer session in the open portion of the Board meeting.

15 6. While Petitioner may believe the interviews were being conducted in
16 executive session for nefarious purposes, no evidence was presented to establish such
17 motives existed.

18 7. Accordingly, Petitioner failed to establish Respondent acted in violation of
19 A.R.S. § 33-1804.

20 Issue 2 and Issue 3

21 8. The evidence presented indicated that the one year prohibition of the IAC’s
22 use of Respondent’s facilities had expired and was no longer in effect at the time of the
23 hearing. No evidence was submitted to establish that the IAC was still precluded from
24 using the facilities.

25 9. A.R.S. § 32-2199.02, provides, in pertinent part, as follows:

26 A. The administrative law judge may order any party to abide by the statute,
27 condominium documents, community documents or contract provision at
28 issue and may levy a civil penalty on the basis of each violation.

29 10. Because the evidence established the IAC was no longer precluded from
30 using Respondent’s facilities at the time of the hearing, even assuming, *arguendo*, that

1 the Administrative Law Judge found the revocation of use privileges was improper, the
2 Administrative Law Judge could not order any action to be taken by Respondent.
3 Accordingly, this matter is moot.

4 Issue 4

5 11. The plain language of Ventana Lake Rules 8.3.B provides that the Board
6 president prepares the monthly Board meeting agendas and must ensure that written
7 requests for Board action by Association members are placed on the agenda for the next
8 upcoming meeting.

9 12. Nothing in the rule requires that all requests must be placed on the agenda.

10 13. As Petitioner acknowledged, it would not be practical for the Board
11 president to include every written request on the Board meeting agenda in the unlikely
12 event hundreds of such requests were received.

13 14. While the hypothetical may be unlikely, it does demonstrate that the Board
14 president has inherent authority to limit the number of items to be included on the Board
15 meeting agenda. Without any specific requirement as to the minimum or maximum
16 number of items to be included, one must conclude that the Board president's authority is
17 broad with respect to setting the Board meeting agenda.

18 15. Therefore, Petitioner failed to establish that Respondent violated Ventana
19 Lake Rules 8.3.B when the Board president failed to include every written request from
20 members on the Board meeting agenda.

21 **ORDER**

22 **IT IS ORDERED** that Petitioner's petition is denied.

23
24 **NOTICE**

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

1 Done this day, July 23, 2020.
2

3 /s/ Tammy L. Eigenheer
4 Administrative Law Judge
5

6 Transmitted by either mail, e-mail, or facsimile July 23, 2020 to:

7 Judy Lowe, Commissioner
8 Arizona Department of Real Estate
9 100 N. 15th Avenue, Suite 201
10 Phoenix, Arizona 85007

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