

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Thomas J. Van Dan Elzen,

4 Petitioner,

5 vs.

6 Carter Ranch Homeowners Association,

7 Respondent.

No. 18F-H1818042-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

9 **HEARING:** June 20, 2018, at 9:00 a.m.

10 **APPEARANCES:** Thomas J. Van Dan Elzen ("Petitioner") appeared on his own
11 behalf; Carter Ranch Homeowners Association ("Respondent") was represented by
12 Chad M. Gallacher, Esq., Maxwell & Morgan, P.C.

13 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

14
15 **FINDINGS OF FACT**

16 **BACKGROUND AND PROCEDURE**

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

20 2. Respondent is a homeowners' association whose members own single-family
21 houses on lots in the Carter Ranch development in Coolidge, Arizona. Carter Ranch
22 has 253 lots in it.

23 3. Petitioner owns a house in and is a member of Respondent.

24 4. On or about April 5, 2018, Petitioner filed a single-issue petition with the
25 Department that alleged that Respondent had violated A.R.S. § 33-1813 when its
26 president called a special meeting of Respondent's members to hold a vote on recalling
27 three recently elected members of Respondent's Board of Directors ("Board").

28 5. Respondent filed a written answer to the petition, denying that it had violated
29 any statute and moving to dismiss the petition. The Department referred the petition to
30 the Office of Administrative Hearings, an independent state agency, for an evidentiary

1 hearing. The Administrative Law Judge assigned to hear the case denied the motion
2 to dismiss.

3 6. A hearing was held on June 20, 2018. Petitioner submitted one exhibit and
4 testified on his own behalf. Respondent submitted two exhibits and presented the
5 testimony of its Community Manager, Mary Chaira.

6 **HEARING EVIDENCE**

7 7. On February 20, 2018, Respondent held its annual meeting to elect new
8 Board members. Ms. Chaira announced that Respondent had not received a sufficient
9 number of ballots to reach the required 26 for a quorum and that another meeting would
10 have to be scheduled to elect Board members.

11 8. Respondent sent out a notice that a second meeting would be held on March
12 20, 2018, to elect Board members. Eight members announced their candidacy for the
13 five open positions on Respondent's Board.

14 9. Ms. Chaira testified that before the March 20, 2018 meeting, she received
15 reports from homeowners that candidates Roxanne Gould, Steve Brownell, and Trish
16 Brownell were going door-to-door in Carter Ranch, disseminating allegedly false
17 information about Respondent's finances, and harvesting ballots to be delivered at the
18 March 20, 2018 meeting that members filled out based on the allegedly false
19 information.

20 10. On March 20, 2018, Respondent held a second meeting to elect Board
21 members. A quorum of 47 homeowners attended the March 20, 2018 meeting. Ms.
22 Chaira testified that the Board's president, Lance Van Horne, addressed the allegedly
23 false information that Ms. Gould and Mr. and Mrs. Brownell had been disseminating, but
24 that homeowners were not allowed to withdraw the ballots that Ms. Gould and Mr. and
25 Mrs. Brownell had harvested based on allegedly false information. Ms. Chaira testified
26 that the March 20, 2018 was unruly and stressful.

27 11. The six candidates who received the most votes and the number of votes
28 for each candidate at the March 20, 2018 meeting were as follows:¹

29 *////*

30

¹ See Respondent's Exhibit A.

Candidate	Number of Votes
Roxanne Gould	30
Steve Brownell	26
Trish Brownell	25
Lance Van Horne	24
Steve F.	23 (tie)
Dave	23 (tie)

12. Because Mr. Van Horne felt that Ms. Gould's and Mr. and Mrs. Brownell's dissemination of allegedly false information and harvesting of votes based on the false information compromised the outcome of the March 20, 2018 election, he called a special election for the recall of Ms. Gould and Mr. and Mrs. Brownell, who had been elected to the Board. A special meeting was noticed for April 24, 2018.

13.. A quorum of 52 homeowners returned ballots at the April 24, 2018 recall election. The votes for and against the recall of Ms. Gould and Mr. and Mrs. Brownell were as follows:

Board Member	Votes for Recall	Votes against Recall
Roxanne Gould	25	27
Steve Brownell	27	25
Trish Brownell	27	25

As a result of the April 24, 2018 recall election, Ms. Gould remained on Respondent's Board, but Mr. and Mrs. Brownell were removed. Other members were elected to serve in the resulting vacant positions on Respondent's Board.

14. As noted above, Petitioner alleged that Respondent violated A.R.S. § 33-1813 when its president, Mr. Van Horne, called the April 24, 2018 recall election because the statute provides that a recall election can only be scheduled by a petition signed by homeowners. Respondent argued that A.R.S. § 33-1813 does not provide the only procedures for calling special meetings for the recall of board members and that the procedures provided by A.R.S. § 33-1804 may also be used.

CONCLUSIONS OF LAW

1. A.R.S. § 32-2199(B) permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of applicable

1 statutes under the authority Title 33, Chapter 16.² Such petitions will be heard before
2 the Office of Administrative Hearings, an independent state agency.

3 2. Petitioner bears the burden of proof to establish that Respondent violated
4 A.R.S. § 33-1813 by a preponderance of the evidence.³ Respondent bears the burden to
5 establish affirmative defenses by the same evidentiary standard.⁴

6 3. "A preponderance of the evidence is such proof as convinces the trier of fact
7 that the contention is more probably true than not."⁵ However, because the facts were
8 not disputed and Petitioner's petition presents a pure legal issue of statutory
9 interpretation, the Administrative Law Judge, the Department, and any reviewing court
10 may review *de novo* the issue and the parties' arguments under common-law canons of
11 statutory construction without regard to the burden or standard of proof.

12 4. A.R.S. § 33-1813 is entitled, "Removal of board member; special meeting"
13 and provides in relevant part as follows:

14 A. Notwithstanding any provision of the declaration or
15 bylaws to the contrary, all of the following apply to a meeting
16 at which a member of the board of directors, other than a
17 member appointed by the declarant, is proposed to be
18 removed from the board of directors:

19

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

22 (a) In an association with one thousand or fewer
23 members, ***on receipt of a petition that calls for removal***
24 ***of a member of the board of directors*** and that is signed
25 by the number of persons who are eligible to vote in the
26 association at the time the person signs the petition equal to
27 at least ***twenty-five percent of the votes*** in the association
28 ***or*** by the number of persons who are eligible to vote in the
29 association at the time the person signs the petition equal to
30 ***at least one hundred votes*** in the association, ***whichever***
is less, the board shall call and provide written notice of

28 ² See A.R.S. § 33-1803.

29 ³ 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
30 Ariz. 369, 372, 249 P.2d 837 (1952).

⁴ See A.A.C. R2-19-119(B)(2).

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

1 **a special meeting of the association as prescribed by**
2 **section 33-1804, subsection B.**

3 (b) **Notwithstanding section 33-1804, subsection B**, in
4 an association with more than one thousand members, **on**
5 **receipt of a petition that calls for removal of a member**
6 **of the board of directors and that is signed by** the
7 number of persons who are eligible to vote in the association
8 at the time the person signs the petition equal to **at least ten**
9 **percent of the votes in the association or by** the number
10 of persons who are eligible to vote in the association at the
11 time the person signs the petition equal to **at least one**
12 **thousand votes in the association, whichever is less,**
13 **the board shall call and provide written notice of a**
14 **special meeting of the association. The board shall**
15 **provide written notice of a special meeting as**
16 **prescribed by section 33-1804, subsection B.**

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

19 (d) **For purposes of a special meeting called pursuant**
20 **to this subsection, a quorum is present if the number of**
21 **owners** who are eligible to vote in the association at the time
22 the person attends the meeting **equal to at least twenty**
23 **percent** of the votes of the association **or** the number of
24 persons who are eligible to vote in the association at the
25 time the person attends the meeting equal to **at least one**
26 **thousand votes, whichever is less**, is present at the
27 meeting in person or as otherwise permitted by law.

28

29 (g) **A petition** that calls for the removal of the same
30 member of the board of directors shall not be submitted
more than once during each term of office for that member.

. . . .

7. A member of the board of directors who is removed
pursuant to this subsection is not eligible to serve on the
board of directors again until after the expiration of the
removed board member's term of office, unless the
community documents specifically provide for a longer
period of ineligibility.

(Emphasis added.) A.R.S. § 33-1804 is entitled “Open meetings, exceptions.” A.R.S. § 33-1804(B) provides in relevant part as follows:

Notwithstanding any provision in the community documents, all meetings of the members' association and the board shall be held in this state. A meeting of the members' association shall be held at least once each year. ***Special meetings of the members' association may be called by the president, by a majority of the board of directors or by members having at least twenty-five percent, or any lower percentage specified in the bylaws, of the votes in the association.*** Not fewer than ***ten nor more than fifty days in advance of any meeting of the members the secretary shall cause notice to be hand-delivered or sent*** prepaid by United States mail to the mailing address for each lot, parcel or unit owner or to any other mailing address designated in writing by a member. The notice shall state the date, time and place of the meeting. ***A 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.*** 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.

(Emphasis added.)

5. A.R.S. § 33-1813 specifically concerns special meetings to remove board members. A.R.S. § 33-1804(B) generally concerns annual or special meetings, including special meetings to amend the declaration or bylaws, changes in assessments, and any proposal to remove an officer. Although both statutes provide for a meeting to be called by a petition of homeowners, the requirements of the two statutes for the number or percentage of homeowners who must sign the petition⁶ and the required advance notice to members of the meeting are different.⁷

⁶ Notwithstanding bylaws, 100 members or 25% of members for association having 1,000 or fewer members/1,000 members or 10% of members for association having more than 1,000 members under A.R.S. § 33-1813(A)(4)(a) and (b) vs. 25% of members or any lower percentage specified in the bylaws under A.R.S. § 33-1804(B).

⁷ Thirty days after receipt of the petition under A.R.S. § 33-1813(A)(4)(c) vs. between 10 and 50 days under A.R.S. § 33-1804(B).

1 6. A.R.S. § 33-1813(A)(4)(b) specifically disavows the petition requirements of
2 A.R.S. § 33-1804(B); the only part of A.R.S. § 33-1804(B) that A.R.S. § 33-1813(A)(4)
3 (b) specifically incorporates by reference concerns the contents of the written notice of a
4 meeting to recall a board member after receipt of a petition. Respondent's
5 interpretation that A.R.S. § 33-1813 allows the president of the association to call for an
6 election to recall board member creates uncertainty about how many members must
7 sign a petition and how much notice the board must provide of the special meeting to
8 recall board members.

9 7. In construing a statute, "we must be guided by the presumption that the
10 legislature did not intend to do a futile act by including a provision which is not operative
11 or that is inert and trivial."⁸ "When provisions of a general statute are inconsistent with
12 those of a special nature on the same subject, the special statute controls."⁹ "Where we
13 have a general statute and a specific statute that are in conflict, the specific governs."¹⁰

14 8. Under this well-established common law, A.R.S. § 33-1813 requires that a
15 petition be filed for a board member to be removed or recalled. Therefore, Petitioner's
16 petition must be granted.

17 **RECOMMENDED ORDER**

18 **IT IS ORDERED** that Petitioner's petition is granted. Respondent shall be
19 required to reinstate Board members Steve Brownell and Trish Brownell.

20 **IT IS FURTHER ORDERED** that Respondent shall reimburse to Petitioner the
21 \$500.00 single-issue filing fee.

22 **NOTICE**

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

28 **////**

29 ⁸ *Campbell v. Superior Court*, 105 Ariz. 252, 255, 462 P.2d 801, 804 (1969).

30 ⁹ *Arden-Mayfair, Inc. v. Department of Liquor Licenses and Control*, 123 Ariz. 340, 342, 599 P.2d 793, 795 (1979).

¹⁰ *State v. Rice*, 110 Ariz. 210, 213, 516 P.2d 1222, 1225 (1973).

1 Done this day, June 25, 2018.

2 /s/ Diane Mihalsky
3 Administrative Law Judge

4 Transmitted electronically to:

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