

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 John H. Kelly,
4 Petitioner,

No. 19F-H1919060-REL

5 vs.

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 Cortez Canyon Unit Owners Association,
7 Respondent.

8 **HEARING:** August 29, 2019 at 1:00 PM.

9 **APPEARANCES:** John H. Kelly ("Petitioner") appeared on his own behalf.
10 Jonathan A. Dessauls, Esq. appeared on behalf of Cortez Canyon Unit
11 Owners Association ("Association" and "Respondent") with Sandra Garcia as
12 a witness.

13 **ADMINISTRATIVE LAW JUDGE:** Jenna Clark.
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16 After review of the hearing record in this matter, the undersigned Administrative
17 Law Judge makes the following Findings of Fact and Conclusions of Law, and issues
18 this ORDER to the Commissioner of the Arizona Department of Real Estate
19 ("Department").

20 **FINDINGS OF FACT**

21 **BACKGROUND AND PROCEDURE**

22 1. The Department is authorized by statute to receive and to decide petitions
23 for hearings from members of homeowners' associations and from homeowners'
24 associations in Arizona.

25 2. On or about April 29, 2019, Petitioner filed a single-issue petition¹ with the
26 Department which alleged that the Association failed to call a special meeting to remove
27 a board member in violation of ARIZ. REV. STAT. § 33-1243. The petition states, in
28 pertinent part, "Cortez Canyon has 84 units and 25% is 21 units. Homeowners have
29 collected more than the required 21 home-owner's signatures. The Cortez Canyon HOA

30 ¹ See Department's electronic file at HO19-19060_Notice_Petition.pdf.

1 board has stated that they will not schedule the required special meeting.” [sic] (*All*
2 *errors in original.*)

3 3. On May 28, 2019, Respondent returned its ANSWER to the Department
4 whereby it denied that the requisite amount of appropriate signatures were collected
5 and therefore no meeting was required.²

6 4. Per the NOTICE OF HEARING, the Department referred this matter to the
7 Office of Administrative Hearings (“OAH”), an independent state agency, for an
8 evidentiary hearing on August 01, 2019³, regarding the following issue:

9 **Whether Cortez Canyon Unit Owners Association violated ARIZ. REV.**
10 **STAT. § 33-1243.**⁴

11 **THE PARTIES AND GOVERNING DOCUMENTS**

12 5. Respondent is a condominium association whose members own
13 properties in the Cortez Canyon residential real estate development located in Phoenix,
14 Arizona. Membership for the Association is compromised of the Cortez Canyon
15 condominium owners.

16 6. Petitioner is a Cortez Canyon condominium owner and a member of the
17 Association.

18 7. The Association is governed by its Covenants, Conditions, and
19 Restrictions (“CC&Rs”)⁵, and overseen by a Board of Directors (“the Board”). The
20 CC&Rs empower the Association to control certain aspects of property use within the
21 development. When a party buys a residential unit in the development, the party
22 receives a copy of the CC&Rs and agrees to be bound by their terms. Thus, the CC&Rs
23 form an enforceable contract between the Association and each property owner.

24 8. The Association’s CC&Rs were recorded with the Maricopa County
25 Recorder’s Office on May 09, 2000.

26 9. The Associations Bylaws were adopted by the Board on June 14, 2000.⁶

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28 ² See Department’s electronic file at HO19-19060_Respondent_Petition_WithForm.pdf.

29 ³ The matter was continued on July 01, 2019, and reset for August 28, 2019, at 1:00 p.m. whereby it was
30 heard.

⁴ See Department’s electronic file at HO19-19060_Notice_Hearing.pdf.

⁵ See Department’s electronic file at HO19-18017_SinVaca_CCR.pdf.

⁶ See Respondent Exhibit 3.

10. Bylaws Article I, Definitions, Section 1 states, in pertinent part, “[T]he term ‘Eligible Votes’ means the total number of votes at a meeting or in a respect of any other lawful action including, but not limited to, action by written ballot or written consent.”

11. Bylaws Article II, Meetings of Members, Section 2 states, "Special meetings of the Members may be called at any time by the President or by a majority of the Board of Directors or by Unit Owners having at least twenty-five percent (25%) of the votes in the Association."

12. Bylaws Article II, Meetings of Members, Section 7 states, “In the event any Unit Owner is in arrears in the payment of any Assessment, monetary penalties or other fees and charges due under the terms of the Condominium Documents for a period of fifteen (15) days, the Unit Owner’s right to vote as a member of the Association shall be automatically suspended and shall remain suspended until all payments, including accrued interest and attorney’s fees, are brought current, and for a period not to exceed sixty (60) days for any infraction of the Condominium Documents.”

HEARING EVIDENCE

13. Petitioner testified on his own behalf. Respondent called Board President Saundra Garcia as a witness and submitted twelve exhibits into the record. The Department's electronic file and NOTICE OF HEARING were also admitted into the record.

14. The parties agree that twenty-one valid Unit Owner signatures had to have been submitted with Petitioner's petition in order to compel the Association to call a special meeting in this matter.

Petitioner's testimony

15. Petitioner, who desired to recall an Association board member, started a petition and distributed it to neighbors who he believed to be Unit Owners of the Association.

16. Petitioner, with the assistance of some associated he recruited, collected thirty-six signatures and turned them into the Association's property management group, Golden Valley, on an unknown date.

1 17. Neither Petitioner nor his assistants verified if the signatures that were
2 collected belonged to Unit Owners eligible to vote prior to submitting their petition to
3 Golden Valley.

4 18. After his submission to Golden Valley, Petitioner secured the signature of
5 Jeffery Law, an Association member and owner of six units. Petitioner did not provide
6 Mr. Law's signature to Golden Valley.

7 19. Upon review, Golden Valley informed Petitioner that he had secured
8 enough signatures to compel a special meeting, and assured Petitioner that it would
9 forward the collected signatures and petition to the Association.

10 20. A short while later, however, Petitioner was informed by the Association's
11 new property management company that he had not collected the threshold number of
12 Unit Owner signatures required, of those eligible to vote, to compel the board to hold a
13 special meeting.

14 21. On April 25, 2019, Petitioner filed a petition with the Department against
15 the Association because he disagreed with their rationale to deny his petition.

16 22. Petitioner argued at the end of hearing that at a minimum he had
17 submitted twenty-three valid signatures for the Association to consider, including Mr.
18 Law's signature; which Petitioner argued should be counted six times.

19 Saundra Garcia's testimony

20 23. On or about April 19, 2019, the Association received Petitioner's petition
21 which included thirty-six purported Unit Owner signatures.

22 24. On June 01, 2019, the Association's management contract with Golden
23 Valley's expired.

24 25. Upon review the Association determined that Petitioner submitted
25 signatures from residential occupants and renters, multiple signatures from the same
26 unit, and signatures from Unit Owners that were ineligible to vote per the Association's
27 Bylaws.

28 26. Specifically, the Association determined that of the thirty-six signatures
29 Petitioner submitted eleven signatures had to be removed because the signatures were
30 from non-owner renters or occupants, six signatures had to be removed because
another Unit Owner signature had already been collected for that unit, and six

1 signatures had to be removed because the Unit Owner was ineligible to vote during the
2 relevant period as they were over fifteen days delinquent on fines, fees and/or dues
3 owed to the Association.⁷

4 27. A Unit Owner is “eligible to vote” when they are in good standing and not
5 more than fifteen days delinquent on Association dues or fines.

6 28. Only one Unit Owner per unit may vote.

7 29. Thus, Petitioner submitted a total of thirteen valid Unit Owner signatures.
8 The signature Petitioner collected from the multiple unit owner, Jeffrey Law, was not a
9 part of the petition received by the Association and therefore was not counted.

10 30. Because Petitioner had not submitted twenty-one valid Unit Owner
11 signatures with his Petitioner as required by the Association’s Bylaws, the Association
12 determined that it was not required to call a special meeting.

13 **CONCLUSIONS OF LAW**

14 1. This matter lies within the Department’s jurisdiction pursuant to ARIZ. REV.
15 STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a
16 planned community association. The owner or association may petition the department
17 for a hearing concerning violations of community documents or violations of the statutes
18 that regulate planned communities as long as the petitioner has filed a petition with the
19 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

20 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-
21 2199.01(D), 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide
22 the contested case at bar. OAH has the authority to interpret the contract between the
23 parties. See *Tierra Ranchos Homeowners Ass’n v. Kitchukov*, 216 Ariz. 195, 165 P.3d
24 173 (App. 2007).

25 3. In this proceeding, Petitioner bears the burden of proving by a
26 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1243.⁸

27 4. “A preponderance of the evidence is such proof as convinces the trier of
28 fact that the contention is more probably true than not.”⁹ A preponderance of the evidence

29 ⁷ See Respondent Exhibits 2-12.

30 ⁸ See ARIZ. ADMIN. CODE R2-19-119.

⁹ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 is "[t]he greater weight of the evidence, not necessarily established by the greater number
2 of witnesses testifying to a fact but by evidence that has the most convincing force;
3 superior evidentiary weight that, though not sufficient to free the mind wholly from all
4 reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the
5 issue rather than the other."¹⁰

6 5. ARIZ. REV. STAT. § 33-1243(H)(4) provides, in pertinent part, that for the
7 purpose of calling for the removal of a member of the board of directors, other than a
8 member appointed by the declarant, "In an association with one thousand or fewer
9 members, on receipt of a ***petition that calls for removal of a member of the board of***
10 ***directors and that is signed by the number of persons who are eligible to vote in***
11 ***the association at the time the person signs the petition equal to at least twenty-***
12 ***five percent of the votes in the association*** or by the number of persons who are
13 eligible to vote in the association at the time the person signs the petition equal to at
14 least one hundred votes in the association, whichever is less, the board shall call and
15 provide written notice of a special meeting of the association." (*Emphasis added.*)

16 6. ARIZ. REV. STAT. § 33-1243(H)(4)(c) notes that a special meeting shall be
17 called, noticed, and held within thirty days after receipt of the petition.

18 7. Based upon a review of the credible and relevant evidence in the record,
19 Petitioner has failed to sustain his burden of proof.

20 8. Here, the material facts are not at issue.

21 9. It is undisputed that petitioner needed to submit twenty-one signatures
22 along with his petition to compel the Association to call a special meeting to recall a
23 board member. While Petitioner is correct that he submitted more than twenty-one
24 signatures to the Association, he is incorrect that all of signatures provided were valid.

25 10. What the evidence of record reflects is that Petitioner only provided
26 thirteen valid signatures along with his petition to the Association, which was not
27 enough to compel the Association to call a special meeting.

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30 ¹⁰ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

11. Therefore, the undersigned Administrative Law Judge concludes that because Petitioner failed to sustain his burden of proof that the Association violated ARIZ. REV. STAT. § 33-1243, his petition must be denied.

ORDER

Based on the foregoing,

IT IS ORDERED that Petitioner's petition be denied.

In the event of certification of the Administrative Law Judge Decision by the Director of the Office of Administrative Hearings, the effective date of the Order will be five days from the date of that certification.

NOTICE

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

Done this day, September 13, 2019.

/s/ Jenna Clark
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate

Transmitted through US Mail to:

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