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ADMINISTRATIVE LAW JUDGE DECISION

1 violated subsection 33-1243(H)(4) by counting ballots at the August 19, 2021 meeting
2 even though some of those ballots were received after the June 30, 2021 deadline.¹

3 7. After receiving petitions to schedule recall-elections of two board
4 members, the Association through its manager Associa Arizona, issued to the members
5 a "Notice of Special Meeting/Solicitation for Action by Secret Ballot" ("Notice").

6 8. The Notice set the special meeting for 10:00 a.m. June 30, 2021; the
7 special meeting was to be conducted virtually. With its Notice, the Association provided
8 a ballot, instructions on how to cast a vote, and the meeting agenda.

9 9. The June 30th special meeting was called "to vote for or against" removing
10 two Board Members.

11 10. By statute, a quorum for the special meeting required 20% of the eligible
12 voters to be present at the meeting in person or as otherwise permitted by law. See
13 ARIZ. REV. STAT. § 33-1243(H)(4)(d).

14 11. The Association planned to use the ballots returned to it by the June 29th
15 deadline to determine whether a quorum existed for the June 30th special meeting.

16 12. Voting was to be done by mail or by bringing the ballot to the Association's
17 clubhouse between 1:00 and 5:00 p.m. June 29, 2021.

18 13. The Notice setting the June 30th special meeting shows:

- 19 a. That all ballots voted by mail had to be received by Associa Arizona by
20 5:00 p.m. June 29, 2021, but nevertheless, the ballots would be
21 counted at the June 30th special meeting. (Underscore added.)
- 22 b. That 20% "of the members must be represented by secret ballot to
23 constitute a quorum."
- 24 c. The ballot was "valid only for the special meeting scheduled for 10:00
25 a.m. on June 30, 2021 via conference call."

26 14. The voting instructions included with the Notice show that:

28
29 ¹ Mr. Iannuzo's overarching concern was to the effect that the special meeting would not serve to educate
30 him as a voter because that meeting was to occur after his vote was due.

- 1 a. "This ballot is valid only for the Special Meeting scheduled for June 30,
2 2021" and that to be counted, ballots voted by mail had to be received
3 Associa Arizona by 5:00 p.m. June 30, 2021. (Underscore added.)
4 b. Ballots would be accepted in person at the Association's clubhouse
5 between 1:00 and 5:00 p.m. June 29, 2021.

6 15. The Ballot shows that:

- 7 a. It "is only valid for the ... Special Meeting scheduled for June 30,
8 2021," and that to be counted, ballots voted by mail had to be received
9 Associa Arizona by 5:00 p.m. June 29, 2021. (Underscore added.)
10 b. The ballots received would be used for quorum purposes.
11 c. There are 224 members/units and that a quorum required 20% or 45
12 ballots.
13 d. The majority of votes cast must be in favor of removal to effect
14 removal.

15 16. The agenda for the June 30, 2021 special meeting shows that the meeting
16 would be called to order after which there would be a determination of quorum.

17 17. On June 30, 2021, at 9:36 and 9:52 a.m., representatives of the
18 Association informed the members that the special meeting was canceled for lack of a
19 quorum and that the "board stands" and the "Board will remain as is."

20 18. On or about July 14, 2021, the Association informed the members that it
21 had received ballots after the June 29/30 deadline; based on these late-received ballots,
22 the Association determined that it had a quorum for a meeting; and that there would be
23 a meeting conducted on August 19, 2021 at which time the ballots submitted for the
24 recall election would be counted and the results announced.

25 19. The Association issued a Notice setting the August 19, 2021 meeting, the
26 sole purpose of which was to count the ballots that were issued for use at the June 30th
27 special meeting.

28 20. Mr. Iannuzo filed his petition on September 13, 2021; the Association filed
29 its Response on October 13, 2021.
30

1 21. Because Mr. Iannuzo's petition set out more than one issue or alleged
2 statutory violation, the undersigned informed Mr. Iannuzo that he was required either to
3 identify a single issue for hearing or to pay to the Department the appropriate fee for a
4 multi-issue hearing.

5 22. Mr. Iannuzo filed additional information regarding his petition and through
6 a November 29, 2021 Response to Order he set out the single issue he would pursue at
7 hearing, i.e., that the Tabulation of the Special Meeting ballots received after the
8 statutory deadline of 6/30/2021 violated ARIZ. REV. STAT. section 33-1243(H)(4).

9 23. Through its answer to Mr. Iannuzo's petition, the Association
10 acknowledged that there was no special meeting held on June 30, 2021.

11 24. The Association argues that it could not hold a meeting because there was
12 no quorum and that setting the meeting was sufficient to meet subsection 33-1243(H)(4)
13 (c)'s requirement to hold the meeting within 30 days of receipt of the recall petitions.

14 25. The Association argues that it was not a violation to tabulate the votes in
15 August because section 33-1243 requires only that the meeting must be held within 30
16 days and it does not specify when the votes must be tallied.

17 26. The Association asserts that section 33-1243 does not speak of
18 adjournment or continuation of a meeting, but rather it only requires that the meeting be
19 held within 30 days.²

20 27. Through his petition, Mr. Iannuzo requests that the August 19, 2021
21 recount results be voided, that a civil penalty be assessed against the Association, and
22 that the Association be subject to oversight by an independent outside administrator.

23 **CONCLUSIONS OF LAW**

24 1. In his petition, Mr. Iannuzo alleges that the Association has violated ARIZ.
25 REV. STAT. section 33-1243. Consequently, the Department of Real Estate has authority
26 over this matter. ARIZ. REV. STAT. Title 32, Ch. 20, Art. 11.

27
28 ² The Association Bylaws at section 2.4 show that the presence of 10% of the members who can vote
29 constitute a quorum, and that if no quorum exists, those present can adjourn the meeting from time to
30 time until a quorum does exist. Bylaws section 2.3 provides that if a meeting is adjourned, the issues
noticed for meeting may be considered at the next session.

1 2. Mr. Iannuzo bears the burden of proof to show that the alleged violation
2 occurred. The standard of proof on all issues in this matter is that of a preponderance of
3 the evidence. ARIZ. ADMIN. CODE § R2-19-119.

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. ARIZ. REV. STAT. section 32-2199.02(A) provides that:

13 The administrative law judge may order any party to abide by
14 the statute, condominium documents, community documents
15 or contract provision at issue and may levy a civil penalty on
16 the basis of each violation.... If the petitioner prevails, the
17 administrative law judge shall order the respondent to pay to
18 the petitioner the filing fee required by section 32-2199.01.

19 5. Statutes should be interpreted to provide a fair and sensible result.
20 *Gutierrez v. Industrial Commission of Arizona*, 226 Ariz. 395, 249 P.3d 1095 (2011)
21 (citation omitted); *State v. McFall*, 103 Ariz. 234, 238, 439 P.2d 805, 809 (1968)
22 ("Courts will not place an absurd and unreasonable construction on statutes.").

23 6. ARIZ. REV. STAT. section 33-1243 provides in part:

24 ***

25 H. Notwithstanding any provision of the declaration or bylaws
26 to the contrary, all of the following apply to a meeting at which
27 a member of the board of directors, other than a member
28 appointed by the declarant, is proposed to be removed from
29 the board of directors:

30 1. The unit owners who are eligible to vote at the time of the
meeting may remove any member of the board of directors,
other than a member appointed by the declarant, by a majority
vote of those voting on the matter at a meeting of the unit
owners.

2. The meeting of the unit owners shall be called pursuant to this section and action may be taken only if a quorum is present.

4. For purposes of calling for removal of a member of the board of directors, other than a member appointed by the declarant, the following apply:

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

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

(Underscoring added.)

7. ARIZ. REV. STAT. section 33-1250 provides in part:

C. [No proxies are allowed] Notwithstanding section 10-3708 or the provisions of the condominium documents, any action taken at an annual, regular or special meeting of the members shall comply with all of the following if absentee ballots or ballots provided by some other form of delivery are used:

3. The ballot is valid for only one specified election or meeting of the members and expires automatically after the completion of the election or meeting.

4. The ballot specifies the time and date by which the ballot must be delivered to the board of directors in order to be counted, which shall be at least seven days after the date that the board delivers the unvoted ballot to the member.

5. The ballot does not authorize another person to cast votes on behalf of the member.

D. Votes cast by absentee ballot or other form of delivery, including the use of e-mail and fax delivery, are valid for the purpose of establishing a quorum.

8. The Association acknowledges that it did not conduct the June 30th special meeting and there is no dispute that no meeting was conducted within 30 days of its receipt of the petitions calling for the recall elections.

9. On its face, subsection 33-1243(H)(4)(c) calls for the quorum to be determined based on the number of eligible voters at the time of the meeting.

10. The Association canceled the June 30th meeting because it had not received enough ballots by the June 29th deadline it set. The Association presented no persuasive legal argument or authority showing that in determining whether a quorum existed it was appropriate for the Association to use only the ballots returned by June 29th, rather than using the ballots and the members present at the meeting on June 30th.

11. What valid options the Association had after it did not receive enough returned ballots to constitute a quorum and canceled the June 30th special meeting is not directly at issue in this matter. But the Association's decision to count the ballots at the August 19th meeting does not comply with section 33-1243 because those ballots were valid only for the June 30th meeting as evidenced by the ballots, the Notice, and the voting instructions. See *also* ARIZ. REV. STAT. § 33-1250(C)(3).

12. Consequently, the preponderance of the evidence shows that the Association violated ARIZ. REV. STAT. section 33-1243.

13. Mr. Iannuzo's requests that the tribunal void the election results and that an oversight administrator be appointed have not been shown to be within the scope of the tribunal's authority. See ARIZ. REV. STAT. § 32-2199.02(A). Consequently, these requested remedies cannot be granted.

14. Mr. Iannuzo has not shown that it is appropriate to impose a civil penalty against the Association. And although the Association did not conduct the required meeting within 30 days of receiving the recall petitions, this violation cannot be cured.

15. Because Mr. Iannuzo has prevailed in this matter (by proving that the Association did violate the statute at issue), the Association is required to refund his filing fee.

ORDER

IT IS ORDERED that James Iannuzo is prevailing party;

IT IS FURTHER ORDERED that Moonrise at Star Pass Community Association must pay to Mr. Iannuzo his filing fee of \$500.00 within thirty days of this Order.

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, December 30, 2021.

/s/ Thomas Shedden
Thomas Shedden
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile December 30, 2021 to:

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