IN THE OFFICE OF ADMINISTRATIVE HEARINGS

n the Matter of Charlotte Tande vs. Wintergardens Co-Operative

No. 23F-H059-REL

ORDER

Pending before the Office of Administrative Hearings is Respondent Wintergardens Co-Operative's Motion to Dismiss (Motion). Petitioner Charlotte Tande filed a response to the motion (Response). Respondent filed a Reply to the Response (Reply). Having reviewed the Motion, Response, and Reply, the Administrative Law Judge makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

- 1. Wintergardens Co-operative (Respondent) is a non-profit corporation that maintains and operates a cooperative mobile home and R.V. Park in Yuma, Arizona. Wintergarden's shareholders are lessees, not owners, under a Proprietary Lease.
- 2. Petitioner Charlotte Tande is a shareholder of the corporation and a lessee of a property within the cooperative.
- 3. Petitioner filed a two-issue petition with the Arizona Department of Real Estate (Department) alleging that Respondent failed to comply with the open meeting requirements of A.R.S. § 33-1804 and failed to provide a certain financial records as required by A.R.S. § 33-1810.
- 4. Respondent filed a written answer to the petition denying the alleged violations.
- 5. The Department referred the petition to the Office of Administrative Hearings, an independent state agency, for an evidentiary hearing.
- 6. Respondent filed the Motion arguing that Respondent is not subject to the provisions of the Arizona Planned Communities Act because Respondent, as a cooperative, did not meet the definition of a "Planned Community" as set forth in A.R.S. § 33-1802(4).

- 7. Petitioner filed the Response asserting that Respondent was a "Planned Community" and therefore was required to comply with the statutes referenced in her petition.
- 8. In the Response, Petitioner asserted that "Respondents' shareholders are Lessees and OWNERS under a proprietary Lease." Petitioner did not identify what the shareholders owned, other than a share of the co-operative.
- 9. In its Reply, Respondent argued that Petitioner failed to present any evidence or argument that the shareholders separately owned lots, parcels, or units or that Respondent met the definition of a "Planned Community."

REFERENCED STATUTES

10. A.R.S. § 33-1802(4) provides as follows:

"Planned community" means a real estate development that includes real estate owned and operated by or real estate on which an easement to maintain roadways or a covenant to maintain roadways is held by a nonprofit corporation or unincorporated association of owners, that is created for the purpose of managing, maintaining or improving the property and in which the declaration expressly states both that *the owners of separately owned lots, parcels or units* are mandatory members and that the owners are required to pay assessments to the association for these purposes. Planned community does not include any of the following:

- (a) A timeshare plan or a timeshare association that is governed by chapter 20 of this title.
- (b) A condominium that is governed by chapter 9 of this title.
- (c) A real estate development that is not managed or maintained by an association.

Emphasis added.

- 11. A.R.S. § 33-1201 provides that that Condominium Act only applies to "Condominiums".
 - 12. A.R.S. § 33-1202(10) defines "Condominium" as follows:

"Condominium" means real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of the separate portions. Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.

CONCLUSIONS OF LAW

- 1. Pursuant to A.R.S. § 32-2199.01(A), "[f]or a dispute between an owner and a condominium association or planned community association that is regulated pursuant to title 33, chapter 9 or 16, the owner or association may petition the department for a hearing concerning violations of condominium documents or planned community documents or violations of the statutes that regulate condominiums or planned communities." That statute provides that such petitions will be heard before the Office of Administrative Hearings.
- 2. As the Department only has the jurisdiction to hear disputes between owners and condominium associations or planned community associations, Respondent must be found to be one or the other for the dispute to properly be before the Office of Administrative Hearings.
- 3. In its Motion, Respondent argued that Respondent's shareholders were Lessees, not owners of any separately owned lots, parcels, or units.
- 4. Petitioner argued that Respondent's shareholders were Lessees *and* owners under the proprietary lease.
- 5. While the shareholders may be owners of a share of Respondent as an entity, nothing in any of the pleadings indicated that the shareholders were owners of any "separately owned lots, parcels or units."
- 6. Accordingly, the Administrative Law Judge concludes that Respondent's cooperative does not fall within the definition of a planned community, as their purposes and functions are separate and distinct.
- 7. Therefore, because Respondent does not fall within the definition of a planned community, the Department does not have jurisdiction to hear a dispute between Petitioner and Respondent.

ORDER

IT IS ORDERED granting Respondent's Motion to Dismiss. The hearing in this matter is vacated from the calendar of the Office of Administrative Hearings.

1 NOTICE 2 Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties 3 unless a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S. § 41-1092.09, a request for rehearing in this matter 4 must be filed with the Commissioner of the Department of Real Estate 5 within 30 days of the service of this Order upon the parties. 6 Done this day, September 5, 2023. 7 8 /s/ Tammy L. Eigenheer 9 Administrative Law Judge 10 11 Transmitted by either mail, e-mail, or facsimile September 5, 2023 to: 12 Susan Nicolson 13 Commissioner Arizona Department of Real Estate 14 100 N. 15th Avenue, Suite 201 15 Phoenix, Arizona 85007 Attn: 16 SNicolson@azre.gov 17 AHansen@azre.gov vnunez@azre.gov 18 djones@azre.gov 19 labril@azre.gov 20 Charlotte Tande 21 grandmacharle@gmail.com 22 Beth Mulcahy, Esq. Mulcahy Law Firm, PC 23 bmulcahy@mulcahylaw.net 24 25 By: OAH Staff 26 27 28 29 4 30