

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of

No. 24F-H006-REL

4 Susannah Sabnekar

**ADMINISTRATIVE LAW JUDGE
DECISION**

5 Petitioner,
6 vs.

7 Four Peaks Vista Owners Association

8
9 Respondent.

10 **HEARING:** October 6, 2023

11 **APPEARANCES:** Petitioner Susannah Sabnekar represented herself. Maria
12 McKee, Esq. represented Respondent Four Peaks Vista Owners Association.

13 **ADMINISTRATIVE LAW JUDGE:** Velva Moses-Thompson

14
15 **FINDINGS OF FACT**

16 1. The Arizona Department of Real Estate (Department) is authorized by statute
17 to receive and to decide Petitions for Hearings from members of condominium unit
18 owners' associations and from unit owners' associations in Arizona.

19 2. Respondent Four Peaks Vista Owners Association is a condominium unit
20 owners' association whose members own the condominiums in the Four Peaks Vista
21 condominium development in Fountain Hills, Arizona.

22 3. Petitioner owns condominium unit 127 in Four Peaks Vista and is a member
23 of Respondent.

24 4. Four Peaks Investment Partners I LLC and Four Peaks Investment Partners II
25 LLC (Four Peaks) owns several units within Four Peaks Vista.

26 5. On March 21, 2022, the Association's Board approved entering into a lease
27 agreement. The Lease granted Declarant the right to maintain a leasing and property
28 management office within a small portion of the community's clubhouse.

29 6. On July 24, 2023, Petitioner filed a single-issue petition with the Department
30 alleging that Respondent had violated its Arizona Revised Statutes (A.R.S.) §§ 33-1252

1 and A.R.S. 33-1217, when the Board “[conveyed] a portion of the common elements
2 without a vote from all homeowners.”

3 7. Respondent filed a written answer to the petition denying the allegation.

4 8. The Department referred the petition to the Office of Administrative Hearings,
5 an independent state agency, for an evidentiary hearing.

6 9. On September 6, 2023, the Department issued a Notice of Hearing setting the
7 matter for hearing on October 6, 2023. The Notice of Hearing provided that the dispute
8 was, “Petitioner alleged the Respondent of violating ARS 33-1252 and 33-1217 by
9 voting, “to convey a portion of the common elements without a vote from all
10 homeowners as required by statute” [sic].”

11 **10.** A hearing was held on October 6, 2023.

12 **11.** At hearing, Petitioner testified on behalf of herself and presented the
13 testimony of Amy Wautier.¹

14 **12.** In its Motion to Dismiss the Petition (Motion), Respondent contended,
15 “Petitioner asserts the Association violated A.R.S. § 33-1257 and § 33-1217 by
16 “conveying” a portion of the Common Elements to [Four Peaks]. However, this conflates
17 “conveyance” of Common Elements with “leasing” Common Elements, which are
18 treated separately under Arizona’s Condominium Act and other Arizona law. By way of
19 example, A.R.S. § 33-1242(A) expressly grants the Association the right to lease
20 Common Elements, and separately grants the Association the right to “convey”
21 Common Elements so long as there is compliance with A.R.S. § 33-1252: Subject to the
22 provisions of the declaration, the association may . . . Grant easements, leases,
23 licenses and concessions through or over the common elements. A.R.S. § 33-1242(A)
24 (9) (emphasis added). Subject to the provisions of the declaration, the association may .
25 . . Acquire, hold, encumber and convey in its own name any right, title or interest to real
26 or personal property, except that common elements may be conveyed or subjected to a
27 security interest only pursuant to § 33-1252. A.R.S. § 33-1242(A)(8) (emphasis added).

28 ¹ The Administrative Law Judge has read and considered each page of each admitted exhibit, even if not
29 mentioned in this Decision. The Administrative Law Judge has also considered the testimony of every
30 witness, even if the witness is not specifically mentioned in this Decision.

1 Notably, subsection (A)(9) expressly provides the Association the right to enter into the
2 Lease, without any mention of A.R.S. § 33-1252, while the right to “convey” Common
3 Elements is subject to the requirements imposed in A.R.S. § 33-1252. Plainly, Arizona
4 law distinguishes between leasing real property and conveying it. These are two
5 separate legal concepts.²

6 **13.** Respondent further contended in its Motion, “With respect to A.R.S. § 33-
7 1252, in order to run afoul of the statute, a Common Element must be “conveyed or
8 subjected to a mortgage, deed of trust or security interest” without the requisite 80%
9 vote. See A.R.S. § 33-1252(A). The Legislature, in crafting the language of the statute
10 and distinguishing between a conveyance and subjecting the property to a mortgage,
11 deed of trust or security interest, made clear its intent that a conveyance is a total
12 transfer of fee title. If a “conveyance” was intended to include any kind of transfer of an
13 estate or interest in real property, then “subjected to a mortgage, deed of trust or
14 security interest” would be superfluous language. “A cardinal principle of statutory
15 interpretation is to give meaning, if possible, to every word and provision so that no
16 word or provision is rendered superfluous.” *Nicaise v. Sundaram*, 245 Ariz. 566, 568, ¶
17 11, 432 P.3d 925, 927 (2019).”³

18 **14.** Respondent argued in its Motion, “Furthermore, once any such
19 “conveyance” occurs, it must be evidenced by the execution and recording of the
20 document in the same manner as a deed. See A.R.S. § 33-1252(B). This reading of
21 Arizona’s Condominium Act is further supported by other provisions in Arizona law. This
22 includes the formal processes which must be followed to evidence the conveyance of
23 real property, i.e., A.R.S. § 33-401 (requiring a deed to be signed by the grantor,
24 acknowledged before a notary, and that recording of the same waives any such defect);
25 see also A.R.S. § 33- 402 (providing formal requirements for all conveyances and only 4
26 types: “to quit claim”; “to convey”; “to convey and warrant”; “to mortgage”). This is why
27 leases are not recorded in the public record in Arizona, as a lease does not quit claim,
28 convey, convey and warrant, or mortgage real property. Consequently, a lease is not a

29 ² See Respondent’s Motion at pgs. 6-7.

30 ³ See Respondent’s Motion at pg. 7.

1 conveyance. See also, A.R.S. §§ 36-1421 (regarding the state and political subdivisions
2 cooperation with housing projects), 36-1487 (same), and 14- 3715 (regarding rights and
3 duties of personal representatives). Here, the Board's decision to enter the Lease and
4 the subsequent decision to reinstate the Lease are expressly provided for in A.R.S. §
5 33-1242(A)(9)."⁴

6 15. Respondent argued in its Motion, "The Lease certainly does not include any
7 language quit claiming, conveying, conveying and warranting, or mortgaging the
8 Common Elements, and it was not recorded after it was executed by the parties. See
9 generally, Petition at Exhibit A. It also expires after a set period of time, whereas a
10 conveyance typically represents a permanent transfer of an interest in property. There is
11 simply no basis in law or fact to conclude that the Lease of the Common Element is a
12 conveyance of it, and therefore, the Association did not violate A.R.S. § 33-1252 by
13 entering into or reinstating the Lease."⁵

14 16. Respondent argued in its Motion, "With respect to A.R.S. § 33-1217, it is
15 unclear which subsection Petitioner alleges was violated by the Association's entry into
16 and reinstatement of the Lease. To the degree Petitioner is relying on subsection (E),
17 which is the only portion that speaks to "conveyances," it states: Except as otherwise
18 permitted by the provisions of this chapter, the common elements are not subject to
19 partition, and any purported conveyance, encumbrance, judicial sale or other voluntary
20 or involuntary transfer of an undivided interest in the common elements made without
21 the unit to which that interest is allocated is void. A.R.S. § 33-1217(E) (emphasis
22 added). As detailed above, entering into the Lease is "otherwise permitted" by A.R.S. §
23 33- 1242(A)(9). This also means this limitation on "conveyance" is inapplicable if the
24 declarant rights statutes "otherwise permit" action to be taken. A.R.S. § 33-1226
25 ("Subject to the provisions of the declaration, a declarant has an easement through the
26 common elements as may be reasonably necessary for the purpose of discharging a
27 declarant's obligations or exercising special declarant rights, whether arising under this
28 chapter or reserved in the declaration."); A.R.S. § 33-1244 (regarding declarant rights

29 ⁴ See Respondent's Motion at pgs. 6-7.

30 ⁵ Respondent's Motion at pg. 7.

transfers and the effects of the same). Furthermore, the Lease specifically limits the portion of the Common Elements that Declarant is permitted to utilize, meaning it is not a lease with respect to an “undivided interest” in the Common Elements. The Association did not violate A.R.S. § 33-1217 by entering into or reinstating the Lease.”⁶

17. Respondent further contended that the lease was permitted under A.R.S. § 33-1225 that provides, “ A declarant may maintain sales offices, management offices and models in units or on common elements in the condominium unless: 1. The declaration provides otherwise. 2. Such use is prohibited by another provision of law or local ordinances.” Respondent contended that Four Peaks was the legal Declarant and the Association properly approved a lease of the common elements to the Declarant.

18. Petitioner contended that the lease was a conveyance that did was not approved in accordance with A.R.S. §§ 33-1252 and A.R.S. 33-1217. Ms. Wautier asserted that she was not sure whether Four Peaks was the Declarant at the time the lease was given.

CONCLUSIONS OF LAW

1. A.R.S. § 32-2199(1) permits a condominium unit owner to file a petition with the Department for a hearing concerning the condominium association’s alleged violations of the Condominium Act set forth in Title 33, Chapter 9. This matter lies within the Department’s jurisdiction.

2. Petitioner bears the burden of proof to establish that Respondent violated the A.R.S. §§ 33-1252 and A.R.S. 33-1217 by a preponderance of the evidence.⁷

Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.⁸

3. “A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not.”⁹ A preponderance of the evidence is “[t]he greater weight of the evidence, not necessarily established by the greater number of

⁶ Respondent's Motion at pg. 8.

⁷ See 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).

⁸ See A.A.C. R2-19-119(B)(2).

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

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

5 4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give
6 effect to the intent of the parties.¹¹ “Restrictive covenants must be construed as a whole
7 and interpreted in view of their underlying purposes, giving effect to all provisions
8 contained therein.”¹² .

9 5. The Administrative Law Judge’s jurisdiction is limited to the single issue
10 raised in the petition: Whether the Board voted to convey a portion of the common
11 elements without a vote from all homeowners as required by statute, and thereby
12 violated A.R.S. 33-1252 and A.R.S. 33-1217.

13 6. As contended by Respondent in its Motion to Dismiss the Petition, the
14 Administrative Law Judge concludes that A.R.S. §§ 33-1252 and A.R.S. 33-1217 do not
15 apply to leases, but rather conveyances. There was no evidence presented at hearing
16 that Respondent made a conveyance of the common elements of the Association.
17 Petitioner has not established the merits of the petition the filed with the Department
18 against Respondent.

19 **ORDER**

20 **IT IS ORDERED**, the petition is dismissed.

26 **NOTICE**

27
28 ¹⁰ BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

29 ¹¹ See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

30 ¹² *Lookout Mountain Paradise Hills Homeowners’ Ass’n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. App. 1993) (quoted in *Powell*, 211 Ariz. at 557 ¶ 16, 125 P.3d at 377).

1 Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties
2 unless a rehearing is granted pursuant to A.R.S. § 32-2199.04.
3 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, October 26, 2023.

7 /s/ Velva Moses-Thompson
8 Administrative Law Judge

9 Transmitted by either mail, e-mail, or facsimile October 26, 2023 to:

10 Susan Nicolson
11 Commissioner
12 Arizona Department of Real Estate
13 SNicolson@azre.gov
14 AHansen@azre.gov
15 vnunez@azre.gov
16 djones@azre.gov
17 labril@azre.gov

18 Chad P. Miesen Esq.
19 Carpenter, Hazelwood, Delgado & Bolen, PLC
20 chad@carpenterhazlewood.com
21 maria.mckee@carpenterhazlewood.com

22 Susannah Sabnekar
23 susannah@sabnekar.com

24 By: OAH Staff
25
26
27
28
29
30