

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Jeffrey Connell & Corey Cox,
4 Petitioners,

No. 24F-H024-REL

5 v.

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 Casa Del Monte, Inc.
7 Respondent.

8
HEARING: March 20, 2024 at 9:00 AM.¹

9 **APPEARANCES:** Ross Meyer, Esq. appeared on behalf of Jeffrey Connell
10 (“Petitioner Connell”) and Corey Cox (“Petitioner Cox”) (jointly as “Petitioners”) with
11 Petitioners and Jonathan Dessaulles, Esq. as witnesses. Solomon Krotzer, Esq. appeared
12 on behalf of Casa Del Monte, Inc. (“Respondent” and “Association”) with Mary Lou
13 Ehmann and Jonathan Ryder as witnesses.

14 **ADMINISTRATIVE LAW JUDGE:** Jenna Clark.

15 **EXHIBITS ADMITTED INTO EVIDENCE:** The NOTICE OF HEARING, including the
16 attached agency file from the Arizona Department of Real Estate (“Department”), was
17 admitted into the record along with Petitioners’ PREHEARING MEMORANDUM, Petitioners’
18 Exhibits 1-7, Respondent’s Exhibits A-G, and MINUTE ENTRY – GRANTING CONTINUANCE
19 issued January 29, 2024.

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21 After review of the hearing record in this matter, the undersigned Administrative
22 Law Judge makes the following Findings of Fact and Conclusions of Law, and issues this
23 ORDER to the Commissioner of the Arizona Department of Real Estate (“Department”).

24 **FINDINGS OF FACT**

25 **BACKGROUND AND PROCEDURE**

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29 ¹ Pursuant to party stipulation, the hearing record in this matter was held open until Monday, April 15, 2024,
30 for the receipt of CLOSING ARGUMENTS from the parties.

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

4 2. On or about November 01, 2023, Petitioners filed a single-issue petition with
5 the Department which alleged that the Association violated Arizona Revised Statute
6 ("ARIZ. REV. STAT.") § 33-1248 by holding a Board meeting in closed session without
7 providing 48-hour notice to its members.² Specifically, Petitioners alleged that a Board
8 Meeting agenda, for a meeting scheduled May 19, 2023, included review of a Code of
9 Conduct but did not identify that discussion would be held in closed session amongst the
10 Board. During a closed session of the May 19, 2023, Board Meeting, Counsel for the
11 Association "strongly encouraged and insisted" that Board Members sign the Code of
12 Conduct. At that time it was also represented to Petitioner Connell that all other incumbent
13 Board Members had already signed the document. A resolution requiring Board Member
14 signage was not provided to Petitioners. During the same closed session the Board also
15 voted to adopt meeting minutes from its April 07, 2023, Board Meeting. Ultimately,
16 Petitioners sought an Order compelling Respondent to comply with the aforementioned
17 statute.³

18 3. On or about December 19, 2023, Respondent returned its ANSWER to the
19 Department whereby it denied all complaint items in the petition.⁴

20 4. Per the NOTICE OF HEARING, the Department referred this matter to the
21 Office of Administrative Hearings ("OAH"), an independent state agency, for an
22 evidentiary hearing on February 15, 2024⁵, regarding the following issue:

23 **Whether Respondent has "repeatedly violated" ARS § 33-1248 at an**
24 **Executive Board Meeting on May 19, 2023 by failing to provide a Notice**
25 **of Meeting within 48 hours, and by voting in an executive session as a**
26 **topic in a closed meeting.**⁶ [sic]

27 ² See Department's electronic file at 2023 1101 – HOA Petition_Form.pdf.

28 ³ *Id.*

29 ⁴ See Department's electronic file at 2023 1101 – ADRE Petition Response.pdf.

30 ⁵ The matter was continued on January 29, 2024, and reset for hearing on March 20, 2024, at 9:00 a.m.
whereby it was heard.

⁶ See Department's electronic file at Notice of Hearing.pdf.

THE PARTIES AND GOVERNING DOCUMENTS

5. Respondent is a homeowners' association whose members own properties in a residential real estate development located in Scottsdale, Arizona. Membership for the Association is comprised of the Casa Del Monte subdivision.

6. Petitioners are Casa Del Monte subdivision property owners, individually, and members of the Association.

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

HEARING EVIDENCE

8. Petitioner Connell, Petitioner Cox, and Jonathan Dessaulles, Esq. testified on behalf of Petitioners. Mary Lou Ehmann and Jonathan Ryder testified on behalf of Respondent. The substantive evidence of record is as follows:

- a. On April 18, 2023, Petitioner Connell and Petitioner Cox were elected by Members to serve a 3-year term on the Board of Directors.
 - i. Petitioner Connell ran for election because concerned with some of the Board's actions and became involved with other community members on an email chain seeking changes to the community.
 - ii. Petitioner Cox ran for election because she had concerns over the Association's maintenance budget and the Board's intention to enter a two million dollar (\$2,000,000.00) loan, without any indication the Association's maintenance issues would be resolved.

After Petitioners were elected, they opined amongst themselves that the Board had begun to act with less transparency by discussing public matters in closed Executive Sessions.

- 1 b. On or about April 20, 2023, Petitioners were advised that a Board Member
2 training session would be held for them by Counsel for the Association.⁷ On
3 May 06, 2023, Mr. Ryder clarified to Petitioners that their “new member
4 orientation” would be contemporaneously held in Executive Session with all
5 remaining Board Members, and that Counsel for the Association would
6 discuss legal issues therein.⁸
- 7 c. The May 19, 2023, Board Meeting agenda contained two agenda items
8 under the Legal subsection: (a) Discussion with counsel, and (b) Code of
9 Conduct. Board Members were provided an Executive Report prior to the
10 meeting, including the aforementioned Code of Conduct for review.
- 11 i. The Executive Report has a subject titled, Amending Association
12 Documents, whereby Counsel for the Association notes inclusion of
13 a flyer from Mulcahy Law Firm, which contains general information
14 about amending Association documents for “educational purposes.”
- 15 ii. The proposed Code of Conduct includes, “The Board of Directors
16 has approved the following code of conduct for its members in order
17 to guide and maintain a high standard of ethical conduct in the
18 performance of Association business, and to ensure that the
19 residents maintain confidence in and respect for the entire Board.”
- 20 d. The Mulcahy Law Firm was not present at the May 19, 2023, Board
21 Meeting. The Board did not consider or discuss retaining the firm for legal
22 representation.
- 23 e. Once the Code of Conduct was raised for discussion during the Executive
24 Session of the May 19, 2023, Board Meeting, Board Members B.M. and J.Y.
25 told Petitioner Connell that they had already signed the document. Per
26 Petitioners’ testimonies, both were strongly encouraged or otherwise
27 recommended to sign the Code of Conduct by Counsel for the Association.

28
29 ⁷ See Respondent Exhibit B.

30 ⁸ See Respondent Exhibit C.

Both declined, choosing not to take his advice. As a result, the Code of Conduct was not adopted by the Board.

ADDITIONAL EVIDENCE

- f. Mr. Ryder testified that Respondent always planned to discuss the Code of Conduct at a later open meeting, but it never occurred because the Board of Directors rejected it.

CLOSING ARGUMENTS

9. In closing, Respondent argued that the May 19, 2023, Board Meeting was moved into Executive Session for the purpose of receiving legal advice from Counsel for the Association, which occurred. Per Respondent, Counsel for the Association answered Board Members' questions about the Code of Conduct, and made recommendations regarding whether it should be adopted via Board Member signature.

10. In closing Petitioners argued that Counsel for the Association did not offer legal advice of any kind regarding the Code of Conduct during the Executive Session held during the May 19, 2023 Board Meeting, as evidence by the fact that Board Members B.M. and J.Y. had already signed it. Per Petitioners, there was no basis to hold an Executive Session to discuss a general document like the Code of Conduct, or pamphlet printout from a law firm's public website. Petitioners further argued that evidence demonstrated that the Board attempted to discuss improper matters in Executive Session in an attempt to coerce Petitioners to sign the Code of Conduct outside of an open meeting.

CONCLUSIONS OF LAW

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

- a. Planned Communities are regulated by ARIZ. REV. STAT. Title 33, Chapter 16, Article 1.

1 2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D),
2 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested
3 case at bar. OAH has the authority to interpret the contract between the parties.⁹

4 3. In this proceeding, Petitioner bears the burden of proving by a
5 preponderance of the evidence that Respondent committed the alleged statutory
6 violation.

7 4. “A preponderance of the evidence is such proof as convinces the trier of fact
8 that the contention is more probably true than not.”¹⁰ A preponderance of the evidence is
9 “[t]he greater weight of the evidence, not necessarily established by the greater number of
10 witnesses testifying to a fact but by evidence that has the most convincing force; superior
11 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
12 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
13 the other.”¹¹

14 5. ARIZ. REV. STAT. § 33-1248(A)(1) provides, in pertinent part, that “Any
15 portion of a meeting may be closed only if that portion of the meeting is limited to
16 consideration of one or more of the following: (1) legal advice from an attorney for the
17 board or the association.”

18 6. The definition of legal advice is “guidance given by lawyers to their
19 clients.”¹²

20 7. Because Petitioners only paid for the adjudication of one (1) issue, this
21 Tribunal may not address all of the tangential issues Petitioners raised during the
22 presentation of their case or closing arguments, including whether the Association
23 properly provided notice of its May 19, 2023, Board Meeting. Therefore, the only issue to
24 be addressed in this matter is whether Respondent committed a violation of ARIZ. REV.
25 STAT. § 33-1248.

26 8. Based upon a review of the credible and relevant evidence in the record,
27 Petitioners have not sustained their burden of proof.

28 ⁹ See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

29 ¹⁰ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

30 ¹¹ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

¹² Black's Law Dictionary (11th Ed. 2019).

1 9. Here, the material facts are clear. It is clear from the record that the Board
2 provided advanced notice to its Directors that it intended to go into Executive Session
3 during its May 19, 2023, meeting to discuss the adoption of a Code of Conduct, and that if
4 most or all Directors were in agreement with adoption that the issue would be placed on
5 an Agenda for public discussion for all Members of the Association. This is evidenced by
6 the fact that incumbent members were already privy to the issue, some members had
7 signed the document, and Petitioners declined to sign though encouraged by Counsel for
8 the Association. The fact that language in the proposal used current language, rather than
9 future tense, is a Red Herring argument and irrelevant. Also irrelevant is the quantity
10 and/or quality of advice given by Counsel for the Association during said Executive
11 Session. The crux of the underlying issue is that newly elected Board Members,
12 Petitioners, were provided with information regarding the Code of Conduct, the
13 opportunity to discuss and ask questions privately, and advised to sign by Counsel for the
14 Association; which they declined as was their right.

15 10. While it is accurate that going into Executive Session for the purpose of
16 discussing reading materials printed from a public website regarding revision of
17 Association's governing documents is not technically legal advice, as it is inherently
18 unprivileged documentation, this record reflects that this was not the sole purpose of
19 closing the Board Meeting from the public. Moreover, the record further reflects that a
20 substantive discussion regarding Mulcahy Law Firm documents or information did not
21 occur on May 19, 2023.

22 11. Therefore, the undersigned Administrative Law Judge concludes that
23 because Petitioners failed to establish Respondent's alleged violation(s) of ARIZ. REV.
24 STAT. § 33-1248 their petition must be denied.

25 **FINAL ORDER**

26 Based on the foregoing,

27 **IT IS ORDERED** that Petitioners' petition be denied.

28 *In the event of certification of the Administrative Law Judge Decision by the*
29 *Director of the Office of Administrative Hearings, the effective date of the Order will be five*
30 *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, May 20, 2024.

Office of Administrative Hearings

/s/ Jenna Clark
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile to:

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