

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Paul Gounder,
4 Petitioner,

5 vs.

6 Royal Riviera Condominium Association,
7 Respondent.

No. 17F-H1716002-REL-RHG

**ADMINISTRATIVE LAW JUDGE
DECISION**

8
9 **HEARING:** May 17, 2016

10 **APPEARANCES:** Paul Gounder ("Petitioner") appeared on his own behalf;
11 Royal Riviera Condominium Association ("Respondent") was represented by Mark Sahl,
12 Esq.

13 **ADMINISTRATIVE LAW JUDGE:** Suzanne Marwil
14

15 **FINDINGS OF FACT**

16 **BACKGROUND AND PROCEDURE**

17 1. The Arizona Department of Real Estate ("the Department") is authorized
18 by statute to receive and to decide Petitions for Hearings from members of
19 homeowners' associations and from homeowners' associations in Arizona.

20 2. Respondent is a homeowners' association whose members own the
21 approximately 32 condominiums in the Royal Riviera development.

22 3. Petitioner owns a condominium in and is a member of Respondent.

23 4. On or about June 23, 2016, Petitioner filed a petition with the Department
24 that alleged that Respondent had violated A.R.S. § 33-1250(C)(2) and Article VII of its
25 Covenants, Conditions, and Restrictions ("CC&Rs") by using two substantively different
26 ballots to elect Board members at the March 14, 2016 annual meeting.

27 5. Respondent's attorney filed an answer to the Petition, denying any
28 violation of its CC&Rs or applicable statutes.

29 6. A hearing was held on October 17, 2016, before Administrative Law Judge
30 Diane Mihalsky.

1 7. On October 18, 2016, Judge Mihalsky recommended dismissal of the
2 Petition because she concluded as follows:

3 Board members are volunteers who are not compensated for their
4 service to the community. Although Respondent is bound by the
5 unequivocal language of applicable statutes, CC&Rs, and bylaws,¹
6 no statute, CC&R, or bylaw by its plain language prevents
7 Respondent from adding to the ballot that will used at the annual
8 election that names of all members who have indicated a
9 willingness to serve on the Board at the election to fill seven open
10 Board positions. No statute, CC&R, or bylaw requires Respondent
11 to contact its members a second time to see if they have changed
12 their minds about serving on the Board after they have failed to
13 return a nominating form indicating that they are willing to service
14 [sic serve on] on the Board.

15 8. That Decision was certified by the Office of Administrative Hearings
16 ("OAH") and Petitioner requested a rehearing, which the Department granted. The
17 Department's February 17, 2017 Order Granting Request for Rehearing noted that "[t]he
18 Department requests review of A.R.S. § 33-1250, specifically A.R.S. § 33-1250(C)(4)."

19 9. At the rehearing, the parties stipulated that Respondent used two different
20 ballots to elect its 2016 Board. The first ballot used was an absentee or mail-in ballot
21 that had six names of interested potential board members along with a blank line for
22 write-in candidates to fill the seventh spot. See Exhibit 5. That ballot was entitled "Mail
23 Ballot", specified a date by which it had to be returned in order to be counted, and was
24 distributed at least seven days before the meeting during which the election was
25 conducted. The second ballot entitled "Ballot" was the ballot handed out to the
26 members who attended the March 14, 2016 meeting. See Exhibit 4. This second ballot
27 was different from the mail-in ballot in that it included the names of seven interested
28 potential board members (adding the name of Eric Thompson whose name was not
29 included on the mail ballot). The meeting ballot had no space to write-in candidates for
30 the Board. It also did not specify when the ballot needed to be returned to be counted
31 and was not sent to members seven days before the meeting to elect board members.

¹ See *Jansen v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991) (quoted in *Bentivegna*, 206 Ariz. at 587 ¶ 20, 81 P.3d at 1046).

1 10. Petitioner contends that the differences in the ballots, specifically the
2 addition of a seventh board member's name on the meeting ballot, deprived members
3 who did not attend the election meeting in person of their right to vote for and against
4 each proposed action in violation of A.R.S. § 33-150(C)(2). Petitioner also argues that
5 the meeting ballot violated A.R.S. § 33-150(C)(4) because it was only presented at the
6 meeting, was not mailed to all members seven days in advance of the March 14, 2016
7 meeting, and did not provide a date it had to be received to be counted.

8 11. Respondent argues that it committed no violation by using two ballots to
9 elect its board members because the statutes do not require the use of identical ballots.
10 Respondent noted that it is common practice for homeowners associations to use one
11 absentee ballot and a different meeting ballot. Respondent also maintained that this
12 matter is moot because Respondent has already held another election in 2017 and has
13 a new board, of which Petitioner's wife is a member.

14 12. The parties agreed that the issue presented was a legal one and that it
15 was not necessary for the Tribunal to rehear the evidence presented at the first hearing
16 or to review the transcript of the record at the first hearing.

17 **CONCLUSIONS OF LAW**

18 1. Petitioner's petition against Respondent is presently under the jurisdiction of
19 the Department pursuant to A.R.S. § 32-2199 *et seq.*

20 2. The Department referred this matter to the OAH for hearing and the issuance
21 of an Order, pursuant to A.R.S. §§ 32-2199.01(D) and 32-2199.02.

22 3. Pursuant to A.A.C. R2-19-119(B), Petitioner has the burden of proof in this
23 matter. The standard of proof is preponderance of the evidence. A.A.C. R2-19-119(A).

24 4. A.R.S. § 33-1250(C) provides procedures for voting and absentee ballots, in
25 relevant part as follows:

26 Notwithstanding any provision in the condominium documents, after
27 termination of the period of declarant control, votes allocated to a
28 unit may not be cast pursuant to a proxy. The association shall
29 provide for votes to be cast in person and by absentee ballot and,
30 in addition, the association may provide for voting by some other
form of delivery, including the use of e-mail and fax delivery.
Notwithstanding section 10-3708 or the provisions of the
condominium documents, any action taken at an annual, regular or

1 special meeting of the members shall comply with all of the
2 following if absentee ballots or ballots provided by some other form
3 of delivery are used:

- 4 1. The ballot shall set forth each proposed action.
- 5 2. The ballot shall provide an opportunity to vote for or against
6 each proposed action.
- 7 3. The ballot is valid for only one specified election or meeting of
8 the members and expires automatically after the completion of the
9 election or meeting.
- 10 4. The ballot specifies the time and date by which the ballot must
11 be delivered to the board of directors in order to be counted, which
12 shall be at least seven days after the date that the board delivers
13 the unvoted ballot to the member.

14 5. Upon careful review of the evidence, the Administrative Law Judge finds that
15 the use of two substantively different ballots in Respondent's March 2016 election
16 violated A.R.S. § 33-1250(C)(2). Because the members who did not attend the meeting
17 in person were not told of Mr. Thompson's willingness to run for the board, these members
18 did not have the opportunity to vote for him and hence were denied their right to vote for
19 or against each proposed action contained in the meeting ballot. Finding this violation
20 does not impose a requirement that ballots be identical; it simply states that substantive
21 changes to ballots must be presented to all members. Moreover, the fact that a new
22 board is currently seated does not render the matter moot as the Administrative Law
23 Judge can and does find that Respondent committed a statutory violation in the course
24 of holding its 2016 election.

25 6. The Administrative Law Judge concludes, however, that Respondent did not
26 violate A.R.S. § 33-1250(C)(4) during that election. Petitioner conceded that the
27 absentee ballot used complied with that statutory subsection. There is no reason that a
28 meeting ballot handed out at the meeting would need to contain a received-by date or
29 be mailed to members seven days in advance of the meeting if the ballot were
30 substantively the same as the absentee ballot which did contain that information. The
problem in this case arose because the ballots used were substantively different.

RECOMMENDED ORDER

1 In view of the foregoing, it is ORDERED Petitioner's Petition be granted and
2 Respondent must reimburse Petitioner's filing fee. At this time, no other relief is
3 available to Petitioner.

4 Pursuant to A.R.S. § 32-2199.02(B), this Order is binding on the parties unless a
5 rehearing is granted pursuant to A.R.S. § 32-2199.04 based on a petition setting forth
6 the reasons for the request for rehearing, in which case the order issued at the
7 conclusion of the rehearing is binding on the parties.

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

11 Done this day, June 2, 2017.

12
13 /s/ Suzanne Marwil
14 Administrative Law Judge

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16 Transmitted electronically to:

17 Judy Lowe, Commissioner
18 Arizona Department of Real Estate
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