

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Paul L. Moffett,
4 Petitioner,
5 vs.
6 Vistoso Community Association,
 Respondent.

No. 20F-H2019014-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

7 **HEARING:** December 16, 2019, with post hearing submissions received through
8 January 7, 2020.

9 **APPEARANCES:** Petitioner Paul L. Moffett appeared and was represented by
10 Richard M. Rollman. Respondent Vistoso Community Association was represented by
11 Jason E. Smith.

12 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer

13
14 **FINDINGS OF FACT**

15 1. On or about September 25, 2019, Petitioner Paul L. Moffett filed a
16 Homeowners Association (HOA) Dispute Process Petition (Petition) with the Arizona
17 Department of Real Estate (Department) alleging a violation of community documents by
18 Respondent Vistoso Community Association. Petitioner indicated a single issue would be
19 presented, paid the appropriate \$500.00 filing fee, and asserted a violation of "Article VII
20 Membership and Voting, Section 7.3.1 Voting Classes."

21 2. On or about October 31, 2019, the Department issued a Notice of Hearing in
22 which it set forth the issue for hearing as follows:

23 The Petitioner alleges that Vistoso Community Association is in violation of
24 community document CC&Rs Article VII Membership and Voting section 7.3.1
 Voting Classes in a single-issue petition.

25 3. At hearing, Petitioner testified on his own behalf and Respondent presented
26 the testimony of Kimberly Rubly, Vice President of Southern Region. Based on the
27 evidence presented at hearing, the following occurred:

- 28 a. On or about March 20, 2007, Vistoso Highlands obtained ownership of
29 39 lots from Declarant.

- 1 b. On or about August 21, 2014, and October 14, 2014, Pulte's
2 predecessor obtained ownership of 168 total lots from Declarant. On or
3 about January 2, 2019, Pulte obtained ownership of the 168 lots from its
4 predecessor.
- 5 c. On or about March 29, 2019, Respondent held an election of the Board
6 of Directors.
- 7 d. In the days preceding the election, the property management staff
8 reached out to Pulte and Vistoso Highlands to obtain their votes for the
9 election.
- 10 e. Both Pulte and Vistoso Highlands cast all their available votes, 207
11 votes, for Sarah Nelson. Patrick Straney, and Dennis Ottley.
- 12 f. Article VII, Section 7.3.1 of the Declaration provides, in pertinent part, "a
13 Class A Member shall not be entitled to vote with respect to any Lots,
14 Parcels or Apartment Units in regard to which the Owner is paying only a
15 reduced Assessment pursuant to Section 8.3."
- 16 g. Article VIII, Section 8.3 of the Declaration allows Developer Owners to
17 pay a reduced assessment for a maximum of two years after the initial
18 Developer Owner obtains ownership from the Declarant.
- 19 h. Pursuant to Article VIII, Section 8.3, the reduced assessments should
20 have terminated on March 20, 2009, for the lots owned by Vistoso
21 Highlands and on October 14, 2016, for the lots owned by Pulte.
- 22 i. For whatever reason, neither Vistoso Highlands nor Pulte had been
23 paying the full assessment as required by the Declaration as of the date
24 of the election.

25 4. Petitioner argued that because Vistoso Highlands and Pulte were paying
26 reduced assessments even though they should have been paying the full assessments,
27 they were not entitled to vote in the election.

28 5. Respondent argued that because Vistoso Highlands and Pulte were not
29 paying reduced assessments "pursuant to Section 8.3" the prohibition in Section 7.3.1
30 was not applicable.

CONCLUSIONS OF LAW

1. Arizona statute permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of planned community documents or violations of statutes that regulate planned communities. A.R.S. § 32-2199. That statute provides that such petitions will be heard before the Office of Administrative Hearings.

2. Petitioner bears the burden of proof to establish that Respondent committed the alleged violations by a preponderance of the evidence.¹ Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.²

3. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."³ A preponderance of the evidence is "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."⁴

4. One cannot read Section 7.3.1 of the Declaration without taking into consideration the provisions of Section 8.3. Section 7.3.1 provides that those members paying only a reduced assessment pursuant to Section 8.3 are not entitled to vote. Section 8.3 provides a Developer Owner is permitted to pay a reduced assessment for a maximum of 24 months after a parcel is purchased from the Declarant.

5. In the instant matter, Vistoso Highlands and Pulte (or Pulte's predecessor) were paying reduced assessments for years beyond when they should have started paying full assessments. While the failure to be invoiced and to pay a full assessment on the 207 parcels at issue is certainly a financial concern for the association as a whole, that

¹ See ARIZ. REV. STAT. section 41-1092.07(G)(2); 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).

² See A.A.C. R2-19-119(B)(2).

³ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁴ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

1 does not necessitate a finding that Vistoso Highlands and Pulte were not entitled to cast
2 votes in the election.

3 6. Because Vistoso Highlands and Pulte were paying reduced assessments
4 but not pursuant to Section 8.3, the prohibition on them voting found in Section 7.3.1. was
5 not applicable to them.

6 7. Accordingly, Vistoso Highlands and Pulte were entitled to vote in the
7 election at issue. Thus, Petitioner failed to sustain his burden to establish a violation of
8 Article VII, Section 7.3.1.

9 **ORDER**

10 IT IS ORDERED that Petitioner's petition is dismissed.

11 **NOTICE**

12 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties**
13 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04.**
14 **Pursuant to A.R.S. § 41-1092.09, a request for rehearing in this matter**
15 **must be filed with the Commissioner of the Department of Real Estate**
16 **within 30 days of the service of this Order upon the parties.**

17 Done this day, January 27, 2020.

18
19 /s/ Tammy L. Eigenheer
20 Administrative Law Judge

21 Transmitted by either mail, e-mail, or facsimile January 27, 2020 to:

22
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