

1 **Final agency action regarding decision below:**

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3 **ALJCERT ALJ decision certified as final**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6  
7 Paul Gounder

8 Petitioner,

9 vs.

10 Royal Riviera Condominium Association

11 Respondent.

**No. 17F-H1716002-REL**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

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14 **HEARING:** October 17, 2016, at 8:00 a.m.

15 **APPEARANCES:** Paul Gounder ("Petitioner") appeared on his own behalf;  
16 Royal Riviera Condominium Association ("Respondent") was represented by Mark  
17 Kristopher Sahl, Esq., Carpenter Hazlewood Delgado & Bolen PLC

18 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

19  
20 **FINDINGS OF FACT**

21 **BACKGROUND AND PROCEDURE**

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

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

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

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



1 Section 2. The Association shall have one class of  
2 voting membership. All Owners shall be entitled to one vote  
3 for each Apartment owned. When more than one person  
4 holds an interest in any Apartment, all such persons shall be  
5 Members. The vote for such Apartment shall be exercised  
6 as they among themselves determine.

7 . . . .

8 Section 4. In any election of the members of the  
9 Board, every Owner entitled to vote at such an election shall  
10 have the right to cumulate his votes and give one candidate,  
11 or divide among any number of the candidates, a number of  
12 votes equal to the number of Apartments owned by the  
13 Owner multiplied by the number of directors to be elected.  
14 The candidates receiving the highest number of votes, up to  
15 the number of the Board members to be elected, shall be  
16 deemed elected.<sup>1</sup>

17 **FACTS**

18 9. The facts are essentially undisputed. Respondent has a seven-member  
19 Board. All the board member positions were up for election at the March 14, 2016  
20 annual meeting.

21 10. In approximately December 2015, Respondent provided notice of the  
22 March 14, 2016 annual meeting and asked members who were interested in running for  
23 and serving on the Board to submit nominating forms. Mr. Peterson explained that  
24 Respondent needed to verify candidates' eligibility to serve on the Board and that  
25 members would benefit from receiving biographical information about the candidates  
26 that they did not know.

27 11. Three of Respondent's members submitted nominating forms for the seven  
28 open positions on the board. Three of Respondent's incumbent board members sent  
29 emails or made telephone calls to indicate that they were willing to continue serving on  
30 the Board. Mr. Peterson explained that Respondent had already verified the incumbent  
Board members' eligibility and Respondent's members were already familiar with the  
incumbent Board members' qualifications as a result of their past service.

12. Respondent prepared an absentee/write-in ballot with the names of the six  
members who had indicated a willingness to serve on Respondent's Board and a blank

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<sup>1</sup> Respondent's Exhibit 3 at 26.

1 line for a write-in candidate. The absentee/write-in ballot informed members that it  
2 needed to be received at Respondent's office by 12:00 p.m. on March 14, 2016, to be  
3 counted.<sup>2</sup>

4 13. Before the March 14, 2016, Respondent received absentee ballots with the  
5 names of three write-in candidates on them. Mr. Peterson testified that Respondent  
6 contacted the three write-in candidates to see if they were willing to serve on the Board.  
7 One candidate indicated that he was not willing to serve.<sup>3</sup> Mr. Petersen testified that  
8 because the other two write-in candidates shared a unit, they asked that only one of  
9 their names be considered.

10 14. Complainant testified that Respondent had arbitrarily selected the  
11 members whom it contacted about serving on the Board and that to be fair, Respondent  
12 should have called all of its members about whether they were willing to serve on the  
13 Board.

14 15. To accommodate the seven members who had indicated a willingness to  
15 serve on the seven-member board, Respondent prepared a ballot for the March 14,  
16 2016 meeting that showed the six candidates who were on the absentee/write-in ballot,  
17 plus the name of Eric Thompson, the only write-in candidate who had indicated a  
18 willingness to serve on the Board.<sup>4</sup> Mr. Peterson testified that because Board positions  
19 are unpaid volunteer positions that require a time commitment, most of Respondent's  
20 members were not interested in serving on the Board and it was hard to find seven  
21 members to accept Board positions. Mr. Peterson testified that most elections of Board  
22 members were not contested.

23 16. Approximately eventeen members attended the March 14, 2016 annual  
24 meeting. Mr. Peterson testified that member Al DeFalco was nominated from the floor  
25 but that, even though Respondent allowed Mr. DeFalco's nomination from the floor, the  
26 seven candidates on the ballot that Respondent had prepared for the March 14, 2016  
27 meeting received the most votes and were elected to the Board.<sup>5</sup>

28 <sup>2</sup> See Respondent's Exhibit 5.

29 <sup>3</sup> See Respondent's Exhibit 6.

30 <sup>4</sup> See Respondent's Exhibit 4.

<sup>5</sup> Complainant submitted the draft board minutes of the meeting. See Complainant's Exhibit E. The minutes do not contain any detail of the meeting, but notes the election of the new Board members.

1 17. Mr. Zehm testified that he received the an absentee/write-in ballot, but did  
2 not hear about the ballot with seven names on it that the Board provided to members  
3 who attended the March 14, 2016 annual meeting until several weeks later. Mr. Zehm  
4 acknowledged that he did not attend the March 14, 2016 meeting.

5 18. Ms. Kleck testified that she filled out the absentee/write-in ballot and took it  
6 to the March 14, 2016 annual meeting. After she was given the ballot that Respondent  
7 had prepared with Mr. Thompson's name on it, she hurriedly completed the new ballot  
8 and turned it in. Ms. Kleck testified that she then realized that it would have been more  
9 appropriate to have turned in the completed absentee/write-in ballot that she had  
10 brought with her. Ms. Kleck asked that the ballot that she had turned in be returned to  
11 her and she submitted the absentee/write-in ballot that she had brought with her. Ms.  
12 Kleck testified that she believed that the March 14, 2016 election was a fraud.

13 19. Petitioner argued that the ballot that Respondent provided at the March 14,  
14 2016 annual meeting that contained seven names for the seven open Board positions,  
15 rather than the six names that were on the absentee/write-in ballot, violated A.R.S. §  
16 33-1250(C)(2)'s requirement that ballots "shall provide an opportunity to vote for or  
17 against each proposed action."

### 18 **CONCLUSIONS OF LAW**

19 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization  
20 to file a petition with the Department for a hearing concerning violations of planned  
21 community documents or violations of statutes that regulate planned communities. That  
22 statute provides that such petitions will be heard before the Office of Administrative  
23 Hearings.

24 2. Petitioner bears the burden of proof to establish that Respondent violated  
25 applicable statutes, CC&Rs, or bylaws by a preponderance of the evidence.<sup>6</sup>  
26 Respondent bears the burden to establish affirmative defenses by the same evidentiary  
27 standard.<sup>7</sup>

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<sup>6</sup> See A.R.S. § 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74  
30 Ariz. 369, 372, 249 P.2d 837 (1952).

<sup>7</sup> See A.A.C. R2-19-119(B)(2).

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

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

17 **RECOMMENDED ORDER**

18 In view of the foregoing, it is ORDERED that no action is required of Respondent  
19 in this matter and that the petition is dismissed.

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

23 Done this day, October 18, 2016.

24 /s/ Diane Mihalsky  
25 Administrative Law Judge

26 Transmitted electronically to:

27 Judy Lowe, Commissioner  
28 Arizona Department of Real Estate

29 <sup>8</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

<sup>9</sup> BLACK'S LAW DICTIONARY at page 1220 (8<sup>th</sup> ed. 1999).

30 <sup>10</sup> 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).