

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

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3 **AAREJ Agency Rejects decision Order Rejecting Recommendation of**
4 **Dismissal/rjr**

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6 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

7
8 Paul Herbert,

9 Petitioner,

10 vs.

11
12 Blackstone at Vistancia Community
13 Association,

14 Respondent

No. 18F-H1817002-REL

**ORDER RECOMMENDING
DISMISSAL FOR LACK OF
JURISDICTION**

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17 Respondent filed a motion to dismiss Petitioner's Petition on the ground that
18 Petitioner is not the owner of the property that is part of Respondent and is the subject
19 of the Petition. Petitioner concedes that his brother Brian Herbert is the trustee of the
20 trust that owns the property at issue in the Petition and that Petitioner is simply the
21 beneficiary of that trust who occupies the property. Petitioner argues that the Arizona
22 Department of Real Estate (Department) has already decided to exercise jurisdiction
23 over the Petition and thus has deemed him an owner for purposes of the planned
24 community statutes. Petitioner also maintains that Respondent's community documents
25 define the term owner to include the beneficiary of a trust and that Respondent's
26 architectural committee has treated him as an owner. None of Petitioner's arguments
27 support deviating from the plain language of A.R.S. § 32-2199.01(A).

28 The Department only has jurisdiction to hear disputes between an owner and a
29 planned community association. A.R.S. § 32-2199.01(A). The plain language of the
30 statute contemplates that a petition must be brought by an owner. Black's Law
Dictionary online defines the term "owner" as "[t]he person in whom is vested the

1 ownership, dominion, or title of property,” i.e., Brian Herbert. By the same token, A.R.S.
2 § 33-1802(1) defines “Association” as “a nonprofit corporation or unincorporated
3 association of *owners* that is created pursuant to a declaration to own and operate
4 portions of a planned community and that has the power under the declaration to
5 assess association members to pay the costs and expenses incurred in the
6 performance of the association's obligations under the declaration.” (Emphasis added).
7 Petitioner has conceded he does not meet this definition of owner.

8 The Department’s forwarding the Petition to the Office of Administrative Hearings
9 was not an acceptance of jurisdiction by the Administrative Law Judge. The Notice of
10 Hearing expressly informed the parties that they should refile any motion with the
11 Administrative Law Judge. As such, the Department did not decide any legal motions in
12 this matter.

13 Respondent’s community documents do not change the analysis as they may
14 employ a different definition of owner than is found in the planned community statutes.

15 **RECOMMENDED ORDER**

16 Because Petitioner is not an “owner” as required by the plain language of the
17 applicable statutes, the Administrative Law Judge hereby recommends dismissal of the
18 Petition. Nothing in this order should be construed as preventing Petitioner from
19 seeking relief in another forum.

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 shall be*
22 *forty (40) days from the date of certification.*

23 Done this day, August 29, 2017

24 Suzanne Marwil
25 Administrative Law Judge

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29 Transmitted electronically to:

30 Judy Lowe, Commissioner

Arizona Department of Real Estate

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