

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of:

No. 23F-H002-REL

4 Eileen Ahearn and Robert Barfield,
5 Petitioners,

**ADMINISTRATIVE LAW JUDGE
DECISION**

6
7 v.

8 High Lonesome Ranch Estates Property
9 Owners Association,

10 Respondent

11

HEARING: November 8, 2022

12
13 **APPEARANCES:** Petitioners Eileen Ahearn and Robert Barfield appeared on their own
14 behalf. Jason Smith, Esq. represented Respondent High Lonesome Ranch Estates
15 Property Owners Association. Randy Kling, Claire Peachey, Joyce Green, and Jeffrey
16 Knox appeared as witnesses for Petitioners.

17 **ADMINISTRATIVE LAW JUDGE:** Sondra J. Vanella

18 **FINDINGS OF FACT**

19 1. On or about July 13, 2022, Eileen Ahearn and Robert Barfield (“Petitioners”)
20 filed a Homeowners Association (HOA) Dispute Process Petition (“Petition”) with the
21 Arizona Department of Real Estate (“Department”) alleging a violation of community
22 documents by High Lonesome Ranch Estates Property Owners Association
23 (“Respondent”). Petitioners indicated a single issue would be presented, paid the
24 appropriate \$500.00 filing fee, and asserted a violation of “HLR CCR 6.2.1 and HLR
25 Association Rules: Nominating and Election Committee Mission and Procedures
26 (approved 19 July 2021).”

27 2. On or about August 19, 2022, the Department issued a Notice of Hearing in
28 which it set forth the issue for hearing as follows:

29 Petitioners state that on July 5th 2022 at the High Lonesome Ranch Property
30 Owners Association Removal/Recall Special Election, Petitioners and other

1 owners “were denied the right to vote . . . even though [they] were at the
2 meeting in person, [] all members [are] in good standing, and [their] votes
3 would have changed the outcome of the election.”

4 3. At hearing, Petitioners testified on their own behalf and presented the
5 testimony of four witnesses. Respondent did not present any evidence, however,
6 presented argument through its counsel. Based on the evidence presented at hearing,
7 the following occurred:

- 8 a. On or about July 5, 2022, Respondent held a Removal/Recall Election
9 for six of its Board members, including the Elections Committee Chair
10 and the President. Ballots were both electronic and paper.
- 11 b. There were 19 ballots without post marks that were not considered in the
12 election.
- 13 c. Petitioners and several other homeowners completed their ballots prior
14 to the meeting and gave those ballots to Claire Peachey, the custodian
15 of the ballot box, and they were placed in the ballot box. Ms. Peachey
16 testified that she “did not think it was a problem to put ballots in the box
17 prior to the election.” Ms. Peachey was on the election committee and
18 had been for several years, was familiar with election procedures, and
19 did not believe the ballots had to be post marked to be considered.
- 20 d. Petitioners and witness Randy Kling testified that this was accepted
21 practice in the past for elections and that the use of couriers for ballots
22 was approved.
- 23 e. The only votes that were counted were electronic ballots and ballots that
24 had been mailed and contained post marks.
- 25 f. Petitioners, Mr. Kling, and Ms. Peachey were present at the July 5, 2022
26 meeting and when they learned that their votes would not be counted
27 because they did not contain a post mark, they attempted to fill out new
28 ballots. Some homeowners whose ballots were in the ballot box prior to
29 the meeting without post marks were able to complete new ballots.
30

- 1 g. When Petitioners and other homeowners attempted to turn in their new
2 ballots, some were accepted and some were rejected for various
3 reasons, including “double voting,” and that the voting was “closed,” and
4 therefore Petitioners and the others were “too late.”
- 5 h. Homeowner Jeffrey Knox personally handed in his ballot at the meeting
6 by placing it in the ballot box at approximately 6:15 p.m., notwithstanding
7 that voting supposedly closed at 6:00 p.m.
- 8 i. All of the homeowners whose ballots were rejected had signed the recall
9 petition that gave rise to the July 5, 2022 Special Election.
- 10 j. All of the electronic votes that had been cast prior to the July 5, 2022
11 election were accepted and at least one of the Board members, the
12 Elections Committee Chair, who was one of the subjects of the Recall
13 Election, had access to the electronic votes and therefore, was aware of
14 the status of the electronic voting.
- 15 k. At the time of the July 5, 2022 Recall Election, Respondent’s Nominating
16 and Election Committee Mission and Procedures were in the process of
17 being revised to include new electronic procedures for electronic voting.

18 4. Respondent argued that it was not in violation of the cited provisions of the
19 community documents because this was a removal election and not an annual meeting.

20 **CONCLUSIONS OF LAW**

21 1. Arizona statute permits an owner or a planned community organization to
22 file a petition with the Department for a hearing concerning violations of planned
23 community documents or violations of statutes that regulate planned communities.¹ That
24 statute provides that such petitions will be heard before the Office of Administrative
25 Hearings.

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¹ A.R.S. § 32-2199.

1 2. Petitioners bear the burden of proof to establish that Respondent committed
2 the alleged violation(s) by a preponderance of the evidence.² Respondent bears the
3 burden to establish affirmative defenses by the same evidentiary standard.³

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

11 4. Respondent’s CC&R 6.2.1 Class A Membership states the following:

12 The Class A Members shall be all Owners of Lots, other than Declarant
13 (until conversion of the Class B Membership). Each Class A Member shall
14 be entitled to one (1) vote for each Lot owned, except that no Class A
15 Member shall have any votes or be entitled to exercise any voting rights,
16 (and no meetings of Class A Members shall be required) prior to the
17 expiration of the Class B Membership. There shall be no more than one (1)
18 vote for each Lot owned by any Class A Member, and in the event of
19 common ownership, whether by joint tenancy or otherwise, there shall be no
20 more than one (1) Class A vote for each Lot, and the Owners must agree
21 among themselves as to the manner in which a vote shall be cast.

22 5. Respondent’s Nominating and Elections Committee Mission and
23 Procedures in effect at the time of the July 5, 2022 Recall Election state the following
24 in pertinent part:⁶

25 1. MISSION

26 A. The Nominating and Elections Committee (NEC) assists the
27 Board of Directors in recruiting nominees for open board positions

28 ² See A.R.S. section 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74 Ariz.
29 369, 372, 249 P.2d 837 (1952).

30 ³ See A.A.C. R2-19-119(B)(2).

⁴ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁵ BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

⁶ See Petitioners’ Enclosure 3.

1 and managing the election process prior to and during the Annual
Meeting of Members (Property Owners) ***and Special Elections***. . . .

2
3 G. Incumbent Board Members Running For Re-Election: Incumbent
4 board members who run for re-election shall not be engaged in the
5 NEC process. Once the ballots are mailed to property owners, no
6 incumbent board member running for re-election shall have custody
of or access to the Association mailbox keys or the secure ballot box
key.

7
8 I. Close of Balloting: Property owners may bring ballots to the
Annual Meeting and place them in the secure ballot box. . . .

9
10 L. Ineligible Votes: The NEC shall withhold from counting
11 those ballots that cannot be identified as valid ballots. Reasons a
12 ballot may not be valid include incorrect number of votes, lot
13 ownership cannot be confirmed, ballot is illegible, ballot envelope is
14 not signed, or a member is not in good standing. Any ballots withheld
shall be reviewed by the NEC Chairperson and Secretary prior to the
close of vote counting. Every effort will be made to count as many
votes as possible assuring a fair, open and honest election.

15 Emphasis added.

16 6. The evidence presented by Petitioners established that Respondent
17 violated its Nominating and Elections Committee Mission and Procedures when the
18 Elections Committee Chair who was engaged in the elections process, refused to
19 count Petitioners' and other homeowners' ballots that had been placed in the ballot
20 box prior to the election, and then refused to accept in-person ballots at the
21 meeting, notwithstanding that those ballots could not be considered ineligible
22 ballots. There was no evidence presented by Respondent that any of those ballots
23 were refused due to an incorrect number of votes, the inability to confirm lot ownership,
24 illegibility, unsigned ballot envelope, or lack of a member's good standing. There was also
25 no reason for Petitioners or the other homeowners to believe that they could not place
26 their ballots in the ballot box prior to the election and have those ballots counted. Further,
27 Respondent's Nominating and Elections Committee Mission and Procedures state
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that “every effort will be made to count as many votes as possible assuring a fair, open and honest election.” This was not the case at the July 5, 2022 Special Election.

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ORDER

In view of the foregoing,

IT IS ORDERED that the Petition be upheld.

IT IS FURTHER ORDERED Petitioners be deemed the prevailing party in this matter.

IT IS FURTHER ORDERED that Respondent pay Petitioners their filing fee of \$500.00, to be paid directly to Petitioners within thirty (30) days of this Order.

IT IS FURTHER ORDERED that within thirty (30) days of the mailing date of the Administrative Law Judge Decision entered in this matter, Respondent shall pay to the Department a civil penalty in the amount of \$500.00, and such payment shall be made by cashier's check or money order made payable to the Department.

NOTICE

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

Done this day, November 17, 2022.

/s/ Sondra J. Vanella
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile November 17, 2022 to:

Louis Dettorre, Commissioner
Arizona Department of Real Estate
100 N. 15th Avenue, Suite 201
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