

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

2
3 **ALJFIN ALJ Decision final by statute**

4
5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 MIKE SAWYER,

8 Petitioner,

9
10 vs.

11 TERRAMAR HOMEOWNERS
12 ASSOCIATION,

13 Respondent.

No. 08F-H088013-BFS

**ADMINISTRATIVE LAW JUDGE
DECISION**

14
15
16
17
18 **HEARING:** May 29, 2008

19 **APPEARANCES:** Mike Sawyer appeared on his own behalf; Attorney Corey Hill
20 represented Terramar Homeowners Association

21 **ADMINISTRATIVE LAW JUDGE:** Thomas Shedden

22
23
24 Petitioner Mike Sawyer alleged that Respondent Terramar Homeowners Association did
25 not hold a recall election of 4 of its board members after presented a petition requesting
26 the recall election. Respondent asserts that the petition was defective.

27 **FINDINGS OF FACT**

28 1. On or about March 27, 2008 Petitioner Michael Sawyer filed a Petition with the
29 Arizona Department of Fire, Building and Life Safety ("Department") alleging that
30 Terramar Homeowners Association (the "HOA") violated A.R.S. § 33-1812 in that the

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007
962-542-9820

HOA did not hold a recall election of 4 board members after being presented a petition requesting such an election.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28
- 29
- 30

1 2. On or about April 18, 2008 the HOA filed a Response in which it asserted that
2 the petition had procedural and legal defects that rendered the petition invalid.
3 According to the HOA these defects included: a failure to identify those soliciting the
4 signatures; a failure to verify that those collecting the signatures were HOA residents; a
5 failure to identify the petitioner; invalid signatures of renters; signatures of homeowners
6 that are not eligible to vote; and signatures that appeared to be forged.

7 3. At hearing the HOA asserted that the petitions were defective based on public
8 policy as supported by A.R.S. § 16-315.

9 4. On April 28, 2008 the Department issued a Notice of Hearing setting the matter
10 for 9:00 a.m. May 29, 2008, at which time the matter was convened.

11 5. Exhibit HOA 2 is a copy of the petition. The petition calls for the removal of
12 board members Ben Dass, Don Flickinger, Keith Miller, and David Mosienko. The
13 petition shows 305 signatures.

14 6. Mr. Sawyer appeared and presented his own testimony and that of Mr. Rick
15 Card. The HOA presented the testimony of board members Dr. Keith Miller and Mr. Ben
16 Dass.

17 7. Mr. Sawyer is a homeowner who signed the petition. Mr. Sawyer also solicited
18 some signatures on the petitions; he could not recall the number of signatures but it was
19 three pages.

20 8. Mr. Sawyer did not know whether the original petitions or a copy had
21 been submitted and he did not know who else solicited signatures. Mr. Sawyer did not
22 put his name on or sign the pages on which he was the solicitor because he did not
23 believe that there was such a requirement.

24 9. Mr. Dass has been on the HOA board for 4 years and the president for 2 years.

25 10. Mr. Dass testified that the HOA had not received the original petition and did not
26 know who initiated the petition or who solicited the signatures.

27 11. Because Mr. Dass and other board members thought that many of the names on
28 the petition looked the same, they hired an independent lawyer (i.e., not the HOA's
29 lawyer). The lawyer was paid for with private funds because Mr. Dass did not want to
30 raise an issue related to misuse of HOA funds.

1 12. According to Mr. Dass, there was a handwriting analysis conducted on the
2 petition, but he did not have any of the details of that analysis with him.

3 13. Mr. Dass testified that he spoke to people who were renting homes in Terramar
4 and the names on the petition for those addresses would be that of the landlord. Mr.
5 Dass also testified that he spoke to people that denied signing the petition.

6 14. Mr. Dass testified that he and Dr. Miller spoke to Mr. Lawrence Flayter whose
7 name appears on the petition as Hap Flayter. According to Mr. Dass and Dr. Miller, Mr.
8 Flayter told them that he did not sign the petition and he would not have signed using
9 "Hap."

10 15. HOA Exhibit 3 is a letter signed by Mr. Flayter in which he writes that he does
11 not recall signing the petition and does not want to be included on the list.

12 16. Mr. Card was called to provide rebuttal testimony in which he provided that he
13 had solicited Mr. Flayter's signature on the petition and he saw Mr. Flayter sign.

14 17. Other than naming Mr. Flayter, Mr. Dass did not provide any details in support of
15 his allegation that signatures were forged or that landlords had signed for homes in
16 which there are renters (i.e., he provided neither the names nor the alleged number of
17 defective signatures).

18 18. Dr. Miller was suspicious of the petition because there were some street names
19 misspelled, some entries appeared to be written in the same hand, and some entries
20 were in the same color of ink.

21 19. Dr. Miller believes that there are 1550 members in the HOA.

22 20. Petitioner Exhibit A is a partial transcript from a case in Justice Court in which
23 Dr. Miller testified that there were 180 valid signatures. See Exhibit A (Docket No.
24 CC2007-217431-000, November 29, 2007). At the instant hearing Dr. Miller testified
25 that he was guessing in the Justice Court.

26 21. According to Dr. Miller, the number of forged signatures could not be determined
27 because the HOA did not have the original petition.

28 22. Dr. Miller testified that there were a lot of signatures that were not valid because
29 the homeowners were in violation of the CC & R's.
30

1 23. Dr. Miller did not provide any details in support of his allegation that signatures
2 were invalid because the homeowners were in violation of the CC & R's (i.e., he
3 provided neither the names nor the alleged number of defective signatures).

4 **CONCLUSIONS OF LAW**

5 1. The Department has the statutory authority to process Petitions against planned
6 communities.

7 2. The Office of Administrative Hearings has the statutory authority to conduct
8 evidentiary hearings and to issue orders in disputes between members and planned
9 communities, but the Office of Administrative Hearings has limited jurisdiction and can
10 only determine whether a homeowners association violated provisions of the planned
11 community documents (i.e. Articles of Incorporation, Bylaws, Covenants Conditions and
12 Restrictions) or has violated A.R.S. Title 33, Chapter 9 or 16. See A.R.S. § 41-2198 et
13 seq.; *Ayala v. Hill*, 136 Ariz. 88, 664 P. 2d 238 (App. 1983) (the powers and duties of
14 administrative agencies are limited to those granted by statute).

15 3. The party asserting a claim, right, or entitlement has the burden of proof; a party
16 asserting an affirmative defense has the burden of establishing the affirmative defense.
17 The standard of proof on all issues in this matter is by a preponderance of the evidence.
18 See A.A.C. R2-19-119.

19 4. The petition shows 305 names entered, which is more than 10% of 1550 as
20 required for a recall election under A.R.S. § 33-1813.

21 5. The HOA has not met its burden with respect to its affirmative defenses.

22 6. The HOA asserts that as a matter of public policy, the election laws from A.R.S.
23 Title 16 should be applied to this matter. But in there is no evidence to show that the
24 HOA's Articles of Incorporation, Bylaws, or CC & R's require petitions to conform to Title
25 16. Consequently, there tribunal has no authority to consider Title 16. See *Ayala v. Hill*.

26 7. Although Mr. Dass and Dr. Miller asserted that the petition contains signatures
27 that are invalid, they offer no actual proof of their assertions (except for the issue
28 regarding Mr. Flayter) nor does the HOA provide the number of signatures that are
29 purported to be invalid. Moreover, Dr. Miller's credibility is suspect because he testified
30

1 that he was suspicious of the petition, in part, because signatures were in the same
2 color ink, but he also testified that he had seen only copies of the petition.

3 8. With respect to Mr. Flayter, Mr. Card provided testimony that he saw Mr. Flayter
4 sign the petition, which could be true even if Mr. Flayter also told Mr. Dass and Dr. Miller
5 that he did not sign. Mr. Flayter did not testify and was not subject to cross examination
6 and, consequently, his letter and the hearsay testimony that he said he did not sign the
7 petition are given no appreciable weight.

8 9. The Administrative Law Judge concludes that Mr. Sawyer sustained his burden
9 of proof in this matter. Pursuant to A.R.S. § 41-2198.02(A), the Administrative Law
10 Judge must order the Respondent HOA to repay to Mr. Sawyer his filing fee of \$550.00.
11 The Administrative Law Judge also finds that the HOA must comply with A.R.S. § 33-
12 1813 and hold a recall election.

13 **ORDER**

14 **IT IS ORDERED** that Mr. Sawyer be deemed the prevailing party in Case No. HO
15 08-8/013;

16 **IT IS FURTHER ORDERED** that Terramar Homeowners Association must
17 comply with the requirements of A.R.S. § 33-1813 by holding a recall election of board
18 members Ben Dass, Don Flickinger, Keith Miller, and David Mosienko within 30 days of
19 the effective date of this Order; and

20 **IT IS FURTHER ORDERED** that Terramar Homeowners Association pay Mr.
21 Sawyer his \$550.00 filing fee within 30 days of the date of this Order.

22 Pursuant to A.R.S. § 41-2198.04(A), this Order is the final administrative
23 decision and it is not subject to a request for rehearing. This Order is enforceable
24 through contempt of court proceedings, pursuant to A.R.S. § 41-2198.02(B).

25 Done this day, June 13, 2008

26
27 _____
28 Thomas Shedden
29 Administrative Law Judge
30

1 Original transmitted by mail this
2 ____ day of _____, 2008, to:

3
4 Robert Barger, Director
5 Department of Fire Building and Life Safety - H/C
6 ATTN: Debra Blake
7 1110 W. Washington, Suite 100
8 Phoenix, AZ 85007

9 By _____

10
11 Copies transmitted by mail this
12 ____ day of _____, 2008, to:

13 R. Corey Hill
14 The Cavanaugh Law Firm, P.A.
15 1850 North Central Ave., #2400
16 Phoenix, AZ 85004-4527

17 Mike Sawyer
18 26254 North 74th Lane
19 Peoria, AZ 85383

20
21 By _____

22
23
24
25
26
27
28
29
30