

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

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August 17, 2021

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3411 N. 6th Avenue, Suite 316  
Phoenix, Arizona 85013

Lidio Rivera  
1328 Saltillo Place  
Las Cruces, New Mexico 88007

**Re: Opinion Request – End of Exclusive Declarant Control under Home Owner Association Act**

Dear Ms. Krupnik and Mr. Rivera:

We have completed our review of the questions submitted by former State Representative Rudy Martinez to this Office, requesting an Attorney General opinion regarding the eligibility and rights of lot owners to run for election to and otherwise fully participate in their homeowners association in accordance the Homeowner Association Act (“HOAA”), NMSA 1978, § 47-16-1 to -16 (2013, as amended through 2019). We understand that the question arises from a difference of opinion between the Picacho Mountain Homeowners Association (“PMHOA”), and a lot owner in the Picacho Mountain Community on whether the Picacho Mountain planned development has reached the percentage of lots sold to non-declarants that would require a board member to be elected to the homeowner’s association board by lot owners, rather than appointed by the declarant. Based on our examination of the relevant constitutional, statutory, and case law authorities, as well as the information available to us at this time, we conclude that Picacho Mountain’s planned community has not yet conveyed the required percentage of lots in the development to necessitate a board election.

Under the HOAA, all residential planned communities must organize an association exclusively consisting of all lot owners in the development. § 47-16-3. “Lot owner” is defined in the HOAA as the “person or group of persons holding title to a lot, including a declarant.” “Declarant” is defined as the “person or group designated in a declaration that creates the authority in the homeowner’s association.” § 47-16-2 (I), (J). Additionally, a declarant generally is the owner of the real property to be developed for a planned community, authorized to create a homeowners association by declaration, see §§ 47-16-3, -4, and -5, and reserve certain rights and powers for himself. § 47-16-8.

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During the period of declarant control of the association, a declarant, or her designee, may appoint and remove the officers and members of the board. § 47-16-8 (A). However, the period of declarant control is not indefinite. The HOAA dictates that the period of declarant control shall terminate, if not voluntarily terminated by the declarant sooner, no later than the earlier of certain specific conditions. For master planned communities, such as the Picacho Mountain Community, it contemplates that as the percentage of lots conveyed to lot owners increases, so too does the percentage of board members elected by the lot owners. For example, after twenty-five percent of a development's lots are conveyed to lot owners other than a declarant, at least one member and not less than twenty-five percent of the board members shall be elected by lot owners. After fifty percent of the lots are similarly conveyed, no less than thirty three percent of the board members shall be elected by lot owners. NMSA 1978 § 47-16-8 (E) - (F). This allows for the orderly transition of authority to control the board from the declarant to parcel owners.

We understand a non-declarant lot owner contends that Picacho Mountain Community sold twenty-five percent of lots to lot owners other than a declarant in 2015 and by 2016 sold fifty percent of lots to lot owners other than a declarant, totaling at least seventy-five percent of the lots that are part of the development. Based on this calculation, the PMHOA must have no less than, "thirty-three percent of the members of the board... elected by lot owners other than the declarant." NMSA 1978 § 47-16-8 (E), (F). However, this calculation also rests on the reasoning that any declarant-owned lots are excluded from the overall calculation. Section 47-16-2 (P) defines a lot owner as, "a person or group of persons holding title to a lot, *including* a declarant." (emphasis added). Further, Section 47-16-8 (E) and (F) apply to the conveyance of lots that are, "part of the development, and any additional lot that may be added to the development." Together, these provisions indicate the *total number of parcels in the development, present and anticipated, including those owned by the declarant*, must be included in the calculation.

According to the Picacho Mountain Community Master Plan, Sketch Plan and Sketch Plan Report, the planned community allows for a total of 1560 total lots, with 1493 of those lots designated for residential purposes. The PMHOA contends only 138 lots have been transferred to owners other than the Declarant, while the lot owner residing in the Picacho Mountain community contends 252 lots have been transferred. By either calculation, the lots sold to date versus the total number of lots in the master plan does not require members of the board be elected by lot owners other than the declarant. *See generally* NMSA 1978 § 47-16-8 (E), (F). The Board of the Picacho Mountain Homeowner's Association may be appointed solely by the Declarant.

To summarize, determining whether a sufficient percentage of lots have been sold to someone other than the declarant, must take into account the total number of lots planned for the community, and is not restricted only those lots that have been developed, or lots that are owned by non-declarants. NMSA 1978, Section 47-16-8. Therefore, the Picacho Mountain Master Planned Community has not reached the threshold required for lot owners, other than the declarant, to elect a board member to the homeowner's association. Of course, this may have changed if more lots have been sold since this request was made, and as stated here, it will obviously change as more lots are sold.

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Please be advised that this opinion is a public record, not subject to the attorney-client privilege. As such, we may provide copies to the public. If this office may be of further assistance, or if you have any questions regarding this opinion, please do not hesitate to contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Novela Salazar". The signature is fluid and cursive, with the first name "Novela" and last name "Salazar" clearly distinguishable.

Novela Salazar,  
Assistant Attorney General