

Final agency action regarding decision below:

ALJFIN ALJ Decision final by statute

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

RICHARD A. DEBOER,

Petitioner,

vs.

TURTLE ROCK III
HOMEOWNERS ASSOCIATION,

Respondent.

No. 07F-H067007-BFS

ADMINISTRATIVE
LAW JUDGE DECISION

HEARING: January 3, 2007

APPEARANCES: Petitioner Richard DeBoer appeared on his own behalf. Respondent Turtle Rock III Homeowners Association appeared through its corporate secretary, Lynne Gustafson.

ADMINISTRATIVE LAW JUDGE: Daniel G. Martin

Richard DeBoer filed a petition with the Arizona Department of Fire, Building and Life Safety (the "Department") alleging that Turtle Rock III Homeowners Association had violated Article X, Section 3 of the Declaration of Covenants, Conditions and Restrictions applicable to the Turtle Rock III subdivision, and Arizona Revised Statutes ("A.R.S.") § 33-1805. Based on the evidence of record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On January 19, 1983, Lawyers Title of Arizona, as trustee, filed with the Maricopa County Recorder a Declaration of Covenants, Conditions and Restrictions (the "Declaration") applicable to the Turtle Rock III subdivision in Phoenix, Arizona ("Turtle Rock III" or "the subdivision"). See Exhibit 5. Turtle Rock III is comprised of seventy-six (76) lots and related common areas. See *id.* Petitioner Richard DeBoer is the owner of lot 31.

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1 2. Pursuant to the terms of the Declaration, responsibility for the
2 maintenance and oversight of Turtle Rock III is vested in a homeowners association
3 (the "Association"), the membership of which consists of Turtle Rock III lot owners. See
4 Exhibit 5, at Article III, § 2.

5 3. Article X, Section 3 of the Declaration provides, in pertinent part:

6 This Declaration may be amended during the first twenty year
7 period by an instrument signed by not less than 90 percent of the
8 lot owners, and thereafter, by an instrument signed by not less than
9 75 percent of the lot owners. Any amendment must be recorded.

10 4. In 2005, the Board of Directors of the Association (the "Board"),
11 responding to concerns that the terms of the Declaration had become outdated, formed
12 an ad hoc committee to study possible revisions to the Declaration.¹ The members of
13 the ad hoc committee were Board members Jim Scott (the Association's President),
14 Lynne Gustafson (the Association's Secretary), and Ida Rouget (one of the
15 Association's Members At-Large), and residents Mert Force, Herman Krehbiel, and
16 Rose Magnifico.

17 5. On July 26, 2005, the ad hoc committee met at Ms. Gustafson's home to
18 begin its review of the Declaration. By September 13, 2005, the committee had
19 completed its review of the Declaration and had commenced review of the Association's
20 Bylaws. See Exhibit 1, at 1-10.

21 6. As of October 11, 2005, the committee had completed draft revisions to
22 the Declaration, the Bylaws, and the Association's Articles of Incorporation. The Board
23 distributed those draft documents to all of the Turtle Rock III lot owners for review and
24 comment. See Exhibit 8, at 8-5. In order to solicit comments on the draft revisions, the
25 Board provided each of the lot owners with a one page survey form by which the owner
26 could express agreement or concerns with the draft documents. See Exhibit 8, at 8-6.

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¹ As indicated by the evidence at hearing, one of the prime movers for the formation of the ad hoc
30 committee was the fact that under the terms of the Declaration, assessments for road repairs had to be
spent in the same year that such assessments were levied. This provision posed a particular hardship
due to the high cost of road repairs.

1 7. As of November 8, 2005, the Board had received responses to the draft
2 revisions to the Declaration, Bylaws, and Articles of Incorporation from 54 of the 76 lot
3 owners within the subdivision. According to the minutes of the Board's meeting on that
4 date, the Board considered the response "disappointing". See Exhibit 1, at 1-13.
5 However, the Board had received sufficient feedback to revise the documents and bring
6 them to a point where they could be reviewed by legal counsel.

7 8. Mr. DeBoer was one of the Turtle Rock III lot owners who provided
8 feedback to the Board regarding the document updates. By letter dated October 26,
9 2005, Mr. DeBoer stated: "I am opposed to granting the Association any additional
10 easements, access rights, or police powers on individual lots. Also, I am opposed to a
11 permanent 10% cap on HOA dues, but would support periodic one-time increases
12 beyond 5%." See Exhibit 3, at 3-1.

13 9. By letter dated November 4, 2005, following a meeting with Mr. Scott (the
14 Association's president), Mr. DeBoer detailed his specific concerns with the proposed
15 changes to the Declaration. The gravamen of Mr. DeBoer's letter was a reiteration of
16 his opposition to any modification to the Declaration that would grant the Association (or
17 any third parties) the authority to access his property. See Exhibit 3, at 3-3 to 3-4.

18 10. The Association held its annual meeting on January 7, 2006. At that
19 meeting, Ms. Gustafson and Mr. Scott provided an update on the status of the proposed
20 revisions to the Association documents, indicating that the documents would be
21 submitted to legal counsel for finalization.

22 11. Between February and April 2006, the law firm of Ekmark & Ekmark
23 reviewed the draft documents. With respect to the Declaration, Ekmark & Ekmark
24 recommended several substantive modifications based on changes in the law that had
25 occurred since the adoption of the Declaration, as well as changes to the phrasing of
26 certain provisions.

27 12. In its May 2006 newsletter, the Board advised the Turtle Rock III lot
28 owners that the updates to the Declaration, Bylaws, and Articles of Incorporation had
29 been completed, and that the documents would be put to a vote at the Association's
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1 summer meeting. The Board advised that absentee ballots, to be distributed with the
2 final documents, would be accepted. See Exhibit 2, at 2-11.

3 13. On or about June 9, 2006, the Board distributed the final set of documents
4 to the Turtle Rock III lot owners for review. The Board included with that package a
5 summary of the changes to the Declaration, Bylaws, and Articles of Incorporation, and
6 ballots for each of the revised documents. See Exhibit E. The Board advised the
7 owners as follows:

8 Please review all of these items, as soon as possible. The deadline
9 for returning the [Declaration] ballot is Monday, 2 July. Although
10 the actual scheduled vote for the Bylaws and Articles is at our
11 summer meeting, 15 July, we encourage you to return them sooner
12 if possible. Ballots can be returned to the HOA mailbox anytime!

13 *See id.*

14 14. By letter to the Board dated June 22, 2006, Mr. DeBoer expressed his
15 belief that there had been “serious irregularities in the voting process for revisions to the
16 Association documents”, and urged the Board “to immediately suspend voting and to
17 discontinue efforts to modify the Association documents.” See Exhibit 3, at 3-5. In
18 support of the foregoing, Mr. DeBoer urged that (i) the Board had prevented public
19 discussion of the substantive changes in the final version, (ii) the summary sheet was
20 incomplete and misleading, and (iii) the Board had failed to adequately advise the
21 community as to the full nature and effect of the proposed changes. *See id.*

22 15. In response to Mr. DeBoer’s June 22, 2006 letter, the Board invited Mr.
23 DeBoer to attend its July 11, 2006 meeting. By letter dated July 9, 2006, Mr. DeBoer
24 indicated his inability to do so. See Exhibit 3, at 3-7.

25 16. The Board received 62 return ballots (out of a possible 76) on the revised
26 Declaration. 58 ballots (one of which was filed under protest) favored adoption of the
27 revised Declaration; 4 were opposed. Mr. DeBoer did not vote on the revised
28 Declaration.
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1 17. In accordance with Article X, Section 3 of the Declaration, the return of 57
2 ballots favoring adoption of the revised Declaration (discounting the one ballot that was
3 filed under protest) constituted a sufficient percentage for passage of the amendments.

4 18. By letter dated July 29, 2006, Mr. DeBoer reiterated his dissatisfaction
5 with the revised Association documents and the manner in which the Board had
6 conducted the update process. See Exhibit 3, at 3-11.

7 19. On August 8, 2006, the Board sought further counsel from Ekmark &
8 Ekmark with regard to Mr. DeBoer's contentions.

9 20. By letter dated August 17, 2006, Ekmark & Ekmark opined that the
10 provisions of the amended Declaration and Bylaws were in compliance with state and
11 federal laws, and that the Association had acted "lawfully and appropriately during the
12 vote of the membership to amend the governing documents." See Exhibit 4, at 4-6.²

13 21. On August 31, 2006, the Association recorded the amended Declaration.
14 See Exhibit 6.

15 22. By letter dated October 19, 2006, Mr. DeBoer requested, pursuant to
16 A.R.S. § 33-1805, that the Association provide him with copies of the following
17 documents:

- 18 1. All ballots (and retractions) submitted by members of the
19 community for approval of Amended and Restated Declaration of
20 Covenants, Conditions and Restrictions for Turtle Rock III
21 Homeowners Association, which required a Monday, July 2, 2006,
22 deadline for returning.
- 22 2. All survey sheets submitted by members of the community in
23 response to the October, 2005 letter from the Board of Directors. . . .
- 23 3. The current, approved, Association Bylaws.³

24 See Exhibit 3, at 3-14.

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28 ² Ekmark & Ekmark's August 17, 2006 letter is marked "Attorney-Client Privileged", a notation about
29 which the Administrative Law Judge was unaware until after the letter had been admitted into evidence.
30 As it was the Association that offered the letter into evidence, it must be deemed to have waived the
attorney-client privilege as to that document.

³ Based on the evidence presented at hearing, the Administrative Law Judge finds that Mr. DeBoer is
in possession of a current copy of the Association's Bylaws.

1 23. By letter dated October 28, 2006, the Association advised Mr. DeBoer that
2 it would not produce the requested "ballots and surveys from the CC&R vote" on the
3 grounds that the Board considered such documents to be confidential. See Exhibit 3, at
4 3-17. In reaching this decision, the Board relied on A.R.S. § 16-624(A) (a provision of
5 one of Arizona's election statutes), which provides:

6 After the canvass has been completed, the officer in charge of
7 elections shall deposit the package or envelope containing the
8 ballots in a secure facility managed by the county treasurer, who
9 shall keep it unopened and unaltered for twenty-four months for
10 elections for a federal office or for six months for all other elections,
at which time he shall destroy it without opening or examining the
contents.

11 24. On November 14, 2006, Mr. DeBoer filed a petition with the Department
12 challenging the Association's adoption of the amended Declaration and its refusal to
13 have produced the ballots and surveys for the vote on the Declaration. Specifically, Mr.
14 DeBoer alleged:

15 The Board of Directors exceeded its authority and did not act in
16 good faith when it promoted, adopted and recorded, on 8/31/06, a
17 completely new Declaration which fundamentally and unnecessarily
18 changed the governance and operating structure of the Association
in favor of the Association.

19 The Board of Directors refused two written requests dated 10/19/06
20 and 10/26/06, for copies of: 1) current association bylaws, 2) signed
21 instruments submitted for approval of the 2006 Declaration, [and] 3)
signed survey forms submitted by lot owners before 11/1/05 to
22 indicate approval/disapproval of draft association documents.

23 See Administrative Record.

24 25. On November 15, 2006, the Department forwarded Mr. DeBoer's petition
25 to the Association.

26 26. By letter dated November 17, 2006 (received by the Department on
27 November 20, 2006), the Association responded to the petition.

28 27. On November 29, 2006, the Department issued a Notice of Hearing
29 setting this matter for hearing before the Office of Administrative Hearings, an
30 independent state agency.

1 28. At hearing, Mr. DeBoer addressed numerous concerns that he has with
2 the amendments that were made to the Declaration. The gravamen of Mr. DeBoer's
3 testimony is that the amended Declaration grants substantial additional powers to the
4 Board that may be abused and with which he, as a property owner, vehemently
5 disagrees.⁴

6 29. The Administrative Law Judge has considered Mr. DeBoer's concerns, but
7 finds that such concerns are ultimately irrelevant to the determination of this matter,
8 which involves not the substance of the amendments but the manner in which those
9 amendments were adopted.⁵ Mr. DeBoer may disagree, even vehemently, with the
10 nature of the changes to the Declaration. Such disagreement, however, does not
11 render invalid the manner in which they were adopted.

12 30. As to other alleged deficiencies in the revision and approval process, the
13 Administrative Law Judge finds that the Board was not obligated to follow any particular
14 process, that the Board sought to include all lot owners in the process that it employed,
15 that the Board kept the lot owners apprised of its activities, and that the Board did not
16 engage in any fraudulent, misleading, or inappropriate conduct. Ultimately, each lot
17 owner had a full and fair opportunity to review the final documents prior to casting his or
18 her ballots.⁶

CONCLUSIONS OF LAW

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20 1. In this proceeding, Mr. DeBoer bears the burden to prove, by a
21 preponderance of the evidence, that the Association violated Article X, Section 3 of the
22 Declaration, and/or A.R.S. § 33-1805. See Arizona Administrative Code R2-19-119.

23 ⁴ Mr. DeBoer took issue with the following provisions, among others: (i) the definition of "common
24 area"; (ii) the definition of "front landscape"; (iii) the definition of "multiuse easement"; (iv) the Board's
25 authority to adopt rules and regulations; (v) the Board's right of entry and enforcement; (vi) third party
26 rights to ingress and egress; (vii) maintenance of sidewalks and curbs; (viii) assessments (including road
27 assessments); (ix) maintenance by owners (and enforcement rights attendant thereto); (x) architectural
28 control; (xi) restrictions on motorized vehicles; (xii) noise restrictions; (xiii) ownership restrictions; and
29 (xiv) amendments.

30 ⁵ In this regard, the Administrative Law Judge does not disagree with Mr. DeBoer that enforcement of
the Declaration's provisions may present challenges for both the Association and the lot owners. Those
issues, however, must be addressed at the time they arise (or perhaps more proactively through
continued study and revision of the Declaration).

⁶ This fact is demonstrated perhaps most clearly by Mr. DeBoer himself, who was able to engage in a
thorough review of the final set of documents prior to sending his June 22, 2006 letter of objection to the
Board (see Finding of Fact No. 14).

1 2. A preponderance of the evidence is “such proof as convinces the
2 trier of fact that the contention is more probably true than not.” Morris K. Udall, ARIZONA
3 LAW OF EVIDENCE § 5 (1960).

4 The Association’s Alleged Violation of the Declaration

5 3. Mr. DeBoer alleged in his petition that the Board “exceeded its
6 authority and did not act in good faith when it promoted, adopted and recorded, on
7 8/31/06, a completely new Declaration which fundamentally and unnecessarily changed
8 the governance and operating structure of the Association in favor of the Association.”
9 The evidence was contrary to this allegation.

10 4. As set forth in Article X, Section 3 of the Declaration, the
11 Declaration may be amended by “an instrument signed by not less than 75 percent of
12 the lot owners.” The evidence demonstrated that the Board conducted a ballot through
13 which 75 percent of the lot owners voted in favor of the amended and restated
14 Declaration. The required percentage having been attained, the amended and restated
15 Declaration was properly adopted. Mr. DeBoer may disagree with the substance of
16 those amendments, but such disagreement does not render the amended Declaration
17 invalid. Nor did Mr. DeBoer present any substantive evidence (or relevant legal
18 authority) to support his assertion that the Board exceeded its authority or failed to act in
19 good faith during the revision and approval process.

20 The Association’s Alleged Violation of A.R.S. § 33-1805

21 5. A.R.S. § 33-1805 provides:

22 A. Except as provided in subsection B of this section, all financial
23 and other records of the association shall be made reasonably
24 available for examination by any member or any person designated
25 by the member in writing as the member's representative. The
26 association shall not charge a member or any person designated
27 by the member in writing for making material available for review.
28 The association shall have ten business days to fulfill a request for
29 examination. On request for purchase of copies of records by any
30 member or any person designated by the member in writing as the
member's representative, the association shall have ten business
days to provide copies of the requested records. An association
may charge a fee for making copies of not more than fifteen cents
per page.

1 B. Books and records kept by or on behalf of the association and
2 the board may be withheld from disclosure to the extent that the
3 portion withheld relates to any of the following:

4 1. Privileged communication between an attorney for the
5 association and the association.

6 2. Pending litigation.

7 3. Meeting minutes or other records of a session of a board
8 meeting that is not required to be open to all members pursuant
9 to section 33-1804.

10 4. Personal, health or financial records of an individual member
11 of the association, an individual employee of the association or
12 an individual employee of a contractor for the association,
13 including records of the association directly related to the
14 personal, health or financial information about an individual
15 member of the association, an individual employee of the
16 association or an individual employee of a contractor for the
17 association.

18 5. Records relating to the job performance of, compensation of,
19 health records of or specific complaints against an individual
20 employee of the association or an individual employee of a
21 contractor of the association who works under the direction of
22 the association.

23 C. The association shall not be required to disclose financial and
24 other records of the association if disclosure would violate any state
25 or federal law.

26 6. In this case, the Association refused to release to Mr. DeBoer the
27 ballots and surveys from the vote on the Declaration based on a determination that such
28 documents were confidential. In reaching this conclusion, the Board relied on A.R.S. §
29 16-624(A). A.R.S. § 16-624(A), however, has no application to a private balloting such
30 as that conducted by the Association in this case. As can be seen from the statutory
scheme of which A.R.S. § 16-624(A) is a part, this statutory provision applies only to
elections conducted by the state or any of its political subdivisions.

1 Original transmitted by mail this ____ day of January, 2007, to:

2 Department of Fire Building and Life Safety - H/C
3 Robert Barger
4 ATTN: Joyce Kesterman
5 1110 W. Washington, Suite 100
6 Phoenix, AZ 85007

7 Copy transmitted by mail this ____ day of January, 2007, to:

8 Richard A. Deboer
9 1025 E. Villa Maria Drive
10 Phoenix, AZ 85022

11 Turtle Rock III Homeowners Association
12 18050 N. 12th Street
13 Phoenix, AZ 85022

14 By _____

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