

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 **LAWRENCE M. WOJTOWICZ,**

8 Petitioner,

9
10 vs.

11 **VOYAGER AT JUNIPER RIDGE**
12 **HOMEOWNERS' ASSOCIATION,**

13 Respondent.

No. 07F-H067002-BFS

ADMINISTRATIVE
LAW JUDGE DECISION

14
15 **HEARING:** February 5, 2007 at 9:00 a.m.

16 **APPEARANCES:** Petitioner Lawrence M. Wojtowicz appeared on his own
17 behalf; Respondent Voyager at Juniper Ridge Homeowners' Association appeared
18 through Tanis A. Duncan, Esq.

19 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

20
21 On February 5, 2007, after Petitioner Mr. Wojtowicz admitted that his dispute was
22 not against Respondent Voyager at Juniper Ridge Homeowners Association ("the
23 HOA"), the Administrative Law Judge granted the HOA's motion to dismiss under
24 A.R.S. § 41-2198.01(B)(1) and (2). The Administrative Law Judge left the record open
25 to allow the HOA to file an application for attorney's fees. The Administrative Law
26 Judge makes Findings of Fact and Conclusions of Law with respect to the dismissal and
27 rules on the HOA's application for attorney's fees to set forth the bases of the dismissal
28 in greater detail for the benefit of the parties and members of the public who may be
29 monitoring decisions of the Office of Administrative Hearings recently effective statute
30 A.R.S. § 41-2198(3). Because neither party disputed its opponent's factual assertions,

the following Findings of Fact are taken from the memoranda and exhibits that both parties submitted.

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FINDINGS OF FACT

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2 1. Voyager at Juniper Ridge RV Resort and Country Club is a planned
3 community, consisting of 529 lots and extensive common areas (“the Planned
4 Community”).

5 2. The Planned Community originally was owned by developer Global
6 Development. On September 24, 1985, Global Development as Declarant recorded the
7 original Declaration of Covenants, Conditions and Restrictions (“CC&Rs”), which
8 provided:

9 The provisions of this Declaration shall run with and bind the
10 land for a term of 30 years from the date this Declaration is
11 recorded, after which time they shall be automatically
12 extended for successive periods of 10 years each. This
13 Declaration may be amended by an instrument signed by
14 Owners having at least 2/3 of the votes outstanding and any
15 amendment must be recorded.

16 3. The 1985 CC&Rs also included Section 11.3, relating to Attorneys’ Fees, in
17 its general provisions, as follows:

18 If the Association or any other party bound by this
19 Declaration commences an action arising out of or in
20 connection with this Declaration, the prevailing party shall be
21 entitled to recover from the losing party reasonable
22 attorneys’ fees and costs of suit.

23 4. Between 1985 and 2003, Global Development and its successors in interest
24 sold fewer than 200 lots. At some point, the Baptist Foundation purchased the
25 remaining unsold lots and rights to develop the Planned Community.

26 5. Petitioner Mr. Wojtowicz was hired by Baptist Foundation in 2000 to market
27 lots.

28 6. At around this time, the Baptist Foundation filed for protection under Chapter
29 11 of the United States Bankruptcy Code.

30 7. In April 2003, the Baptist Foundation held an auction to dispose of its
remaining assets in the Planned Community as well as certain adjoining property. Over
330 lots within the Planned Community were auctioned off.

8. Voyager at Juniper Ridge, LLC ("the LLC") was the successful bidder at the April 2003 auction for a package that included 228 lots within the Planned Community along with the Declarant's rights under the original CC&Rs. N.E. Isaacson is the managing member of the LLC.

9. Petitioner provided with his complaint to the Department of Building, Fire and Safety a copy of an unsigned letter from "Juniper Ridge Homeowners," dated May 12, 2003 to Mr. Isaacson, which requested a response to Attorney Dan G. Curtis in Scottsdale. Attached to the letter was a letter from Mr. Curtis to Clifton R. Jessup, Jr. at Patton Boogs, LLP in Dallas, Texas, which was dated April 1, 2003 and concluded that "absent instruments assigning Declarant rights and preserving an unbroken chain through all subsequent entities to and including BFA, there is no current Declarant under the Juniper Ridge Declaration."

10. In 2003, the common areas were in substantial disrepair. To date, the LLC has invested more than \$600,000 to repair and develop the community's common facilities, including construction of tennis and bocce ball court.

11. The LLC also invested approximately \$300,000 to complete development of the remaining lots to market them.

12. On July 9, 2003, the LLC as Declarant and as owner of 228 lots within the Planned Community, with the written consent of the owners of 151 additional lots, for a total approval of not less than 72% of the record owners of lots in the Planned Community, recorded an "Amended and Restated Declaration of [CC&Rs]." The LLC recorded a "First Amendment to the Amended and Restated Declaration of Covenants, Conditions, and Restrictions" on November 5, 2003.

13. Included among the 2003 amendments was a CC&R that established two classes of voting membership, in relevant part as follows:

Class A. Class A Members shall be all Owners, with the exception of the Declarant, and shall be entitled to one vote for each Lot owned. When more than one person holds an interest in a Lot, all of such persons shall be Members. The vote for such Lot shall be exercised as they determine, but in no event shall more than one vote be case with respect to any Lot. In the absence of a designation to the

Association as to who shall cast the vote for Members of a single Lot, the Association shall make such designation.

Class B. The Class B member shall be the Declarant and the Declarant shall be entitled to ten (10) votes for each Lot owned by the Declarant. Class B membership shall cease when the Declarant no longer owns any portion of the property, and thereafter, there shall be a single class of Members.

14. Also included among the 2003 amendments was a CC&R that established the composition of the Board of Directors of the HOA ("the HOA Board"), in relevant part as follows:

The affairs of the association shall be managed by a Board of five (5) Directors. As long as there is a Class B Member, three (3) of the Directors shall be elected by the Declarant and two (2) of the Directors will be elected from the Class A members.

15. The 2003 amendments did not change Section 11.3 of the CC&Rs, relating to attorneys' fees.

16. In November 2004, Petitioner purchased a lot in the Planned Community and was subsequently elected to the HOA Board.

17. Petitioner hired Brown and Brown Law Offices, P.C. to challenge the 2003 amendments to the CC&Rs. On November 7, 2005, Attorneys Michael J. Brown and Douglas E. Brown wrote a demand letter to the LLC on behalf of "various individuals who own property in the Juniper Ridge Subdivision located in Navajo County." Based on the provision in the original CC&Rs, quoted *supra* at Finding of Fact No. 2, under the authority of the Arizona Court of Appeals' opinion in *Scholten v. Blackhawk Partners*, 184 Ariz. 326, 909 P.2d 393 (App. 1995), Attorneys Brown argued that the 2003 amendments were ineffective because the CC&Rs could be amended only at the expiration of the initial 15-year term, September 24, 2015. Attorneys Brown also argued that the LLC was not a proper successor to the original Declarant, Global Development Corp. The letter concluded with a request to meet with representatives of the LLC and its legal counsel "to determine if a mutually agreeable solution to these issues can be reached without the need for expensive and time consuming litigation."

18. On November 21, 2005, Attorneys Brown, Petitioner, the LLC's Attorneys Richard M. Rollman and Michael Botwin, Mr. Isaacson, several other LLC's partners and employees, and two other homeowners in the Planned Community met. They did not resolve the matters referenced in Attorneys Brown's November 7, 2005 demand letter.

19. On January 3, 2006, Attorney Rollman on the LLC's behalf responded to the demand that Attorneys Brown had made on Petitioner's behalf. Attorney Rollman pointed out differences in the language of the Planned Community's CC&Rs and the CC&Rs interpreted in the *Scholten* case, which he said prevented *Scholten* from being controlling authority. He also cited other authorities in support of a HOA's ability to amend its bylaws. Finally, Attorney Rollman pointed out that Petitioner's "decision to raise these issues after [the LLC] has spent literally hundreds of thousands of dollars expanding and improving the common areas of the community give rise to equitable defenses to any type of injunctive relief that [Petitioner] might seek" and that, if the invalidation of the amendments to the CC&Rs turned back the clock, "property values will undoubtedly suffer [which] may cause the project to revert to its prior history as a failed planned development, and the stigma of failure may significantly depress values."

20. Petitioner did not file a declaratory judgment action in superior court to request that the amendments to the CC&Rs be invalidated under the authority of *Scholten* and that the LLC be required to restore the Planned Community to its 2003 condition. Although Petitioner and the LLC apparently discussed settlement, in the end they did not settle their dispute.

21. On February 21, 2006, the LLC as Declarant recorded additional amendments to the CC&Rs to allow the HOA to enter into a "Joint Use and Maintenance Agreement pertaining to the Common Areas . . . with White Mountain Lake Vistas Homeowners Association and [the LLC]." The amendments indicated that more than two-thirds of the owners of lots within the Planned Community had consented to the amendment. According to Respondent, the amendment was approved by 87% of the lots.

22. The 2006 amendment did not change Section 11.3 of the CC&Rs, relating to attorneys' fees.

23. Petitioner actively opposed the 2006 amendments to the CC&Rs. After more than 145 lot owners signed a recall petition and the Board set a special meeting to consider his recall, he resigned from the HOA Board.

24. On September 26, 2006, Petitioner filed a Complaint to the Department of Building, Fire and Life Safety ("the Department"), alleging in relevant part as follows:

Board Not properly constituted based on proper CC&R's in affect [sic].

Petitioner's initial complaint did not reference any statute or specific CC&R.

25. Petitioner attached a document entitled "Court Brief" to his complaint, which alleged the following:

Conclusion

1. The main and only thrust of [the LLC] and Mr. N.E. Isaacson was the control and use of the Amenities of the Juniper Ridge HOA for the future development plans of these parties. It is truly fair to conclude that they coveted them and that is against one rule of ten that appears on the doors entering the Supreme Court of this nation. "Thou shall not covet thy neighbors goods." If we the Homeowners benefited it was only because [the LLC] and Mr. N.E. Isaacson would benefit even more.
2. [The LLC] and Mr. N.E. Isaacson are not on trial as to their motives or desires. What is being asked is to make a ruling as to the Lawfulness of the CC&R's recorded July 9, 2003 and the "First Amendment to the Amended and Restated Declaration of CC&R's recorded November 5, 2003. If these are not Lawful, then anything done by Voyager at Juniper Ridge, LLC and Mr. N.E. Isaacson and the unduly constituted [HOA Board] should be declared null and void and of no further affect [sic].

Prayers to the Court

1. When the Court decides in favor of the Petitioner, the Petitioner prays that the Court will require [the LLC] and Mr. N.E. Isaacson to return the Amenities of [the Planned

Community] to the condition as found on April 26, 2003 or better, which is the date of the Auction of this property they acquired. They should also be required to adhere to the affective [sic] CC&R's and the Rules and Regulations, Architectural Standards and Bylaws of a duly constituted Board that will assume the responsibilities of [the HOA].

2. Petitioner additionally prays that the Court will require that [the LLC] and Mr. N.E. Isaacson pay the Petitioner's legal expenses of \$10,891.45 incurred with Brown and Brown and Mr. Dan Curtis, ESQ, plus the \$550.00 for this filing.

26. The Department sent a copy of the initial complaint to the HOA. On October 12, 2006, the HOA's President Sue Fuller requested that the Department not refer the petition to the Office of Administrative Hearings but instead dismiss it under A.R.S. § 41-2198.01(B)(1) and (2), because Petitioner's dispute was clearly with the LLC and Mr. Isaacson.

27. The Department requested that Petitioner provide additional detail in his complaint.

28. On November 6, 2006, Petitioner filed the following amended complaint:

1. Board Not properly constituted based on proper CC&R's in affect [sic].
2. Invalid CC&R's recorded in Docket 2003-16513 and any and all amendments there to based on the legal opinions of Mr. Dan Curtis, Esq., a HOA Attorney, and Mr. Michael J. Brown Esq., an HOA Attorney, all of which were provided in evidence.

Petitioner again attached a copy of his "Court Brief" to the amended complaint.

29. The Department forwarded a copy of the amended complaint to the HOA for its response.

30. On November 16, 2006, the HOA Board President Ms. Fuller responded to the amended complaint. Ms. Fuller "respectfully reiterated that [the Department] does not have jurisdiction to hear the matters addressed in the Petition (for the reasons set forth in [the HOA's] response of October 12, 2006)" Ms. Fuller pointed out that

1 A.R.S. § 41-2198.01(B) allows a petition to be filed to the Department alleging
2 “**violations** of . . . planned community documents or **violations** or statutes that
3 regulate . . . planned communities,” and that Petitioner had not alleged the violation of
4 any specific CC&R or statute.

5 31. On November 21, 2006, the Department informed Petitioner:

6 Your case has been given careful consideration and has still
7 been deemed incomplete by the director of our department.
8 Please list the specific applicable section(s) of the CPCA
9 documents or applicable statutes. Also, please provide
10 additional details for your request.

11 32. On November 6, 2006, Petitioner filed the following second amended
12 complaint:

- 13 1. Board Not properly constituted since based on Original
14 CC&R’s in affect [sic] dated 9-25-85. (See attached letter
15 and e-mails (also in evidence) which affect the Validity of
16 the CC&R’s dated 7-9-03 and any and all additional
17 amendments thereto as in #2 below (See Brief for
18 additional information).
- 19 2. Section 1.8 (Invalid) per #1 above. Section 1.7 (Invalid)
20 making Section 4.3 invalid and Article VIII and Section
21 11.6 Invalid. Section 1.2 (Invalid) making Sections
22 3.1(A), 3.2, 3.3 and 3.4 Invalid.

23 Petitioner again attached a copy of his “Court Brief” to the second amended complaint,
24 as well as a copy of Attorneys Brown’s November 7, 2005 letter to the LLC and a
25 portion of Attorney Curtis’ April 1, 2003 letter.

26 33. The Department forwarded a copy of the second amended complaint to the
27 HOA for its response.

28 34. On December 18, 2006, the HOA Board President Ms. Fuller responded to
29 the second amended complaint. Ms. Fuller “respectfully reiterate[d] that [the
30 Department] lacked jurisdiction.” In the alternative, Ms. Fuller requested that the
Department inform Petitioner that he “has been given ample opportunity to file a
complete petition complying with the Arizona Revised Statutes and with the
Department’s published procedures; that he has failed; that the Department has

1 decided to not refer the petition to the Office of Administrative Hearings; and THAT NO
2 FURTHER MODIFICAITONS TO THE PETITION WILL BE REVIEWED OR
3 ACCEPTED (THEREBY EFFECTIVELY TERMINATING THIS PROCEEDING).”

4 35. Instead, the Department referred the complaint to the Office of
5 Administrative Hearings and issued a notice of hearing, setting an administrative
6 hearing on February 5, 2007.

7 36. Before the administrative hearing, the HOA moved to dismiss the complaint.
8 The LLC moved to intervene and to dismiss the complaint. The Administrative Law
9 Judge took the motions under advisement and allowed Petitioner to respond to the
10 motions.

11 37. A hearing was held on February 5, 2007. Petitioner and seventeen
12 homeowner members of the HOA, including Mrs. Fuller and her husband, traveled to
13 Phoenix from their homes in the White Mountains to attend the hearing.

14 38. The HOA’s and the LLC’s attorneys reiterated the legal arguments in their
15 motions to dismiss.

16 39. The Administrative Law Judge asked Petitioner on the record whether he
17 disagreed with the factual bases of the motions to dismiss. He indicated that he did not.

18 **CONCLUSIONS OF LAW**

19 1. A.R.S. § 41-2198.01(B) allows an owner of property in a planned community
20 to “petition the department for a hearing concerning violations of . . . planned community
21 documents or violations of the statutes that regulate . . . planned communities.”

22 2. Petitioner bears the burden of proof and must establish that he is entitled to
23 relief by a preponderance of the evidence.¹ “A preponderance of the evidence is such
24 proof as convinces the trier of fact that the contention is more probably true than not.”² A
25 preponderance of the evidence is “[t]he greater weight of the evidence, not necessarily
26 established by the greater number of witnesses testifying to a fact but by evidence that
27 has the most convincing force; superior evidentiary weight that, though not sufficient to

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29 ¹ See A.A.C. R2-19-119; see also *Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952).

30 ² Morris K. Udall, ARIZONA LAW OF EVIDENCE § 5 (1960).

free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”³

THE MOTION TO DISMISS

3. All of Petitioner’s alleged violations flow from Mr. Isaacson’s and the LLC’s alleged violation in 2003 of the 1986 CC&R that provided for an initial term of 30 years under the *Scholten* case, which was a declaratory judgment action, not the terms of the CC&Rs. Petitioner’s complaint does not allege any violation of the CC&Rs based on the condition of his individual property under A.R.S. § 33-1803(C) but rather complains about ownership and control of the common property in the Planned Community under the original CC&Rs interpreted under *Scholten*. His dispute concerns the validity of the amendments to the CC&Rs, not their application. The relief that Petitioner seeks would affect the rights of all the residents of the Planned Community, not just himself.

4. All of Petitioner’s complaints against the HOA involve Mr. Isaacson’s and the LLC’s alleged wrongful amendment of the CC&Rs in 2003 and 2006, based on their statuses as property owning members and as developer/declarant. The Department and the Office of Administrative Hearings therefore lack jurisdiction over this dispute under A.R.S. § 41-2198.01(B)(1) and (2).⁴

5. Petitioner has an adequate avenue to obtain relief against Mr. Isaacson and the LLC in a declaratory judgment action, to which all potentially affected property owners in the Planned Community may be joined.⁵

³ BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

⁴ This statute provides that the Department lacks jurisdiction to hear:

1. Any dispute among or between owners to which the association is not a party.
2. Any dispute between an owner and any person, firm, partnership, corporation, association or other organization that is engaged in the business of designing, construction or selling . . . any property or improvements within a planned community as defined in 33-1802 . . . related to the design, construction, condition or sale of . . . any property or improvements within a planned community.

⁵ The court of appeals issued a supplemental decision in *Scholten* to “grant [defendants’] motion for reconsideration and remand this case for the trial court to fashion the appropriate equitable remedy” in light of defendants’ argument that the remedy requested, that they be enjoined from resubdividing the planned community, was “too burdensome because the site has already been resubdivided, half the lots

THE ATTORNEYS' FEES APPLICATION

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2 6. The Administrative Law Judge allowed the Respondent HOA leave to file an
3 application for attorney's fees and to address the effect of *Semple v. Tri-City Drywall,*
4 *Inc.*⁶ on its application. In that case, the Court of Appeals held that "we do not believe
5 that an administrative agency can be characterized as a court so that a proceeding
6 before it could be called an 'action' for purposes of A.R.S. section 12-341.01" and that
7 "there is no indication that the legislature intended section 12-341.01 to apply to
8 attorney's fees incurred by the prevailing party in an administrative proceeding."⁷

9 7. The HOA does not dispute that *Semple* precludes an award of fees under
10 A.R.S. §§ 12-341.01(A) (relating to an "action arising out of a contract") and 33-1807(H)
11 (relating to an "action brought under this section"). Nonetheless, the HOA argues that,
12 when the Declarant recorded Section 11.3 of the CC&Rs, which allows the prevailing
13 party in "an action arising out of or in connection with this Declaration," "the use of those
14 words were not intended by the declarant to be limited to actions filed in court."

15 8. The HOA argues that, since the CC&Rs were recorded prior to the enactment
16 of A.R.S. §§ 41-2198 to 41-2198.05 and "there was no way that the declarant could
17 have intended that disputes between the Association and owners in the subdivision
18 would be resolved in a non-existent administrative tribunal where the prevailing party
19 was not entitled to an award of its attorneys fees and costs." But the amendments to
20 the CC&Rs were made after the Court of Appeals decided *Semple*. The HOA offers no
21 evidence to support its contention that Global Development in 1985 meant for a
22 member to be liable for attorneys' fees in whatever tribunal a dispute was litigated. The
23 HOA also offers no evidence that, in the subsequent amendments, made after *Semple*
24 was decided, the property owners who voted to approve the amendments meant to

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27 sold, and thirteen homes constructed." 184 Ariz. at 331, 909 P.2d at 398. The Administrative Law Judge
28 notes that the remedy that Petitioner seeks here, that the common areas be returned to their 2003
29 condition, may be similarly burdensome, in addition to affecting the rights of persons who cannot be
30 joined to this administrative proceeding.

⁶ 172 Ariz. 608, 838 P.2d 1369 (App. 1992).

⁷ 172 Ariz. at 611-12, 838 P.2d at 1372-73.

1 affirm Global Development's original intention that they would be liable for attorneys'
2 fees in an administrative proceeding against the HOA.

3 9. A more reasonable inference is that, since Global Development apparently
4 borrowed the language of its CC&Rs from the language of A.R.S. § 12-341.01, that it
5 intended the language to be interpreted consistently with the statute. Neither Global
6 Development nor later property owners reasonably expected the HOA's attorneys' fees
7 to be awarded in a forum in which neither Global Development, the HOA, nor the
8 property owners could imagine finding themselves. If the HOA wishes its CC&Rs to
9 allow for an award of attorneys' fees to the prevailing party in an administrative
10 proceedings brought under A.R.S. § 41-2198, it will need to amend the CC&Rs
11 effectively.⁸

12 **ORDER**

13 Based on the foregoing,

14 **IT IS ORDERED** dismissing Petitioner Lawrence M. Wojtowicz' Complaint
15 against Respondent Voyager at Juniper Ridge Homeowners Association.

16 **IT IS FURTHER ORDERED** denying Respondent's application for attorneys'
17 fees.

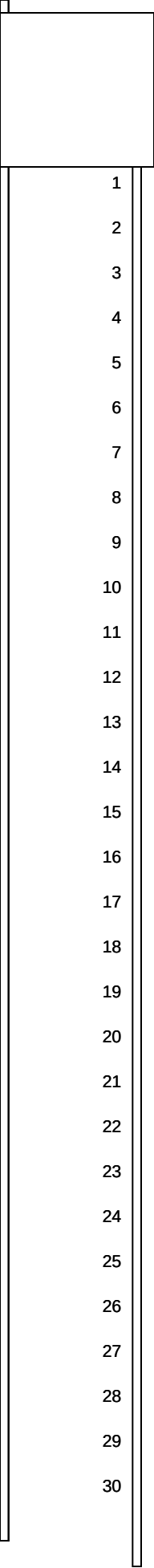
18 Done this day, February 21, 2007.

19 _____
20 Diane Mihalsky
21 Administrative Law Judge

22 Original transmitted by mail this
23 _____ day of February, 2007, to:

24 Department of Fire Building and Life Safety - H/C
25 Robert Barger, Director
26 ATTN: Joyce Kesterman
27 1110 W. Washington, Suite 100
28 Phoenix, AZ 85007

29 _____
30 ⁸ The Administrative Law Judge expresses no opinion on the issue of whether, under *Scholten*, the
CC&Rs can be amended before the year 2015.



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By _____