

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

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3 **ALJFIN ALJ Decision final by statute**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 NANCY WAUGAMAN,

8 Petitioner,

9 vs.

10
11 TROON VILLAGE MASTER
12 ASSOCIATION

13 Respondent.

No. 07F-H067029-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

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16 **HEARING:** July 30, 2007

17 **APPEARANCES:** Nancy Waugaman, Petitioner; Carrie Smith and Jason Smith,
18 attorneys, on behalf of Respondent.

19 **ADMINISTRATIVE LAW JUDGE:** Michael K. Carroll

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22 On April 6, 2007, a Petition was filed with the Department of Fire Building and
23 Life Safety alleging eight separate violations of state statutes or community documents
24 by Respondent.

25 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

26 **Findings of Fact:**

27 (1) Petitioner is a member of Troon Village Master Association (Respondent), a
28 planned community comprised of 1,322 members, which is governed by a Declaration
29 of Covenants, Conditions and Restrictions (Declaration), Articles of Incorporation
30 (Articles) and Bylaws.

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007
(602) 542-9826

1 (2) On October 16, 2006, Respondent's Board of Directors (Board) scheduled a
2 regular meeting. Prior to the time scheduled for the start of the regular meeting, the
3 Board met in executive session with attorneys representing Respondent to discuss a
4 pending lawsuit against Respondent brought by one of the Association's members.

5 (3) During that session, and in an attempt to avoid future legal problems
6 suggested by that lawsuit, the Board also discussed Section 11.02 of the Declaration
7 which sets forth the voting requirements to amend the Declaration.

8 Section 11.02 provides:

9 After the Change Date, the Declaration may be amended by the
10 affirmative vote of Owners holding at least eighty percent (80%) of the
11 total voting power in the Association at a meeting duly called pursuant to
12 the Article and Bylaws for the adoption of the amendment.

13 (4) Following the discussion in executive session, the Board, upon
14 recommendation of its attorneys, passed a Resolution interpreting Section 11.02 to
15 mean that, rather than requiring an affirmative vote of at least 80% of the entire
16 membership of the Association to amend the Declaration, only an affirmative vote of at
17 least 80% of the members voting, either in person or by absentee ballot, at a meeting to
18 amend the Declaration would be required. Because Article 3, Section 3.5 of the Bylaws
19 defines the "quorum" necessary to conduct business at an Association meeting to
20 constitute 10% of the total voting membership in the Association, the effect of this
21 resolution was to reduce the number of affirmative votes necessary to change the
22 Declaration from a minimum of 1058 votes to a minimum of 106 votes.¹

23 (5) The Board based its authority to interpret Section 11.02 of the Declaration on
24 Article 14, Section 14.01 of the Declaration, which provides

25 Interpretation of the Covenants. Except for judicial construction, the
26 Association, by its Board, shall have the exclusive right to construe and
27 interpret the provisions of this Declaration. In the absence of any
28 adjudication to the contrary by a court of competent jurisdiction, the
29 Association's construction or interpretation of the provisions of this
30 Declaration shall be final, conclusive and binding as to all persons and
property benefited or bound by the provisions of this Declaration.

¹ 1058 is 80% of all 1,322 members of the Association; 106 is 80% of 132, or 10% of the members necessary to constitute a quorum at an Association meeting.

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5 (6) Subsequent to the passage of that Resolution, the Board scheduled a
6 Special Meeting for the purpose of a vote to amend the Declaration to (a) eliminate
7 "tract" voting by the Association and its sub-Associations,² (b) eliminate fee
8 assessments for the "tracts," and (c) create staggered terms for members of the Board.
9 Under the new interpretation of Article 11, Section 11.02 announced in the Board's
10 Resolution, all of these proposed amendments to the Declaration passed.

11 (7) Following the passage of the amendments to the Declaration, Petitioner filed
12 a Petition with the Department of Fire Building and Life Safety challenging the legality of
13 the actions taken by the Board to amend the Declaration.

14 **Conclusions of Law:**

15 Although the Petition listed eight separate counts alleging various violations of
16 state law and documents governing the Association, those counts essentially raise four
17 issues:

18 (1) Could the Board pass a Resolution interpreting a provision of the Declaration
19 in executive session?

20 Petitioner argues that the meeting held in executive session was not properly
21 "noticed" as required by A.R.S. §33-1804(C). Petitioner does not dispute that the
22 general meeting scheduled for October 16, 2006 was properly noticed to the
23 membership of the Association. See Respondent's Exhibit 6. She argues, however,
24 that the failure of that notice to include mention of the executive session that took place
25 immediately prior to the open meeting was a violation of notice requirements in A.R.S.
26 §33-1804(C) and Respondent's Bylaws, Section 4.5.

27
28 ² The main Association and several sub-Associations, which comprised the total membership, were each
29 allotted blocks of votes based upon tracts of land that existed in the community, but which could not be
30 sold as improved lots due to various zoning and building restrictions. The association and the sub-
Associations were each assessed membership fees based upon the size of each Association's "tract."
Votes were also allotted to the main Association and the sub-Associations based upon the size of each
Association's "tract."

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4 While, ideally, notice of a regular meeting of the Board would make mention of a
5 planned executive session and the purpose for that session (see, for example,
6 Petitioner's Exhibit KK), there is no specific provision in the documents governing
7 Respondent which requires that such notice be provided, nor does such a requirement
8 exist under A.R.S. Title 33, which governs planned communities. Furthermore, if the
9 subject of the executive session is one for which a closed meeting is authorized under
10 A.R.S. §33-1804A (1)-(4), members of the Association who are not also Board
11 members may be excluded, thus lending little purpose to such a notice. Finally, even if
12 the Board failed to provide notice to the membership regarding a planned meeting in
13 executive session, that failure, in itself, would not invalidate any action taken by the
14 Board at that closed meeting. A.R.S. §33-1804C.

15 Petitioner also alleges that the Resolution passed by the Board in the executive
16 session was not a proper subject for consideration in an executive session and should
17 have occurred with the notice to and the opportunity for discussion by the entire
18 membership of the Association, as required by A.R.S. §33-1804A. As noted above,
19 however, A.R.S. §33-1804A allows meetings to be conducted by the Board in a closed
20 session if, among other things, it involves "legal advice from an attorney for the board or
21 the association." A.R.S. §33-1804A (1).

22 Respondent maintains that the purpose of the executive session was to discuss
23 pending litigation with the Association's attorney, and, in connection with that
24 discussion, obtain legal advice as to how to proceed in the future with respect to some
25 of the issues raised by that lawsuit. Part of the legal advice imparted by the
26 Association's attorney was that the Board should consider adopting the Resolution,
27 which would interpret the voting requirements for amending the Declaration in a manner
28 that would reduce the total number of affirmative votes necessary to effect such
29 amendments. See written settlement agreement marked as Petitioner's Exhibit AAA.
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1 It would appear that the proposal to pass a resolution changing the interpretation
2 of a key voting provision in the Declaration could have been severed from the
3 discussion regarding the pending litigation, and that the proposed resolution could have
4 been presented for consideration by the entire membership of the association outside of
5 the executive session. However, the issue is not whether the Board could or even
6 should have acted differently, but rather whether the Board's failure to do so was a
7 violation of A.R.S. §33-1804A.

8 Given the relationship between the pending litigation and the Board's desire to
9 seek the advice of counsel to avoid such legal entanglements in the future, there has
10 been an insufficient showing by a preponderance of the evidence that the Board was
11 acting outside of the scope of its authority, granted by A.R.S. §33-1804A (1), in
12 discussing and passing the Resolution during the executive session. While statutory
13 exceptions to the open meeting requirement should not be used as a guise by boards to
14 shield important association business from membership scrutiny, in this case there was
15 insufficient evidence to suggest that was the Board's purpose. The discussion with the
16 attorneys regarding how to avoid future problems, which had been identified, to a
17 certain extent, by the pending litigation, was reasonably related to the discussions
18 regarding the pending lawsuit which were clearly the proper subject of a closed board
19 meeting.

20 Furthermore, even if the Board had chosen to conduct a discussion with the
21 entire membership regarding the passage of the Resolution, it still possessed the
22 exclusive right, under Article 14, Section 14.01, of the Declaration, to accept or reject
23 the recommendations of the membership, and to interpret a provision in the Declaration
24 without securing the membership's approval.

25 (2) Is there any limitation on the Board's use of the authority granted by Article
26 14, Section 14.01 to effectively change the manner in which the Declaration can be
27 amended by the Association's membership?

28 Respondent argued that Article 11, Section 11.02 of the Declaration which sets
29 forth the requirements necessary to amend the Declaration was "at least unclear if not
30 completely ambiguous." Respondent further suggested that the drafters of the

1 Declaration anticipated that some of the language used in the Declaration might be
2 “unclear, inconsistent or plain ambiguous.” To avoid the problems inherent in
3 competing interpretations of the Declaration, the drafters included Article 14, Section
4 14.01 to give the Board the exclusive authority to resolve such disputes. See
5 Respondent’s Pre-Hearing Brief, p.5.

6 Although Respondent appears to concede that the Board’s authority under Article
7 14, Section 14.01 is limited to interpretation of only those provisions of the Declaration
8 for which the intent was not clear,³ Section 14.01 does not contain explicit limiting
9 language to that affect. It merely provides that the Board “shall have the exclusive right
10 to construe and interpret the provisions of this Declaration.”

11 Despite the broad language of Section 14.01, however, the limitation that
12 Respondent finds implicit in that section appears justified by a simple dictionary analysis
13 of the terms “construe” and “interpret.” “Construe” means “to analyze the grammatical
14 structure of a clause or sentence so as to determine the use and function of each word,”
15 and “to explain or interpret the meaning” of a clause or sentence.” Similarly, “interpret”
16 is defined a “give the meaning [of something]; to make [something] clear.” See
17 Webster’s Collegiate Dictionary.

18 Implicit in such definitions is the concept that whatever is being analyzed,
19 explained or clarified is something that is not self-explanatory or self-evident. To ignore
20 such an implicit limitation on the authority granted in Section 14.01 would be to suggest
21 that none of the provisions in the Declaration have their intended meaning if the Board
22 simply chooses to ascribe a different meaning to them. Such a broad interpretation of
23 Section 14.01 would, in essence, allow the Board to nullify any provision of the
24 Declaration. That was clearly not the intent of the drafters of the Declaration, nor is it a
25 reasonable interpretation of the exceptionally broad authority suggested by the
26 language of Section 14.01.

27 (3) Was Article 11, Section 11.02 of the Declaration ambiguous or unclear?

28 The pertinent portion of Section 11.02 provides:

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³ Even the Resolution passed by the Board indicated the Board’s wish to “interpret certain provisions of
the Declaration to clarify any ambiguity.” Petitioner’s Exhibit 1.

1 ...the Declaration may be amended by the affirmative vote of owners
2 holding at least eighty percent (80%) of the total voting power in the
3 Association at a meeting duly called pursuant to the Articles and Bylaws
4 for the adoption of the amendment.

5 Petitioner argued that the meaning of Section 11.02 is clear. Respondent argued
6 that Section 11.02 is ambiguous because inclusion of the phrase “at a meeting”
7 suggests that only 80% of the total voting power represented at that meeting would be
8 required to amend a provision of the Declaration. In support of that position,
9 Respondent argued that “The ‘total voting power *at a meeting*’ is quite different from
10 ‘total voting power.’” See Respondent’s Pre-Hearing Brief, p.5. At the hearing,
11 Respondent cited *Aldous v. Intermountain Building and Loan Association of Arizona*, 36
12 Ariz. 225, 284 P. 353 (1930) for the proposition that “It is a cardinal rule of the
13 construction of contracts that some effect is to be given, if possible, to every part
14 thereof.” 284 P. at 355.

15 Applying the principle cited in *Aldous, supra*, to the specific language of the
16 Declaration, Respondent’s interpretation of the pertinent part of Section 11.02 would
17 render the qualifying phrase “in the Association” superfluous. If Respondent’s
18 interpretation were correct, the drafters of the Declaration could have simply stated that
19 an amendment could be accomplished “by the affirmative vote of Owners holding at
20 least eighty percent (80%) of the total voting power at a meeting duly called pursuant to
21 the Articles and Bylaws for the adoption of the amendment.” There would have been no
22 need for the qualifying language “in the Association” unless the drafters intended that
23 80% of the *entire membership of the association* must vote affirmatively to effect an
24 amendment of the Declaration.⁴

25 Respondent argued that, unless Section 11.02 is given the interpretation
26 suggested by the Board’s Resolution, it is virtually impossible to change any provision of
27 the Declaration even when necessary to account for changes that may arise due to the

28 ⁴ Although Respondent, through counsel, argued that “total voting power” referred to only those
29 members represented at a meeting called to amend the Declaration, the actual wording of the Board’s
30 Resolution interpreted the language of 11.02 “to mean that, to amend the Declaration, Owners holding at
least eighty percent (80%) of the votes *that are cast*, in person or by absentee ballot, at a meeting duly
called, pursuant to the Articles and Bylaws, must vote to affirm the amendment.” Petitioner’s Exhibit 1.

1 passage of time, or changes in law, circumstances, etc. In fact, the former Board
2 president testified at the hearing that there had been four different attempts to amend
3 the Declaration since 2005. However, despite overwhelming community support for
4 those proposed amendments, they were unsuccessful because, prior to the Resolution,
5 Section 11.02 had been interpreted by the Board to require an affirmative vote of 80%
6 of the entire membership in the Association. He explained that, because of the difficulty
7 in getting 80% of *all* the owners to even vote in an election to amend the Declaration,
8 much less getting an 80% *affirmative* vote, changes to the Declaration, even though
9 deemed advisable and even necessary by the vast majority of the members of the
10 Association, were virtually impossible.

11 Although testimony at the hearing made for a compelling argument that
12 homeowner associations should be wary of making the ability to amend their governing
13 documents too strenuous, it does not obviate the fact that the existing Declaration
14 represents a contract between the Association and its 1,322 members – a contract upon
15 which each of those individual owners had a right to rely. Furthermore, the Board's
16 "interpretation" of Section 11.02 had the effect of allowing as few as 106 members of
17 the association to make significant changes to the contract governing all 1,322 of its
18 members. That was a dramatic change from the Board's belief, prior to the passage of
19 the Resolution, that an affirmative vote of at least 1,058 members of the Association
20 would have been necessary to amend the contract which governed all the Association's
21 members

22 Article 11, Section 11.02 of the Declaration was not ambiguous on its face. Its
23 meaning was clear, even to the Board prior to October 16, 2006. It was not a proper
24 subject for interpretation under Article 14, Section 14.01, and the Resolution changing
25 the interpretation of Section 11.02 was an invalid exercise of the Board's authority under
26 the Declaration.

27 (4) Did Respondent deny Petitioner a copy of the Association's mailing list in a
28 "workable format?"

29 At the hearing, Petitioner testified that Respondent originally responded to her
30 request for a copy of the Association's mailing list by providing her with the information

1 in a "spreadsheet" format, rather than in a "label" format used by Respondent. Although
2 the information was ultimately provided to Petitioner in a "label" format prior to the
3 hearing, Petitioner nevertheless maintained that Respondent's initial failure to provide
4 the "label" format was a violation of A.R.S. §33-1805.

5 There is nothing contained in either the documents governing the Association or
6 A.R.S. §33-1805 which requires the Respondent to provide information to members in a
7 specific format. A.R.S. §33-1805A simply provides that "all financial and other records
8 of the association shall be made reasonably available for examination by any
9 member..." That statute also requires an association to provide photocopies of records
10 to members if requested. However, the association may charge a fee of not more than
11 \$0.15 per page for photocopies.

12 **ORDER**

13 Based upon the foregoing,

14 **IT IS ORDERED** vacating the Board's Resolution of October 16, 2006, by which
15 the Board interpreted the meaning of Article 11, Section 11.02 of the Declaration.

16 **IT IS FURTHER ORDERED** vacating any amendments to the Declaration,
17 passed after the Board's Resolution of October 16, 2006, and which were based upon
18 the affirmative votes cast by 80% of the members, either in person or by absentee ballot
19 at a meeting called for the purpose of amending the Declaration.

20 **IT IS FURTHER ORDERED** that Respondent shall reimburse the filing fee paid
21 by Petitioner in the amount of \$2,000.00.⁵

22 Done this day, August 13, 2007.

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25 _____
26 Michael K. Carroll
27 Administrative Law Judge
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30 _____
⁵ Pursuant to A.R.S. §41-2198.04(A) this Order is the final administrative decision and is not subject to a request for rehearing.

1 Original transmitted by mail this
2 _____ day of _____, 2007, to:

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

9 Nancy J. Waugaman
10 25924 North 115th Way
11 Scottsdale, AZ 85255

12 Carrie H. Smith Esq.
13 Jason Smith, Esq.
14 Carpenter, Hazelwood, Delgado & Wood, PLC
15 1400 E. Southern Ave, Suite 640
16 Tempe, AZ 85282-8010

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18 By _____
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