

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 THOMAS HEEKIN,

8 Petitioner,

9
10 vs.

11 THE COTTAGE AT COFFEE POT
12 HOMEOWNERS ASSOCIATION,

13 Respondent

No. 07F-H067033-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

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17 **HEARING:** August 27, 2007

18 **APPEARANCES:** Frederick M. Aspey, an attorney, on behalf of Petitioner;
19 Armistead Gilliam and Charles Nyberg, on behalf of Respondent

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

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23 On April 20, 2007, a Petition was filed with the Department of Fire, Building and
24 Life Safety, alleging that Respondent adopted Bylaws which violated the Declaration of
25 Covenants, Conditions and Restrictions of The Cottages at Coffeepot Homeowners
26 Association ("Declaration").

27 **FINDING OF FACT AND CONCLUSIONS OF LAW**

28 **Findings of Fact:**

29 (1) Petitioner owns a residence at a planned community called The Cottages at
30 Coffeepot, in Sedona, Arizona ("The Cottages").

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1 (2) The Cottages consists of individual townhouses constructed on 34 lots.
2 Owners of those lots are members of The Cottages at Coffeepot Homeowners
3 Association ("Respondent"). Each lot represents one membership in Respondent, and
4 entitles the owner(s) to one vote in any business of Respondent that is subject to a vote
5 of the membership.

6 (3) Respondent is governed by a Board of Directors consisting of nine members
7 ("Board"), and the Board is governed by the Declaration, Articles of Incorporation of The
8 Cottages at Coffeepot Homeowners Association ("Articles"), and Bylaws of The
9 Cottages at Coffeepot Homeowners Association ("Bylaws"). Exhibits P1, P2 and P3.

10 (4) At the annual meeting of the Board, in April, 2005, there was a discussion in
11 which one of Respondent's members informed the Board that he was a member of an
12 association that required purchasers of homes in the association to pay a 2% fee on the
13 sales price of the home to help fund upkeep and maintenance of the association's
14 property. Following a discussion of this idea, "the members approved this approach for
15 the cottages and instructed the Board to pursue the matter and explore what level might
16 be appropriate as a fee for new buyers." See Minutes of Meeting, April 30,2005, Exhibit
17 R17.

18 (5) At a regular Board meeting held November 30, 2005, there was a discussion
19 of the need "for increased funding for association operations and capital improvements."
20 After that discussion, the Board voted to increase the quarterly fee "for operations" to
21 \$210, and the quarterly fee for "capital improvements" to \$35. See Minutes of Meeting,
22 November 30, 2005, Exhibit R18.

23 (6) Later, during that same meeting, the Board discussed the need for "funds for
24 operations, capital improvements and contingencies beyond the increased funding
25 provided from quarterly increases to lot owners." Following that discussion, "the
26 previously approved lot Buyer's Assessment of .5% was increased to 1% per lot sale."
27 Exhibit R18.

28 (7) On April 9, 2006, the Board's president sent a letter to Respondent's
29 members in which he informed them that proposed changes to the Declaration would be
30 discussed at the annual meeting scheduled for April 29, 2006. He also announced that

1 a special meeting would be held immediately after the conclusion of the annual meeting
2 for the express purpose of voting on the proposed amendments to the Declaration.
3 Enclosed in that letter were absentee ballots for both the election of the Board at the
4 annual meeting, and also for the proposed amendments to the Declaration. Exhibit
5 R20.

6 (8) There were separate ballots for each of the four proposed changes to the
7 Declaration. Each of the ballots is summarized below.

8 A. Amend the required percentage of members voting to change the
9 Declaration from 75% to 66²/₃%;

10 B. Amend the definition of "Special Assessment, " in Section 1.2.2 of the
11 Declaration, to include an "amount to be paid by a successive new
12 member upon the sale exchange or other change of ownership of any kind
13 or form from a particular member to a new member." The amendment
14 also included changes in Section 5.4 of the Declaration, to allow "Special
15 Assessments" to be levied against "a successive new Member and his lot,
16 at the time of the sale, exchange, or other change of ownership of any
17 kind or form from a particular member to a successive new member
18 except in the case of succession of a new member and his lot by
19 inheritance or by will..."

20 C. Add a section to the Declaration which would limit the "authority and
21 discretion" of the architectural Design Review Committee to approve only
22 plans which do not involve any change in the original design of any
23 Cottage "by new construction, add-on construction or modifications to the
24 original building envelope or the foundation on which the structure was
25 originally constructed."

26 D. Revoke the right of members to vote by proxy.

27 See Exhibit R22.

28 (9) On April 27, 2006, two days before the scheduled vote to amend the
29 Declaration, the Board held a meeting at which it voted to add a provision to
30 Respondent's Bylaws, designated Article X, which prohibited the Design Review

1 Committee from approving a change in “the outside dimensions of any cottage...by new
2 construction, add-on construction or modifications to the original building envelope or
3 foundation on which the cottage was originally constructed.” Exhibit R21.

4 (10) On April 29, 2006, after tabulating the votes for the proposed amendments
5 to the Declaration, the Board determined that there were not enough votes to reduce
6 the voting requirements in Section 17.2 of the Declaration from 75% to 66 $\frac{2}{3}$ %. Since
7 that amendment did not pass, there were insufficient votes to pass the three remaining
8 amendments to the Declaration. Exhibit P8.

9 (11) On May 12, 2006, the Board held a meeting at which there was a
10 discussion of the need to increase the awareness of members, realtors, title companies
11 and lenders regarding the 1% assessment on the sales price of units sold at the
12 Cottages. Following that discussion, the Board voted to adopt a new Bylaw, designated
13 Article XI, to require all new owners to pay a “Special Assessment” of “1% of the
14 transaction price between existing and new lot owners,” except in the case of a new lot
15 owner obtaining ownership of his or her lot by inheritance or by will. Exhibit P7.

16 (12) On January 4, 2007, the Board president sent a letter to Respondent’s
17 members which, among other announcements, included the following:

18 Five cottages changed ownership during 2006. All of the sales were at
19 substantial increases over the purchase prices. Thanks to the members
20 vote in 2005 to add a one percent *buyer’s assessment* onto the purchase
21 price for each transaction a significant addition was made during 2006 to
22 our treasury. *Without this addition the need to increase the annual dues
23 or to impose a special maintenance assessment on each homeowner
24 would have been necessary. As of now the dues will remain the same for
25 the upcoming year.*

26 Exhibit P10. Emphasis added.

27 (13) In April, 2007, Petitioner filed this Petition challenging the Board’s authority
28 to adopt Articles X and XI of the Bylaws. He claimed that the Board’s action effectively
29 amended the Declaration by a simple majority vote of the Board rather than by a 75%
30 vote of the membership required under Section 17.2 of the Declaration.

Conclusions of Law:

1 The facts are not in dispute. The sole issue is whether the Board has the
2 authority to pass Bylaws which (1) impose a 1% assessment on the sale of a member's
3 lot, and (2) limit the authority of the architectural design committee to approve any
4 change to a structure which expands the foundation on which a residential unit was
5 originally constructed.

6 Petitioner argues that the Board's adoption of the two new Bylaws accomplished
7 indirectly what it was prohibited from doing directly as a result of the membership vote
8 defeating the passage of the amendments to the Declaration. Those defeated
9 amendments contained the identical language of the newly adopted Bylaws. Petitioner
10 claims that the Board's action circumvented the will of the membership and was a
11 breach of its duty to engage in fair dealing and act in good faith towards Respondent's
12 members.

13 Respondent argues that there is nothing in the Declaration, Articles or Bylaws
14 which prohibits the action the Board took in amending the Bylaws. In support of its
15 argument, Respondent cites A.R.S. §10-3302, which provides that, in the absence of a
16 prohibition in the Articles of Incorporation, every non-profit corporation, such as
17 Respondent, has the power to "impose dues, assessments, admission and transfer fees
18 on its members."

19 Respondent further argues that under Article VIII, Section 8.1 of the Bylaws, the
20 Board is empowered to alter, amend, repeal or adopt new Bylaws. Once the Board
21 adopts a new Bylaw, that provision is valid unless it conflicts with any provision in the
22 Declaration. Bylaws, Article IX, Section 9.1. As additional support for that argument,
23 Respondent refers to Section 3.7 of the Declaration which provides that "The Articles
24 and Bylaws may contain any provisions relating to the conduct of the affairs of the
25 Association and the rights and powers of its directors, officers, employees, agents and
26 Members not inconsistent with law or this Declaration."

27 Finally, Respondent points out that the action of the Board amending the
28 Bylaws, though not supported by 75% of the members needed to amend the
29 Declaration, was nevertheless supported by a clear majority of Respondent's members
30 who voted at the election to amend the Declaration.

1 The first step in resolving this dispute is to analyze the Declaration to determine if
2 either of the challenged Bylaws conflicts with any of its provisions. If there is a conflict,
3 the Declaration controls. Declaration, Section 20.1.

4 With regard to Article XI of the Bylaws, which established the 1% "Special
5 Assessment," on several occasions, both at Board meetings and in written
6 correspondence from the Board to the membership, it was explained that the "Special
7 Assessment" was imposed to fund the upkeep, maintenance of association,
8 contingency funds, and capital improvements to association property. Exhibits R14,
9 R17, R18, R22, R23, R24 and P10. Despite its designation as a "Special Assessment,"
10 the revenue derived from that Special Assessment was clearly intended by the Board to
11 apply to, and, in fact, was applied to costs normally paid from Respondent's "Regular
12 Assessments." See Exhibit P10.

13 Section 1.2.1 of the Declaration provides that "'Regular Assessment' means the
14 amount which is to be paid by each Owner as such Owner's Proportionate Share of the
15 Common Expenses of the Association, as provided in Section 5.3." The term "Common
16 Expenses" is defined in Section 1.8 of the Declaration as

17 "the actual and estimated costs incurred by the Association in
18 administering, maintaining and operating the Project, including, without
19 limitation, the following: (a) maintenance, management, operation, repair,
20 and replacement of the Common Areas, and all other areas on the Project
21 which are maintained by the Association...(g) reasonable reserves for
22 contingencies, repairs, replacements, and other proper purposes as
23 deemed appropriate by the Association...(o) costs of security gates...(q)
24 any other costs incurred by the Association...(excepting reconstruction
25 costs and capital improvement costs, which are otherwise provided for
26 herein)...

27 Under Section 5.6 of the Declaration, "*The Regular Assessments, Capital*
28 *Improvement Assessments, and Reconstruction Assessments for each owner shall be*
29 *uniform.*" Emphasis added. Section 5.6 *prohibits* assessing individual owners
30 differently for the purpose of raising revenue to cover those costs which are to be
funded by "Regular Assessments" and "Capital Improvement Assessments."

The 1% fee on the sale of each property not only assesses members
disproportionately as a result of the varying sales prices of the units, the fee applies *only*

1 to those actually buying and selling units, and is not assessed at all if the unit is
2 acquired through an inheritance. In essence, only those members buying or selling
3 their lot are forced to subsidize costs which, under the explicit terms of the Declaration,
4 are to be shared by all of Respondent's members equally.

5 Notwithstanding the name attached to it by the Board or the mechanism of its
6 adoption, Article XI of the Bylaws violated Section 5.6 of the Declaration, and is invalid.

7 Similarly, Article X of the Bylaws, which prohibited any changes to the original
8 concrete footprint of each unit, is contradictory to Section 10 of the Declaration which
9 gives the authority to the Architectural Design Review Committee to approve or
10 disapprove changes to a unit. Declaration, Section 10.4. More importantly, Section
11 10.2.2 of the Declaration vests the power to designate the maximum developable area
12 of any lot in the Design Review Committee.

13 There is nothing in the Declaration which prohibits the Design Review Committee
14 from establishing a design guideline, under Sections 10.2 and 10.2.2 of the Declaration,
15 which accomplishes precisely what the Board was attempting to achieve by adopting
16 Article X of the Bylaws. Furthermore, given the fact that testimony at the hearing
17 revealed that the present Design Review Committee is comprised only of current Board
18 members, such a result is a strong likelihood.

19 However, the *authority* granted to the Design Review Committee in the
20 Declaration cannot be negated by the adoption of a Bylaw. As pointed out above, the
21 Declaration controls over any Bylaw which conflicts with any provisions of the
22 Declaration. Additionally, Section 18.5 of the Declaration provides that "unless
23 otherwise expressly provided in this Declaration, no change of conditions or
24 circumstances shall operate to extinguish, terminate, or modify any of the provisions of
25 this Declaration." The Board's adoption of Article X in the Bylaws extinguishes the
26 authority given to the Design Review Committee, under Section 10.2.2 of the
27 Declaration, to designate the maximum developable area of any lot.

28 It makes logical sense that the language in Section 10.2.2 of the Declaration
29 should prevail over that in Article X of the Bylaws, notwithstanding the practical realities
30 associated with the current makeup of the Board. The Board will eventually change

1 membership, the Association will ultimately change character over time, and there may
2 come a time when the prevailing sentiment of the members is that they should at least
3 maintain the right to submit plans for approval which are not limited by the narrow
4 dictates of Article 10 of the Bylaws. And, although that Bylaw could easily be changed
5 or repealed by future Board action, under Section 8.1 of the Bylaws, it currently conflicts
6 with specific terms of the Declaration, and, as such, violates the contract made between
7 each member and Respondent at the time he or she purchased a unit in the
8 Association. Article 10 of the Bylaws is invalid.

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11 **ORDER**

12 Based upon the foregoing,

13 **IT IS ORDERED** vacating the Board's action of April 27, 2006, adopting Article X
14 of the Bylaws.

15 **IT IS FURTHER ORDERED** vacating the Board's action of May 12, 2006,
16 adopting Article XI of the Bylaws.

17 **IT IS FURTHER ORDERED** that Respondent shall reimburse the filing fee paid
18 by Petitioner in the amount of \$550.¹

19 Done this day, August 30, 2007.

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22 _____
23 Michael K. Carroll
24 Administrative Law Judge

25 Original transmitted by mail this
26 ____ day of _____, 2007, to:

27 Department of Fire Building and Life Safety - H/C
28 Robert Barger
29 ATTN: Joyce Kesterman

30 _____
¹ 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. It is enforceable through contempt of court proceedings. A.R.S. § 41-2198.02 B.

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By _____