

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 WILLIAM M. BROWN

8 Petitioner,

9
10 vs.

11 TERRAVITA COMMUNITY ASSOCIATION,
12 INC.,

13 Respondent

No. 07F-H067035-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

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17 **HEARING:** August 9, 2007

18 **APPEARANCES:** William M. Brown, Petitioner; Kristina L. Pywowarczuk and
19 Lynn M. Krupnik, attorneys, on behalf of Respondent.

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

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23 On May 18, 2007, a Petition was filed with the Department of Fire, Building and
24 Life Safety alleging that three of the members of Respondent's Board of Directors
25 ("Board") had been elected pursuant to a proxy, in violation of A.R.S. §33-1812.

26 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

27 **Findings of Fact:**

28 (1) Terravita Community Association ("Respondent") is a planned community
29 consisting of 1,380 homes and residential lots. It is governed by a Declaration of
30 Covenants, Conditions, and Restrictions for Terravita ("Declaraton"), Articles of

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1 Incorporation of Terravita Community Association (“Articles”), and By-Laws. Exhibits
2 R2, R3 and R4.

3 (2) Respondent is divided into 22 distinct geographic neighborhoods, each of
4 which elects a “delegate” who represents the members living in that neighborhood at
5 elections for members of the Board. Declaration, Article III, Sections 3.3 and 3.4.

6 (3) Each neighborhood votes annually for the election of one “voting delegate”
7 and “one alternate voting delegate.” The voting delegates and alternate voting
8 delegates are elected by the majority of the members living within that neighborhood,
9 and each member is entitled to one vote per lot owned in that neighborhood for each
10 delegate position. Declaration, Article III, Section 3.4(b).

11 (4) Once elected, the voting delegate, or the alternate delegate, may cast its
12 vote in all elections, including elections for members of the Board, as that voting
13 delegate “deems appropriate in its sole discretion.” Declaration, Article III, Section 3.3
14 (c) and 3.4 (b).¹

15 (5) Petitioner is a lot owner and member of the Terravita Community
16 Association. As a lot owner, he is entitled to one vote for each lot he owns in the
17 community. Like all other members of the Terravita Community Association, his voting
18 rights are limited, except where the Declaration specifically provides otherwise, to the
19 selection of a voting delegate and alternate voting delegate from his neighborhood, who
20 then casts one vote on behalf of the neighborhood whenever a vote is called by
21 Respondent.

22 (6) On May 15, 2007, Respondent held an election for three positions on its
23 Board. The three new Board members were elected by neighborhood voting delegates
24 in accordance with the procedures outlined in Article III, Section 3.4 (b) of the
25 Declaration. At that election, 18 of the voting delegates from the 22 neighborhoods cast
26 votes for new Board members on behalf of 1,094 members in the Association.

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¹ Apparently, the only exceptions to this unlimited discretion are (1) a vote to institute litigation, (2) a vote
30 to impose a Special Assessment in excess of limitations set forth in the Declaration, (3) a vote to amend
the Declaration, and (4) a vote to terminate a management agent. See Declaration, Article III, Section
3.4 (b).

1 (7) Following that election, Petitioner filed the Petition in this case challenging
2 the election on the basis that the neighborhood voting delegate system was a “proxy”
3 vote prohibited by A.R.S. §33-1812.

4 **Conclusions of Law:**

5 There is no dispute regarding the facts in this case. The only issue raised by the
6 Petition is whether a “delegate” form of representative government for a homeowners’
7 association violates the prohibition against the use of proxy voting in A.R.S. §33-
8 1812A.

9 Arizona Revised Statutes §33-1812 A provides:

10 Notwithstanding any provision in the community documents, after
11 termination of the period of declarant control, votes allocated to a unit may
12 not be cast pursuant to a proxy. The association shall provide for votes to
13 be cast in person and by absentee ballot and may provide for voting by
14 some other form of delivery.

15 Respondent argues in its Memorandum of Law (“Memorandum”) that voting
16 “delegates” are not “proxies.” Citing distinctions made in the Arizona Nonprofit
17 Corporation Act, A.R.S. §10-3101, *et seq.*, Respondent argues that “the use of proxies
18 is a form of vote *delivery*, while the use of delegates is a form of corporate *governance*.”
19 Memorandum, pp. 3-4. Emphasis added.

20 Black’s Law Dictionary, Eighth Edition, 2004, defines “proxy” as “one who is
21 authorized to act as a substitute for another.” Respondent’s Declaration defines “voting
22 delegate” as “The representative selected by the Members responsible for casting the
23 votes attributable to Lots in the Neighborhood on matters requiring a vote of the
24 membership.” Declaration, Article I, Section 1.44. By definition, “delegates” are
25 authorized to act as substitutes for a group of association members with respect to
26 voting on association matters which require a vote of the members. That is a proxy.
27 Furthermore, it is a unique form of proxy that removes the customary rights that a voter
28 would otherwise retain with the more traditional form of proxy.

29 As Respondent points out in its Memorandum, a proxy is *revoked* in non-profit
30 corporation elections when the member either appears at the election or executes a
written revocation of the proxy. A.R.S. §10-3724F. In contrast, members of an

1 association with a delegate voting system have no ability to exercise their individual
2 election preferences or revoke the delegation of their vote to the voting delegate once
3 the delegate is elected to that position.²

4 Respondent acknowledges that the Arizona Legislature's motivation in prohibiting
5 votes by "proxy" was to minimize the possibility of fraud and abuse inherent in an
6 association election that allows votes to be cast by a person other than the member
7 who possesses the right to that vote. Respondent argues, however, that such potential
8 abuses do not exist in a delegate voting system because (1) unlike proxies, the
9 delegate voting system does not create the opportunity to forge signatures, and (2)
10 delegates "form a 'representative assembly' on behalf of the member groups" and,
11 therefore, the delegate voting system differs from the situation in which a single proxy
12 can cast a "controlling bloc of votes in an election."³ See Memorandum, pp. 7-8.

13 Notwithstanding Respondent's attempt to distinguish proxies from delegate
14 voting, not even proxies create as much potential for abuse as the delegate voting
15 system. Respondent's delegate voting system essentially disenfranchises all but 22 of
16 Respondent's 1,380 members in Board elections.⁴ Proxies could rarely, if ever,
17 achieve such a dramatic deprivation of an association membership's right to vote.
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21 ² Under Article III, Section 3.4(b) of the Declaration, a voting delegate may only be removed during his or
22 her one-year term upon the vote or written petition of a majority of the votes attributable to lots in the
23 neighborhood represented by that delegate.

24 ³ It is difficult to understand Respondent's argument regarding the delegate's inability to cast "a
25 controlling bloc of votes in an election." Casting a "bloc of votes in an election" appears to be the
26 essence of the delegate voting system. Furthermore, delegates are not required to vote in accordance
27 with the interests of the member group they represent. In fact, Article III, Sections 3.3 (c) and 3.4 (b) of
28 the Declaration make it clear that an elected delegate has *no* obligation to cast its votes in accordance
29 with the wishes of the majority of the owners living in the delegate's neighborhood.

30 ⁴ The Bylaws provide for the election of the members of the Board by a majority vote of the voting
delegates. Bylaws Article III, Section 3.5(c). Since there are 22 voting delegates, as few as 12 votes can
elect a Board member. Since a quorum is established whenever there are a sufficient number of voting
delegates present to represent a majority of the total votes in the Association, fewer than 12 votes could
potentially elect a Board member. In the May 15, 2007 Board election, all but 18 of the 1,380 members
were effectively disenfranchised. Taken to the extremes permitted by Respondent's governing
documents, even if a candidate for the Board were *opposed* by 1,367 of Respondent's members, 12
delegates could override that opposition and elect that candidate to the Board. The political reality of
such a system is that a prospective Board member need only convince 12 delegates out of 1,380 total
members of the association that he or she is the best candidate.

1 The irony of Respondent's claim that the voting delegate system is not a proxy is
2 best demonstrated by the argument set forth in Section 4D of its Memorandum, in which
3 Respondent states:

4 The heart of Petitioner's claim appears to be that delegates are
5 proxies for purposes of A.R.S. §33-1812 and that the Association violated
6 the statute by using delegates at the May 15, 2007 Board election. By
7 definition, however, a proxy vote can only be cast on behalf of one who
8 has the right to vote. Under the Association's governing documents,
9 owners from distinct geographical units elect delegates to represent their
10 interests, *but only those delegates have the right to vote for members of*
11 *the Board*. Citations omitted. For purposes of Board elections, owners
12 have no right to vote and thus no vote that could be cast pursuant to a
13 proxy or any other form of delivery (such as in person or by absentee
14 ballot) under A.R.S. §33-1812.

15 Reduced to its essence, Respondent argues that the individual association
16 members were incapable of violating the prohibition against the use of proxies in A.R.S.
17 §33-1812 A because the Declaration precludes their right to vote at all. As a corollary to
18 that argument, Respondent's Bylaws prohibit voting delegates, the *only* members
19 eligible to vote in Board elections, from voting by proxy. Bylaws, Article II, Section 2.9.

20 Respondent's argument in Section 4D of the Memorandum suggests that the
21 Legislature's prohibition against the use of proxies could be circumvented by simply
22 creating a system that transfers the voting rights of 1,380 association members to a
23 handful of delegates who are technically in compliance with the statute because those
24 delegate votes are not cast pursuant to a proxy. Surely the Legislature did not intend
25 such a result when it enacted A.R.S. §33-1812A.

26 Respondent also argues that prohibiting delegate voting would be an
27 unconstitutional impairment of the contractual rights of the Association and its Members.
28 Setting aside the obvious fact that an association's governing documents are hardly
29 products of the typical give-and-take contract negotiation that ordinarily occurs between
30 a buyer and seller, it is nevertheless difficult to argue that a ruling that *expands* a
member's right to participate in his association *impairs* the contractual rights of either
the association or its members. The association *is* its members. The association and
its members both possess the same rights and, presumably, the same interests. How

1 could those rights and interests be compromised by requiring important association
2 decisions to be based on a vote of all of its members?

3 Respondent's attempt to differentiate the delegate voting system from the use of
4 proxies is a classic "distinction without a difference." The voting delegates were
5 "proxies," and, as such, violate the clear language and intent of A.R.S. §33-1812A.
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8 **ORDER**

9 Based upon the foregoing,

10 **IT IS ORDERED** that Respondent abide by A.R.S. §33-1812A, which prohibits
11 votes cast pursuant to a proxy.

12 **IT IS FURTHER ORDERED** that Respondent reimburse the filing fee paid by
13 Petitioner in the amount of \$550.⁵
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15 Done this day, September 6, 2007.
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17 _____
18 Michael K. Carroll
19 Administrative Law Judge

20 Original transmitted by mail this
21 ____ day of _____, 2007, to:

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

27 Lynn M Krupnik
28 Quentin T. Phillips
29 Kristina L. Pywowarczuk
30 Ekmark & Ekmark, LLC
6720 N. Scottsdale Road, Suite 261

⁵ Pursuant to A.R.S. §41-2198.04A, this Order is the final administrative decision and is not subject to a request for a rehearing. It is enforceable through contempt of court proceedings pursuant to A.R.S. §41-2198.02B.

1 Scottsdale, AZ 85253
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