

Final agency action regarding decision below:

ALJFIN ALJ Decision final by statute

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

ELMER BITTNER,

Petitioner,

vs.

GREENFIELD GLEN HOMEOWNERS ASSOCIATION,

Respondent.

No. 08F-H088018-BFS

ADMINISTRATIVE LAW JUDGE
DECISION

HEARING: August 13, 2008.

APPEARANCES: Elmer Bittner appeared personally. The Greenfield Glen Homeowners Association was represented by its attorneys, Franklyn D. Jeans, Esq. and Nicole S. Cassett, Esq.

ADMINISTRATIVE LAW JUDGE: Brian Brendan Tully

Based upon the evidence of record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

- 1. Pursuant to A.R.S. §41-2198.01(B), the Arizona Department of Fire, Building and Life Safety ("Department") is authorized to receive Petitions in disputes between homeowner associations and its members.

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

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- 2. Such Petitions received by the Department are forwarded to the Office of Administrative Hearings, an independent agency, for formal hearing.
- 3. Greenfield Glen Homeowners Association (“Respondent”) is located in Mesa, Arizona.

- 1 4. Respondent's powers are subject to its governing documents.
- 2 5. Elmer Bittner ("Petitioner") is the owner of 1021 S. Greenfield Road, Unit 1003,
- 3 Mesa, Arizona. Petitioner's residence is within the boundaries of Respondent.
- 4 6. Petitioner filed a single issue Petition with the Department against Respondent.
- 5 The Petition alleges the following:

6
7 On or about March 22, 1988 specify date, the Respondent
8 committed the following act, or specifically failed to act in the
9 following manner, or caused the following condition to occur:

10 Changed common element dues amount from equal to higher rate
11 of \$70.58 for 2-car garage units vs. \$57.75 for 1 car garage units, in
12 violation of the following provisions of the condominium or planned
13 community documents and/or A.R.S. § Title 33, Chapter 9
14 (condominium) or A.R.S. Title 33, Chapter 16 (planned community).

15 Please specify the subsection: 1985 Declaration 85-0455873,
16 pages 5/34, 9/7; 1962 Horiz. Property Regime Article 1, Chptr 4.1,
17 Sections 31/32.4, 33-551/68 & 33-553/3 & 6; and A.R.S. 33-1217,
18 and 33-1255.

- 17 7. Petitioner is the owner of a two-car garage residence.
- 18 8. Although Petitioner had the legal recourse to sue Respondent since March 22,
- 19 1988, he did not do so.
- 20 9. The Administrative Law Judge ruled that Petitioner's Petition could not address
- 21 issues predating the effective date of A.R.S. § 41-2198, *et seq.*, which became
- 22 effective on September 21, 2006.
- 23 10. The Administrative Law Judge issued an Order which provided, among other
- 24 things, that the "issue in this dispute is a narrow, straightforward one: Did
- 25 Respondent's governing documents give it the authority since September 2006
- 26 to assess Petitioner, the owner of a two car garage, at a rate difference from
- 27 members owning one car garages?"
- 28 11. The Administrative Law Judge's Order further advised the parties that a decision
- 29 would be "based upon a legal analysis of Respondent's governing documents by
- 30 the Administrative Law Judge."

1 12. The following are Respondent's relevant governing documents:

- 2
- 3 a. The Declaration of Horizontal Property Regime and Declaration of
- 4 Covenants, Conditions and Restrictions for Greenfield Glen
- 5 Condominiums, dated August 16, 1985, recorded September 26,
- 6 1985 as document number 85-0455873 in the official records of
- 7 Maricopa County, Arizona.
- 8 b. That certain Amendment to Declaration of Horizontal Property
- 9 Regime and Declaration of Covenants, Conditions and Restrictions
- 10 for Greenfield Glen Condominiums, dated February 7, 1986,
- 11 recorded February 11, 1986 as document number 86-067299 in the
- 12 official records of Maricopa County, Arizona.
- 13 c. That certain Clarification and Amendment Agreement dated August
- 14 7, 1987, recorded August 10, 1987 as document number 87-
- 15 718038 in the official records of Maricopa County, Arizona.
- 16 d. That certain Third Amendment to Declaration of Horizontal Property
- 17 Regime and Declaration of Covenants, Conditions and Restrictions
- 18 for Greenfield Glen Condominiums, dated July 26, 1989, recorded
- 19 August 2, 1989 as document number 89-356851 in the official
- 20 records of Maricopa County, Arizona.
- 21 e. That certain Certificate of Amendment to the Declaration of
- 22 Horizontal Property Regime and Declaration of Covenants,
- 23 Conditions and Restrictions for Greenfield Glen Condominiums,
- 24 dated December 12, 1994, recorded December 15, 1994 as
- 25 document number 94-0872878 in the official records of Maricopa
- 26 County, Arizona.

27 13. The 1987 Clarification and Amendment Agreement added the following

28 language as paragraph 32.6 to the Declaration:

29

30 32.6 Platting of Additional Property. No provision of this Declaration shall prohibit Declarant from platting or replatting from time to time all or any part of the property that may be added to this Declaration and the horizontal property regime established thereby or shall require Declarant to add parcels of any particular shape or size. However, Declarant may not add any property to the Declaration and horizontal property regime unless:

32.6.1 Said property has been platted or replatted to conform to the plat attached hereto as Exhibit "B"; or

32.6.2 The property to be added is platted or replatted so that the total number of platted Units for all property subject to the

1 Declaration (including in the calculation the Units to be located on the
2 property being added) is equal to or less than the aggregate total
3 number of Units shown on Exhibit "B" for all property then subject to
4 the Declaration plus the property being added.

5 No property shall be subject to the Declaration until it is added to the
6 horizontal property regime in the manner described in this paragraph
7 32.

8 Furthermore, the share of Common Expenses described in paragraph
9 7 to be borne by each Unit hereafter added to the Declaration shall be
10 equal to the pro rata portion of the Common Expenses that would have
11 been borne by all of the Units on the property being added had said
12 property been platted in conformance with Exhibit "B." For example, if
13 property shown on Exhibit "B" as having 21 Units were to be added to
14 the Declaration after being replatted to shown 14 Units thereon and if
15 the Common Expenses for each of said 21 Units would have been
16 \$10.00 had the property been platted in conformance with Exhibit "B,"
17 then the Common Area expenses borne by each of the 14 added Units
18 would be equal to \$210.00 divided by 14 which is \$15.00. The
19 numbers used in the preceding sentence are intended only to illustrate
20 the method of calculating assessments for Common Expenses for
21 Units added and are not intended to reflect the actual number of Units
22 to be added at any time or the actual dollar amount of assessments for
23 any Units.

24 14. In Section II of its Answer to the Complaint, Respondent admits to the following:

25 While Petitioner's Claim is not supported by the Declaration or
26 statutory provisions he cites, his Claim is endemic of a problem faced
27 by the Association in applying Section 32/6 of the Declaration. As
28 Petitioner points out, for a number of years, the Association has levied
29 unequal assessments based upon the number of garages spaces in
30 each Unit. However, Section 32.6 does not support this allocation nor
does any other provision in the Declaration. In fact, no one currently
serving on the Board of Directors of the Association or Unit owners
available to the Board can explain what Section 32.6 was intended to
cover or how it was intended to be applied.

In light of the foregoing, the Association's Board of Directors is in
the process of submitting an amendment to the Declaration to the Unit
owners that will bring the Declaration into alignment with past
assessment practice. As the Declaration requires a seventy-five
percent (75%) favorable vote of all Unit owners (voting or not) to
amend its terms, the Board is fearful that the amendment will not
pass. If it does not, then the Board intends to appeal to the Superior

1 Court of Maricopa County to reform the Declaration so that the Board
2 has a clear set of rules with which to make Assessments.

- 3 15. Respondent's governing documents do not authorize it to make unequal
4 assessments to Unit owners based upon whether they have one car garages or
5 two car garages.

6 **CONCLUSIONS OF LAW**
7

- 8
9 1. In adjudicating petitions forwarded to the Office of Administrative Hearings by the
10 Department of Fire, Building, and Life Safety the jurisdiction of Office of
11 Administrative Hearings is limited to adjudicating complaints regarding and
12 ensuring compliance with Title 33, Chapter 16, Arizona Revised Statutes, and the
13 planned community documents of the Respondent Association. This authority is
14 granted by statute, specifically, A.R.S. §41-2198.
15 2. Pursuant to A.A.C. R2-19-119(B), Petitioner has the burden of proof in this matter.
16 The standard of proof is preponderance of the evidence.
17 3. Respondent's governing documents, including paragraph 32.6 of the Declaration,
18 does not give Respondent the authority to impose unequal assessments to Unit
19 owners of one car garages and Unit owners with two car garages.
20 4. The evidence of record supports the issuance of an order directing to abide by its
21 governing documents in future assessments to Unit owners, pursuant to A.R.S. §
22 41-2198.02(A).
23 5. Since Petitioner is the prevailing party in this matter, he is entitled to payment of his
24 filing fee, required by A.R.S. § 41-2198.01, from Respondent, as provided by
25 A.R.S. § 41-2198.02(B).
26

27 **ORDER**
28

29 IT IS ORDERED that Respondent shall abide by its governing documents in future
30 assessments of Unit owners irrespective of the size of a Unit owner's garage, unless and

1 until the governing documents are amended to provide for unequal assessments based
2 upon garage sizes.

3 IT IS FURTHER ORDERED that Respondent shall pay Petitioner his \$550.00 filing
4 fee paid to the Department within 30 days from the date of this Administrative Law Judge
5 Decision and Order.

6 Pursuant to A.R.S. § 41-2198.02(B), this Administrative Law Judge Decision and
7 Order is the final administrative decision and is not subject to a request for rehearing. The
8 Order issued in this matter is enforceable through contempt of court proceedings.

9 Done this day, September 2, 2008

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Brian Brendan Tully
13 Administrative Law Judge

14
15 Original transmitted by mail this
16 ____ day of _____, 2008, to:

17
18 Robert Barger, Director
19 Department of Fire Building and Life Safety - H/C
20 ATTN: Debra Blake
21 1110 W. Washington, Suite 100
22 Phoenix, AZ 85007

23 Elmer Bittner
24 1021 South Greenfield Road, Unit 1003
25 Mesa, AZ 85206

26 Franklyn D. Jeans, Esq.
27 Nicole S. Cassett, Esq.
28 Beus Gilbert, PLC
29 4800 North Scottsdale Road, Ste. 6000
30 Scottsdale, AZ 85251-7642

By _____

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