

Final agency action regarding decision below:

ALJCERT ALJ decision certified as final

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

JOSEPH DEBENEDICTIS
Petitioner,

VS

SUNRISE DESERT VISTAS POA,
Respondent.

No. 12F-H1212005-BFS

**ADMINISTRATIVE LAW JUDGE
DECISION**

FINDINGS OF FACT

1. The Department of Fire, Building and Life Safety (the Department) is authorized by statute to receive Petitions for Hearings from members of homeowners' associations and from homeowners' associations in Arizona.
2. Sunrise Desert Vistas Property Owners Association (Respondent) is an association of homeowners located in Scottsdale, Arizona.¹
3. Joseph DeBenedictis (Petitioner) owned a residence in Sunrise Desert Vistas at all times pertinent herein.
4. On February 29, 2012, Petitioner submitted a Petition to the Department alleging that on or about November 16, 2011, Respondent failed to act with regard to promissory notes repayment.
5. On August 17, 2012, the Office of Administrative Hearings conducted a prehearing conference in this matter. At that time, Petitioner was instructed to identify the statute or provision of the Covenants, Conditions, and Restrictions (CC&Rs) or Bylaws alleged to have been violated by the Respondent's purported failure to repay the promissory note in question.

¹ Respondent maintained it was not a planned community within the definition of Title 33 of the Arizona Revised Statutes and, therefore, was not subject to the jurisdiction of the Office of Administrative Hearings. Based on the analysis set forth in this order, a conclusion on that matter is not necessary.

6. In response, Petitioner identified the following provision of the CC&Rs:

4. Property Owners Association

....

D. The Association shall have the power to borrow and encumber its assets and, in all respects, shall have the powers necessary to carry out its purposes, whether or not specifically set forth herein, including the power to enter into contracts with third parties to perform all or part of its functions, and to hire its own employees to do so. The Association shall have the power to dedicate the roads and grant the easements to the County as shown on the Result of Survey.

Petitioner also identified the following provision of the Bylaws:

ARTICLE IX

Duties and Powers of the Board

....

8. Pay all taxes, special assessments and other assessments and charges which are or would become a lien on Association owned or maintained property.

CONCLUSIONS OF LAW

1. A.R.S. 41-2198.01(B) provides that, “[f]or a dispute between an owner and a . . . planned community association that is regulated pursuant to title 33, chapter 9 or 16, the owner or association may petition the department for a hearing concerning violations of . . . planned community documents or violations of the statutes that regulate . . . planned communities.”

2. Petitioner argued that the “power to borrow” included in the CC&Rs included an obligation to repay. However, the plain language of the CC&Rs grants the Respondent the power to borrow money, which Petitioner alleges occurred. Nothing in the provision of the CC&Rs identified speaks to the repayment of any money borrowed.

3. Petitioner argued that the duty to pay “charges which are or would become a lien on Association owned or maintained property” included the repayment of the promissory note. However, the failure to pay a promissory note does not fall within the meaning of the provision. The promissory note in question is not a tax, special assessment, or other assessment. Furthermore, the promissory note is not a “charge.” Even assuming, *arguendo*, that the promissory note was a “charge,” it is not and would not necessarily become a lien although there exists the possibility that it *may* or *could*

1 become a lien. However, Article IX, Section 8 of the Bylaws does not address what
2 *may* or *could* possibly occur. Rather, it contemplates that the failure to pay taxes,
3 special assessments, and other assessments or charges would result in a lien, which is
4 distinguishable from a promissory note not secured by property, such as in the instant
5 matter.

6 4. Petitioner failed to identify a statute or a provision of the CC&Rs or Bylaws
7 that was violated by Respondent, and thus failed to state of cause of action that can be
8 properly adjudicated by the Office of Administrative Hearings.

9
10 **ORDER**

11 The Petition in this matter is dismissed and no action is required of Respondent.

12
13 *In the event of certification of the Administrative Law Judge Decision by the*
14 *Director of the Office of Administrative Hearings, the effective date of the Order will be 5*
15 *days from the date of that certification.*

16
17 Done this day, September 6, 2012.

18
19 /s/ Tammy L. Eigenheer
20 Administrative Law Judge

21
22 Transmitted electronically to:

23 Gene Palma, Director
24 Department of Fire Building and Life Safety
25
26
27
28
29
30