

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2007-000588-001 DT

03/25/2008

HON. MARGARET H. DOWNIE

CLERK OF THE COURT
S. Bindenagel
Deputy

TERRAVITA COMMUNITY ASSOCIATION
INC

QUENTIN T PHILLIPS

v.

WILLIAM M BROWN (001)
ARIZONA STATE DEPARTMENT OF FIRE
BUILDING AND LIFE SAFETY (001)

WILLIAM M BROWN
6751 E. AMBER SUN DRIVE
SCOTTSDALE AZ 85266
MICHELLE L WOOD

OFFICE OF ADMINISTRATIVE
HEARINGS

RULING MINUTE ENTRY

The court has had this matter under advisement. It now rules as follows.

Factual and Procedural Background

Defendant William M. Brown (“defendant” or “Brown”) is a member of the Terravita Community Association, Inc. (“plaintiff” or “Association”) by virtue of his ownership of real property within the Terravita planned community. The Association is an Arizona non-profit corporation that manages the affairs and maintains the common areas of the community. Terravita is comprised of 1380 homes and residential lots.

On May 15, 2007, the Association held an election for three positions on its Board of Directors (“Board”). For reasons discussed *infra*, the only individuals who could vote in that election were elected neighborhood delegates. Soon after the election, Brown filed a petition

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with the Arizona Department of Fire, Building and Life Safety (“Department”).¹ He claimed that the directors were elected pursuant to proxies, in violation of A.R.S. § 33-1812. Specifically, Brown alleged:

On or about May 15, 2007 . . . the Respondent committed the specific following act, or specifically failed to act in the following manner, or caused the following condition to occur: After termination of the period of declarant control, votes allocated to a unit (Lot) were cast in the association’s election of 3 board members pursuant to a (one or more) proxy . . .

An evidentiary hearing was held on August 9, 2007 at the Office of Administrative Hearings. Thereafter, Administrative Law Judge (ALJ) Michael K. Carroll ruled that the Association had violated A.R.S. § 33-1812(A). The Association subsequently filed a timely complaint for judicial review with this court.

Legal Analysis

The Superior Court has jurisdiction over this appeal pursuant to the Administrative Review Act, A.R.S. §§ 12-901, *et seq.* A.R.S. § 12-910(E) defines the scope of this court’s review:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

No facts are in dispute; purely legal issues are presented. This court reviews the agency’s legal conclusions *de novo*. See *Eastern Vanguard Forex, Ltd. v. Arizona Corporation Comm’n*, 206 Ariz. 399, 79 P.3d 86 (App. 2003) (issues of statutory interpretation are questions of law that are reviewed *de novo*).

A.R.S. § 33-1812 states:

- A. Notwithstanding any provision in the community documents, after termination of the period of declarant control, **votes allocated to a unit may not be cast pursuant to a proxy.**² The association shall provide for votes to be cast in person and by absentee

¹The Department is appearing as a nominal party in these proceedings.

² Emphasis added.

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ballot and may provide for voting by some other form of delivery. Notwithstanding § 10-3708 or the provisions of the community documents, any action taken at an annual, regular or special meeting of the members shall comply with all of the following if absentee ballots are used:

1. The absentee ballot shall set forth each proposed action.
 2. The absentee ballot shall provide an opportunity to vote for or against each proposed action.
 3. The absentee ballot is valid for only one specified election or meeting of the members and expires automatically after the completion of the election or meeting.
 4. The absentee ballot specifies the time and date by which the ballot must be delivered to the board of directors in order to be counted, which shall be at least seven days after the date that the board delivers the unvoted absentee ballot to the member.
 5. The absentee ballot does not authorize another person to cast votes on behalf of the member.
- B. Votes cast by absentee ballot or other form of delivery are valid for the purpose of establishing a quorum.
- C. Notwithstanding subsection A of this section, an association for a timeshare plan as defined in § 32-2197 may permit votes by a proxy that is duly executed by a unit owner.
- D. For the purposes of this section, “period of declarant control” means the time during which the declarant or persons designated by the declarant may elect or appoint the members of the board of directors pursuant to the community documents or by virtue of superior voting power.

A.R.S. § 33-1812(A) does not regulate who can and cannot vote in planned community elections. It merely prohibits proxy voting when votes have otherwise been allocated to individual units or property owners. In the case at bar, no votes for the May 2007 Board election were “allocated to a unit.” Rather, by virtue of Terravita’s governing documents, all votes for that election were allocated to 22 neighborhood delegates.

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Terravita's governing documents divide the community into 22 neighborhood districts. Annually, each neighborhood district elects one "voting delegate" and one "alternate voting delegate." These delegates represent members of their respective neighborhoods at elections for the Board of Directors (and in other capacities not relevant to these proceedings). Members of the community cannot vote individually in these elections, and the elected delegates cast their votes in their sole discretion, as they deem appropriate.

Nothing in the record reflects that any of Terravita's elected delegates cast their votes by proxy in the May 2007 election. A delegate system of governance is not synonymous with a proxy vote. The Arizona Non-Profit Corporation Act³ draws a clear distinction between the two. Compare A.R.S. § 10-3724 (proxies) with A.R.S. § 10-3640 (delegates). A.R.S. § 10-3640 states:

§ 10-3640. Delegates⁴

- A. A corporation may provide in its articles of incorporation or bylaws for delegates that have some or all of the authority of members.
- B. The articles of incorporation or bylaws may set forth provisions relating to:
 - 1. The characteristics, qualifications, rights, limitations and obligations of delegates including the delegates' selection and removal.
 - 2. Calling, noticing, holding and conducting meetings of delegates.
 - 3. Carrying on corporate activities during and between meetings of delegates.

A.R.S. §10-3726 specifically authorizes non-profit corporations to elect directors by delegate votes. It provides:

§ 10-3726. Other methods of electing directors

³ A.R.S. §§ 10-3101, *et seq.*

⁴ A.R.S. § 10-3140(17) defines "delegates" as follows:

"Delegates" means those persons elected or appointed to vote in a representative assembly for the election of a director or directors or on other matters.

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A corporation may provide in its articles of incorporation or bylaws the process for election of directors by members or delegates by any of the following means:

1. On the basis of chapter or other organizational unit.
2. By region or other geographic unit.
3. By preferential voting.
4. By any other reasonable method.

The Association is subject to both the Arizona Nonprofit Corporation Act and the Planned Community Act. Read together, these acts demonstrate that the legislature distinguishes between delegates and proxies and knows how to draw that distinction in its enactments. The legislature has prohibited proxies as a form of vote-casting in planned communities, but not the use of delegates as a form of corporate governance.⁵ The fact that the legislature has exempted planned communities from certain enumerated provisions of the Nonprofit Corporation Act⁶ further demonstrates that other Act provisions apply to communities like Terravita.

Conclusion

It is not the role of the Department or this court to determine whether Terravita's form of governance is good or bad policy. If a sufficient number of Terravita property owners are unhappy with the current system, they can pursue amending the governing documents to establish a more palatable form of governance. Alternatively, they could lobby the legislative branch to outlaw delegate voting in planned communities. Given the existing statutory scheme, however, a court would have to impose its own policy views in order to overturn the May 2007 election.

⁵ A.R.S. § 33-1812 was enacted well after the Arizona Nonprofit Corporation Act. Courts presume that the legislature is aware of existing statutes when it enacts new statutes. *Washburn v. Pima County*, 206 Ariz. 571, 81 P.3d 1030 (App. 2003); *In re Manny*, 211 Ariz. 301, 120 P.3d 1111 (App. 2005).

⁶ See, e.g., A.R.S. § 10-11602, dealing with inspection of records by members. Subparagraph (G) states:

This section does not apply to any corporation that is a condominium as defined in § 33-1202 or a planned community as defined in § 33-1802.

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IT IS ORDERED reversing the final decision of the Arizona Department of Fire,
Building and Life Safety.

IT IS FURTHER ORDERED denying all pending motions filed by the parties.

/s/ Margaret H. Downie
HON. MARGARET H. DOWNIE