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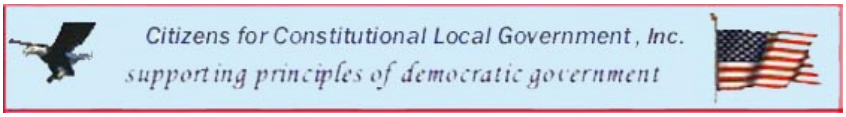
ARIZONA OFFICE OF ADMINISTRATIVE HEARINGS

First Year Case Summaries of HOA Complaints

2006 - 2007



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Case No.: 07F-H067001-BFS

Complaint: violated rights under CC&Rs

Source of Law: Declaration and Amendment

Discussion: The 1987 Declaration superseded the 1971 Declaration. The 1987 Declaration governs, among other things, the "replacement of an existing mobile home." Therefore, it is concluded that Petitioner is subject to the provisions of the 1987 Declaration, which was approved by a majority of the association's homeowners as required by the 1971 Declaration.

Petitioner failed to obtain Committee approval of his proposed replacement of his existing mobile home prior to purchasing it as required by both the 1987 and 1971 Declarations. Respondent did not abuse its discretion to grant Petitioner a hardship variance to the replacement age limitation under the 1987 Declaration.

Holding: Denied petition. Homeowner is subject to new CC&RS.

Additional Remarks: Petitioner sought variance from amended CC&Rs that prohibited replacing mobile homes with homes more than 5 years old. He claimed financial hardship if he had to buy a home 5-years or less.

Ex post facto "laws" are valid in HOAs.

Case No.:

Complaint:

Source of Law: ARS 41-2198.01 relating to OAH authority; declaration and amendments

Discussion: Dismissed; no jurisdiction.

Holding: Because Petitioner Mr. Wojtowicz admitted that his dispute is against the successor in interest to the original developer, Voyager at Juniper Ridge, L.L.C. and its principal N.E. Isaacson, regarding their amendments to the original declarations of Covenants, Conditions, and Restrictions ("CC&Rs") when they took over development of the planned community rather than against Respondent Voyager at Juniper Ridge Homeowners' Association for any alleged violation of valid CC&Rs.

IT IS FURTHER ORDERED allowing Respondent leave to file an application for attorney's fees and costs and affidavit on or before *February 9, 2007*. As the Administrative Law Judge stated on the record, she does not believe that attorney's fees and costs are available as a matter of right to a Homeowners' Association in an administrative proceeding, even if, as here, it prevails on the merits. The statutes and regulations governing procedure in the Office of Administrative Hearings do not provide for counterclaims in this type of proceeding. Respondent has not paid any filing fee or filed any petition for affirmative relief against Petitioner under the CC&Rs, which A.R.S. § 41-2198.01(B) allowed it to do. Moreover, an administrative proceeding such as this one is not an "action" such as to make attorney's fees available under either A.R.S. §§ 33-1807(H) or 12-341.01. The Administrative Law Judge requests Respondent to address these concerns in its application for attorney's fees and costs.

Additional Remarks: The Holding above relates to a third party, the developer and not the HOA. Only complaints against the HOA are permitted.

HOA is not entitled to fees if HOA wins as in civil court case, but attorney must argue why it should be paid fees and costs.

HOA filed a response seeking to declare the new law, ARS 33-2198.01 as unconstitutional and that OAH lacks jurisdiction. OAH replied that constitutional challenges are not within its jurisdiction and must be filed in Superior Court. It further advised parties that OAH "**will not rule of Respondent's constitutional argument**, but merely notes that the argument was properly preserved for purposes of any appeal ..." (An appeal must specify goings on at the trial level, and if an issue was not raised there, it cannot be raised on appeal).

From material provided to me to my petitioner, this seems to be a case where a developer declared himself Declarant, by means of amendments and proceeded to create his own personal fiefdom, solely controlling amendments without member approval, and exempting Declarant from all restrictions.

Original CC&Rs make it clear from its wording that no amendments were permitted until after the initial 30 year period. The amendments violated Arizona law with respect to uniformity of covenants. *La Esparanza Town Home Association, Inc. v. Title Security Agency of Arizona*, 142 Ariz. 235, 689 P.2d 178 (App. 1984).

Finally, petitioner's attorney wrote Respondent in 2005 that there is no documentation on record showing that alleged declarant, the Respondent, was the legal successor or assignee assigned of the original declarant. The property, the lots still owned by Developer were purchased through bankruptcy sales, but this alone does not make the original lot purchaser the Declarant. We have, thereby, a broken and invalid chain of subsequent property owners claiming to be the Developer’s assigns or successor’s in interest. Consequently, Respondent has no standing as declarant and no control of HOA board.

Property is in the Pinetop, AZ area, northeast of Phoenix.

Case No.: 07F-H067003-BFS

Complaint: breach of fiduciary duty; failure to enforce CC&Rs

Source of Law: Declaration and Amendment XII

Discussion: Article XVII of the Eleventh Amended and Restated Declaration **granted exclusive authority to Respondent's Board of Directors to construe and interpret the document**.

Petitioners' complaint that Respondent failed to enforce the provisions of the Eleventh Amended and Restated Declaration is untimely, **due to it having been amended and superseded by the Twelfth Amended and Restated Declaration and their failure to timely prosecute a civil claim while the Eleventh Amended and Restated Declaration was effective. Petitioners' complaints are now moot because of the Twelfth Amended and Restated Declaration.**

[Amendment XII reads**,** "[l]andscaping of Common Areas and Lots bordering the Golf Course shall be maintained to avoid **undue** obstruction of views of the Golf Course."]

It is concluded that Respondent has maintained the landscaping of the common areas to avoid undue obstruction of Petitioners' views of its golf course.

Holding: Denied petition.

Additional Remarks: **Another instance where the alleged HOA contract is meaningless** as a result of broad CC&R amendment provision to allow any validly passed amendment to be binding on all homeowners, regardless whether or not CC&Rs were not in effect at time of purchase. **The courts have upheld equitable servitudes provision for a single set of covenants for all homeowners over the Constitution and state laws.**

Homeowners bought property under amendment XI and its restrictions on obstruction of views of golf course. Homeowners paid for premium lot on golf course.

Case No.: 07F-H067004-BFS

Complaint: HOA was negligent in maintaining its property, a sewer line that resulted in damage to petitioner's home.

Source of Law: Declaration

Discussion: After careful consideration of the evidence of record and the arguments of the parties, the Administrative Law Judge concludes that Ms. McBee failed to demonstrate a violation by the Association of Section 6.3, and therefore that she failed to demonstrate grounds for an award of damages. The Administrative Law Judge observes that even if Ms. McBee had been able to establish liability, she would not be entitled to an award of compensatory damages. **Arizona case law limits administrative adjudication of monetary relief claims to awards of remedial restitution.** See Cactus Wren Partners v. Arizona Department of Building and Fire Safety, 177 Ariz. 559, 564, 869 P.2d 1212, 1217 (App. 1993). Thus, Ms. McBee would only have been entitled to an award for expenses already incurred as a direct consequence of the backflows.

Holding: Further, the Board met its repair obligations under Section 6.3. Thus, the Administrative Law Judge concludes that Ms. McBee failed to demonstrate that the Association violated Section 6.3 with respect to its repair obligations. Ms. McBee did not assert any other violations by the Association of the Declaration, and none are found herein.

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Comments: Homeowner sought punitive damages and restitution for alleged damages from HOA**.** HOA filed a motion to dismiss, which was denied with respect to petitioner seeking restitution, but held that punitive damages were not applicable. See *Cactus Wren Partners v. Arizona Dept. of Building & Fire Safety*, 177 Ariz. 559, 869 P.2d 1212 (App. 1993). Homeowner is seeking restitution in the amount of some $7,000 for damages caused by flooding of her home, resulting from defective installation on HOA property. A construction defect issue or HOA failure in its duty of care?

Issue concerns an improper installation by a contractor that resulted in flooding of home. Installation was on HOA maintained, owned and controlled property. Not disputed by HOA. HOA says that it's a contractor problem; petitioner says that's right, but homeowner looks to HOA obligations under CC&Rs – let HOA deal with the contractor.

This is a third-party problem where homeowner is damaged by work done for HOA, and homeowner has no dealings with the contractor, just the HOA.

HOA claims a latent construction defect and that there was no negligence on the part of HOA. HOA is not a warrantor or guarantor of contractor, or of builder. HOA tried to fix the sewer line. Attorney avoided discussion of the damages to the homeowner caused by this faulty installation.

ALJ informed the parties that this was not a strict negligence case, but one that involved HOA obligations under the CC&Rs.

Case No.: 07F-H067005-BFS

Complaint: ACC prohibition of backyard playground

Source of Law: Declaration; case history relating to CC&Rs

Discussion: The record in this matter shows that Architectural Committee and the San Marcos Manor HOA board refused to consider Mr. Ketchum's requests to approve the play structure until he reduced its height to 6' or less. The board did not even suggest that it might approve a structure that was higher than 6' until its August 14, 2006 letter to Mr. Ketchum, which was written after the board had consulted counsel and after fines had started to accrue under the notice policy. At that point, it offered to approve the play structure if its height was reduced to within 18" of the perimeter wall. This requirement is not found in the CC&Rs or Architectural Guidelines.

Mr. Ketchum is correct when he points out that neither the CC&Rs nor the Architectural Guidelines absolutely prohibited improvements higher than 6' in members' backyards. The Architectural Committee and HOA Board both refused to approve the play structure unless it was lowered to less than 6', which would not have required any approval under the CC&Rs and Architectural Guidelines. Their refusal to exercise discretion was arbitrary and capricious.

Holding: IT IS ORDERED granting Petitioner's Petition and requiring Respondent to exercise its discretion under the CC&Rs and Architectural Guidelines to consider Petitioner's request for approval of the play structure in his backyard.

Additional Remarks: This is a usual case where board refuses to OK variances from ACC, gives verbal assurances, and then issues a decision that is inconsistent with CC&Rs. It arbitrarily decided a 6 foot height or less would be approved.

Mulcahy law firm represented HOA.

Case No.: 07F-H067006-BFS

Complaint: 1. discrimination by landscaping
2. threats of additional assessments

Source of Law: Declaration; by-laws; case law

Discussion: At the hearing, Petitioner submitted 30 photographs of homes within Respondent's jurisdiction illustrating the use of wrought iron and landscaping at the front of homes within the Respondent's community. It is uncontroverted that Respondent does not have the authority to regulate a member homeowner's landscaping. Respondent's contention that Petitioner's plan to install trelliswork between the columns of his residence creates the appearance of security issues for its community is not justified by the evidence.

There is an inconsistent logic in denying Petitioner request to install wrought iron trelliswork between the columns of his carport as he proposes, and the presence of existing wrought iron in homes throughout Respondent's community.

A.R.S. § 41-2198.02(A) provides that a homeowner association may be assessed a civil penalty not to exceed $500.00. **Respondent threatened Petitioner with the imposition of its attorney fees in this matter, which it had no basis for doing so.** The Administrative Law Judge concludes that the imposition of a civil penalty is appropriate for such improper conduct by Respondent.

Holding: **The Administrative Law Judge concludes that Respondent made an arbitrary and capricious decision** when it did not approved Petitioner's request for installing trellis work, but instead restricted such installation to a height limited to 3 feet 11 inches rather than 8 feet, the height of the arch above the columns.

IT IS ORDERED that Petitioner's request to install the trelliswork for Jasmine between the columns of his carport, including attaching the trelliswork to the structure, be granted.
IT IS FURTHER ORDERED that Respondent repay Petitioner his $550.00 filing paid to the Department within 30 days of the effective date of the entered Order in this matter.
IT IS FURTHER ORDERED that Respondent pay a civil penalty in the amount of $500.00 to the Department within 30 days of the effective date of the entered Order in this matter.

Comments: In this dispute over the height and size of a homeowner's fence/gate, the HOA attorney found it necessary to submit a 10-page legal memorandum on the Friday before the Monday Hearing. Legal memoranda present arguments and contain biased points of view, with or without supporting authority. They are not evidence. This, in my opinion, was a CAI HOA attorney playing hardball and attempting to apply their legalese to thwart homeowner justice.

OAH has no procedures or rules governing the submission of legal memoranda, which are arguments on some motion before the judge (or an appellate court argument), except that a brief may be filed as part of the docket (record), R2-19-108, or as a supplement to closing arguments, R2-19-116(G) and (H), and as a pre-conference agreement, R2-19-112. (As a guide, when memoranda are submitted with a motion or appellate procedure, the opposing party gets 10 - 20 days to respond -- see Rules of Civil Proc).

Accepting the current OAH rules that a memorandum may be accepted, these rules violate the impartiality doctrine of the courts and impartial adjudication process of OAH. They do not inform the parties that written arguments are permissible in addition to the evidentiary hearing process. In short, knowledgeable attorneys understand that a memorandum is a legal argument, but this is not made clear to the public who is told that a lawyer is not necessary, and any references to submitting memorandum as part of the adjudication is avoided on the OAH materials provided to the public on its website. This silence seems to reflect an attitude, that, well. the average person doesn't understand legal memos anyway, so why bother to inform him.

Petitioner requested a 20-day continuance to respond to HOA memorandum, which was "ambush tactics". Koepke responded that, all that they were doing was "**advising the court about the substantive issues of law on the topics before it**". Without explanation, the ALJ denied the motion for continuance. Then, the ALJ asked petitioner, "Did you have a chance to look at it? "Yes", replied petitioner. "Well, then you are ahead of me, I just got it this morning and haven't had a chance to look at it. I will look at it later."

Petitioner has not had a chance to respond, as a matter of fairness and court impartiality, so the ALJ would see both positions. As it stands, the ALJ violated its impartiality by accepting the memorandum, by not granting a continuance, nor even advising the Petitioner that he could submit a memorandum as a supplement to the closing arguments, as per R2-19-108.

HOA attorney is Penny Koepke at Ekmark.

Case No.: 07F-H067007-BFS

Complaint:	1. CC&R amendment not in good faith; fundamentally changed nature of community. 2. HOA violated ARS33-1805 with respect to access to HOA records.
Source of Law:	ARS 33-1805; Declaration
Discussion:	ALJ did not hear evidence relating to the substance of the amendment, which related to violations of good faith and fundamental changes in character of community. Declaration provision alleged being violated only dealt with vote required to pass amendment.
Holding:	1. Amendment was validly passed. 2. HOA ordered to provide requested records.
Additional Remarks:	The amendment permitted HOA to appropriate homeowner sidewalk property without homeowner consent and without a signed deed. Raises issue of cloud on homeowner property since Arizona law requires a signed and notarized deed with explicit wording. For more details, see Sidewalks.

Case No.: 07F-H067008-BFS

Complaint: enforce the architectural standards (allow petitioner's changes)

Source of Law: declaration; bylaws; Rules & Regs

Discussion: However, to the extent that Arizona case law is applicable to and informs an alleged violation, it should be considered, and the Administrative Law Judge will do so herein.

[T]he Administrative Law Judge first observes that Mr. Fairfield comes before this Tribunal with unclean hands in that he directly violated the terms of the Declaration by proceeding with the installation of the driveway extension without first obtaining the approval of the Architectural Committee (approval he knew he was required to have).

The evidence in the instant case demonstrated that the Architectural Committee considers the type of extension installed by Mr. Fairfield to conflict with the harmony of the external design of lots within the subdivision, and that in the past six years, the Architectural Committee has not granted any requests to install such extensions.

Holding: **IT IS ORDERED** that Mr. Fairfield's petition is denied.

Additional Remarks: Homeowner sought to cover driveway with concrete to prevent drainage runoff from eroding front yard in this desert-landscaped community. HOA considered this to be a structure and subject to its prior approval. No Cave Creek ordnance violation. Cement addition existed for some time period, about a month, before HOA insisted that it be removed, and threaten fines if homeowner did not comply. Cement composition was same as used on existing driveway. Other properties have extensions – what was allowed leads to the meanings of the rules.

HOA notice referred to a violation that in reality did not exist – "driveway must extend to garage". Homeowner seeks approval; HOA seeks removal.

Homeowner attorney stated that the restriction was a rule and not a covenant in the CC&Rs, and that HOA could not **add** to CC&Rs by means of rules. [Cases exist relating to the meaning of "to amend" – to modify or to change, but not to add]. There is no mention of driveways in CC&Rs, but only in the Rules & Regs. HOA claims general powers under "abiding by ACC decisions".

HOA attorney clarifies that "going to the city for approval is not the same as going to the HOA for approval." **Furthermore, he argued that it was irrelevant what other properties looked like since HOA can change the rules, unless it could be shown that other properties were subject to same set of rules or CC&Rs.** Homeowner failed to get prior approval

of ACC for any appearance or landscaping changes. Portrays HOA as really cooperative, helpful and willing to resolve the issue.

HOA board has broad discretionary powers, as granted by the CC&Rs, in regard to concerns relating to appeal of community. In the last paragraph in the Discussion above, we see that the ALJ may have ignored the fact that ALJ did not state whether there had been requests for extensions, but simply said the HOA did not grant other extensions. The Petitioner alleged that other lots had similar modifications, but is not clear whether or not the others, existing since the time of construction, were a meaningful deviation from the Petitioner's extension. In any event, Petitioner had argued that his extension blended in with the landscaping as currently existed, but did not argue for arbitrary or capricious inforcement.

Morgan of Maxwell & Morgan, representing HOA. James Tanner of Jackson, White, representing homeowner. HOA is Rancho Manana in Cave Creek.

Case No.: 07F-H067009-BFS

Complaint: 1: involves HOA purchase of a $723,000 building without member vote.
2: involves 2005 increase of Transfer Fee on property from $300 to $950 to create a discretionary fund for making major purchases, thus avoiding a special assessment and avoiding a vote of the homeowners.
3. Validity of transfer fee upon sale of property for application to purchase.

Source of Law: Divizio v. Kewin Enterprises; declarations and bylaws.

Discussion: The Administrative Law Judge concludes that by virtue of the Board's authority to run the business activities of the Apache Wells, the provision in the Bylaws that Apache Wells can purchase real estate, and the credible evidence of record that Apache Wells needed to obtain additional office space and meeting rooms, it was not unreasonable for Apache Wells to purchase the Building to satisfy its business needs.

The evidentiary record reflects that the determination as to the amount of the increase of the transfer fee was arbitrarily and capriciously selected and not reasonably related to specific expenses that are anticipated. Under the circumstances, the Administrative Law Judge concludes that the increase of the transfer fee was not authorized and was not reasonable related to expense.

Holding: [I]t is concluded that with respect to Issue 1, Apache Wells acted appropriately with respect to the purchase of the Building and no action is required of Apache Wells with respect to that issue;

It is concluded that with respect to Issue 2, Apache Wells acted arbitrarily, capriciously and unreasonably in increasing the transfer fee from $300.00 to $950.00. Therefore, the increase of the transfer fee is voided and the transfer fee shall be $300.00;

IT IS ORDERED that within forty days from the date of this Order, Apache Wells shall pay to Mr. Stromme his filing fee of $550.00.

Additional Remarks: This involved some legalities relating to amendment to complaint. Other issues are not properly before me if not related to governing documents or statutes regulating planned communities or the governing documents. **Issues are not related unless they are tied into the statutes or governing documents ... cannot address these issues without additional legal authority.**

ALJ also advised parties that although documents were submitted as evidence, the parties must speak to the relevant parts of those documents for the record – do not assume ALJ will understand whatever point trying

to be made without specifically speaking to those concerns. Homeowner basically argued that his interpretation does count, when he reads any HOA document of budget entry.

Attorneys submitted "legal memoranda", which are their written arguments to the ALJ with supporting authorities – laws, case history, declaration, bylaws, etc. (Big dollars at stake here since assessments are being used to fund building purchase).

Important legal authority cited by homeowner was: *Divizio v. Kewin Enterprises*, 666 P.2d 1085 (Ariz. App. Div. 2 1983)(fiduciary duty; interpretation of covenants; CC&Rs as contract). (listed in my HOA case history file posted to website). This case held that maintenance assessments could not be used to purchase property.

In this case, the HOA insisted that the transfer fee was not part of a general assessment or member fee, but imposed on the BUYER at closing. **The homeowner attorney demanded to know how the HOA can impose a payment on the buyer who is not an HOA member**? (Implication is extortion of buyer, or interference with title company duties by not allowing closing to go ahead. In reality, transfer fees must be a member obligation, and all member fees must be uniformly applied to all members. A transfer fee is transactional, applied on a case by case basis).

HOA answered that "It's widely done". HOA tells title company to collect, even though their is no legal basis for title company action -- there is no recorded lien. HOA maintained that bylaws give HOA authority to collect a transfer fee, yet provided no basis in bylaws and declarations to do so.

In cross, HOA president is asked, "What happens if the buyer refuses to pay?" He responded, "Property wouldn't go through . . . seller doesn't have qualified buyer, like with a qualified buyer under a mortgage."

Current president said the board passed such an obligation, as to a transfer fee about a year ago. Transfer fee was for a number of reasons, as a result of a budget shortage. Transfer fees benefit the community, therefore justified. "Contributions from purchasers", argued the HOA attorney, for existing amenities -- "only fair

HOA attorney repeatedly objected on the basis of "foundation", meaning that the petitioner has no knowledge of what went on. He did not participate in the board decisions regarding declarations or in the preparation of the budget. The impression given was that the poor homeowner is not allowed to have any input or interpretation of what he receives from the HOA – he must just accept it unquestioningly and does as ordered.

While the courts operate on the basis that words are to be interpreted as to their common meanings, but somehow HOA seems to be arguing that their words meant other things. Was this an attempt to discredit the witness who "is inexperienced" in HOA matters?

HOA attorney argued purchase of building within "community" to benefit the community as an administrative facility. A 15-year loan in the amount of some $600,000 was entered into. $9,000 per month, plus interest. HOA admitted payment was from general assessment funds.

Both parties represented by lawyers. HOA by Jackson of Jackson, White.

Case No.: 07F-H067010-BFS & 07F-H067011-BFS (consolidated cases)

Complaint: violations of CC&Rs and ACC; failure of HOA to respond within in specified time.

Source of Law: Declarations.

Discussion: The CC&Rs contain no requirement that the DRC can only approve an application if it finds a "compelling reason" for departing from the original community plans or a prior practice. Neither applicable statute nor common-law authority supports such requirement.

Petitioners therefore have not established that the proposed private gate at the end of their shared driveway, off the cul-de-sac, would "maintain uniformity of architectural and landscaping standards throughout Eagle Mountain and thereby enhance the aesthetic and economic value of Eagle Mountain" or that the DRC should have approved their application under § 11.2 of the CC&Rs.

However, Petitioners have established that the DRC did not furnish a written decision within 45 days of the date that they submitted the application.

Therefore, under § 11.4 of the CC&Rs, the DRC's admitted failure either to disapprove Petitioner's application on the merits or to disapprove it as incomplete in writing within 45 days requires the application to be deemed approved.

Although Petitioners prevailed in this matter, an administrative proceeding is not an "action" such as to make attorney's fees awardable under A.R.S. §§ 33-1807(H) or 12-341.01. Petitioners' request for attorneys' fees must therefore be denied.

Holding: **IT IS ORDERED** granting Petitioners' Petition and requiring Respondent to deem approved the application for the private gate at the end of Petitioners' shared driveway.

IT IS FURTHER ORDERED that Respondent pay to Petitioners the filing fees, $550.00 each, for a total of $1,100.00, that they paid to initiate these administrative complaints within forty (40) days of the date that this order is mailed, if no appeal is taken.

Additional Remarks: A consolidated case generally occurs when more than one complaint deals with the same legal issues. More than one homeowner is involved -- one for each case.

Took HOA 72-days to respond to ACC request; CC&Rs specified a 45 day response time. Failure to respond constituted an automatic approval.

(This was a 4-hour plus hearing!) Petitioner's wanted to install a private gate on for their custom homes with 300-foot driveways. Homeowners were not allowed to remain in ACC committee during its supposed approval.

HOA claimed an incomplete submission was made -- needed a waiver from neighbors. Yet, there is no waiver requirement by neighbors in the CC&Rs or rules and regulations. Aesthetic concerns were reason for denial. Mulcahy now claims, even though not stated by ACC for denial at the time in question -- which is the issue -- that HOA never approved private gates for private driveways.

Second issue raised by Mulcahy, again not reason for the denial, gates were not aesthetically appropriate – denial was required within 45 days as per the written contract, "black-letter law". It was the custom of ACC to get waivers, although not in the governing documents.

A decision against homeowners would, once again, demonstrate that when it comes to protecting homeowners, the CC&Rs are not worth the paper it's written on. We are well aware of court opinions referring to the written contract and the meaning of the provisions as stated, unless ambiguous. (No case history was mentioned in the opening arguments by either lawyer).

ALJ said, "I always forget what CC&Rs stand for." And to Ms. Mulcahy, "I saw your firm and recognized it."

Beth Mulcahy for the HOA. Mr. Lynch for homeowners. Also asked for attorney fees.

Case No.: **07F-H067012-BFS; 07F-H067013-BFS (consolidated case)**

Complaint: Numerous (13), but only 4 allowed: accounting for reserve monies; access to records; selective HOA enforcement; initial dispute was a question of access to lots.

Source of Law: Declaration; bylaws.

Discussion:

Holding:

Comments: Pre-conference hearing. Either party may request a pre-conference hearing to settle or clarify aspects relating how the hearing will proceed; such as date for exchanging documents and list of witnesses.

In response to a late filing by HOA of a **17-page motion** -- **with legal memorandum** containing HOA arguments -- to limit scope of the hearing, the ALJ said that he would give Petitioner time to respond. HOA attorney said that he just files papers with respect to the topic of the pre-hearing, but ALJ pointed out that he **filed a motion**, and as such, Petitioner is permitted time to respond. ALJ set a 10-day response period.

HOA attorney subpoenaed documents from Petitioner. Cannot ask other party to prepare new documents, or to do interrogatories (submit written questions to other party) or depositions (ask direct questions of other party). With respect to a settlement agreement, ALJ properly advised parties that this is a matter outside the OAH.

After a second pre-conference hearing, the ALJ declared many of the homeowner complaints as alleged criminal activity that is outside OAH's jurisdiction. These relate to statutes outside the Planned Community statutes, and to alleged criminal activities. They will not be heard.

The ALJ denied all but 4 of the complaints, and only those allegations occurring after Sept. 21, 2006. Subpoenas for a total of 48 witnesses, 12 by petitioner and 27 by HOA, were sought, but the ALJ denied them and warned,

> If they continue to feel that a witness's desired testimony will shed light on these limited and narrow issues within their permissible scope, they should feel free to call such witness at the hearing and re-submit the subpoena request. However, they are admonished that they do so at the risk of the witness's testimony not being allowed.

Again, this is a blanket charge against the HOA rather than complaints related to an event, like for example, an invalidly held election giving rise to several violations.

The Hearing of the petition (3 ½ hours):

One petitioner appeared by phone, and declared he was incapable of speaking too long as a result of his illness.

Petitioner Nevins recounted a litany of complaints about the board following homeowners being denied a second access to their lots. HOA objected to this litany against the board, and ALJ sustained the objection. Petitioners decide to present their case at OAH. ALJ ordered petitioner to make only statements pertinent to the issues before the ALJ (see above), but petitioner wanted his statements read into the record.

ALJ allowed petitioner to mention harassment by HOA, to which HOA objected as irrelevant. ALJ allowed these allegations to be mentioned as part of HOA's denial of access to records. He would not get into questions of good or bad accounting, just violations of governing documents or statutes.

ALJ decided to permit the HOA, defendants/respondents, to present their case in an effort to speed up the hearing – looks like a summary judgment type decision in that petitioner made no valid claim as to a violation of the governing documents or statutes.

Sadly, this case appears to be one of a disagreement and anger at the HOA for its decisions that may or may not be acts within their discretion -- petitioner just didn't like the way things were being done – rather than a violation of substance.

Case No.: **07F-H067014-BFS**

Complaint: Failure of HOA to enforce governing documents.

Source of Law: Declaration.

Discussion: The weight of the evidence of record did not establish that the Board had sufficient information to conclude that the business activity of the Downings on their lot constitutes a nuisance. Section 3.11 of the CC&Rs provides the Board with sole discretion as to what constitutes a nuisance. There is credible evidence that the Board did not consider the Downings' business activity to be a nuisance. Consequently, no violation of CC& R Article 3, Section 3.3 is found.

The weight of the evidence of record established that the Board had information showing that the Downings violated the provisions of the Architectural Guidelines, Rear Yard and Side Yard Landscaping Sections found on page 3 by having a mist system that watered plants near the side of the boundary wall at issue and there was no credible evidence that the Downings' corrected that situation although they represented to the Association that they would. The Board neglected to perform any follow-up visit to confirm compliance with the request made by Mr. Kellogg.

Holding: Based on the above, the Association is ordered to comply with and enforce its CC&Rs and Architectural Guidelines in accordance with the Findings of Fact and Conclusions of Law set forth above and within forty-five days of this Order the Association shall reimburse Mr. Martin his $550.00 filing fee.

Comments: Neighbor's over-watering of lawn caused drainage problems for petitioner. Neighbor operated a plant services business in his backyard. HOA claims it's a dispute between neighbors, not involving HOA, and charges the petitioner with trying to involve the HOA in personal dispute. Agent for the association (manager?) found no nuisance on petitioner's property.

ALJ cautioned parties not to bring in repeated witnesses to consume hearing time needlessly. He also took time to explain OAH procedures and answer questions before opening arguments – "preliminary matters."

There was considerable delay due to the submission and exchange of numerous exhibits (over 25 each, many emails), and objections by opposing party. The ALJ advised the parties to proceed a little slowly during the hearing since he will not have copies of the exhibits.

Motion to dismiss nuisance items by HOA was denied since it was not timely filed (missed deadline of 15 days from hearing date, without any reason for delay – see AAC, R2-19-106(C)). HOA also filed a motion to quash (dismiss); several complaints exceeded limited jurisdiction of OAH. Cannot bring in HOA when complaint is against a third party. 5 items out of 9 were dismissed.

HOA attorney was not permitted to object to witness subpoenas since he did not represent the witnesses.

Pat Haruff, who attended the Hearing, advises, "DO NOT and I repeat DO NOT count on the opposition following through on their witness list (they don't have to). MAKE SURE YOU SUBPEONA EVERYONE YOU WANT TO QUESTION!!!!" The neighbor who operated the business was on the HOA witness list, but did not appear at the hearing.

The fact that a homeowner brings numerous complaints against the HOA reflects the seriousness of HOA problems, which further demands that steps be taken to insure that homeowners are not barred from due process of law, either as a result of the unequal power of the HOA or because of unreasonably high filing fees.

This was a 5-hour hearing in which opening arguments began some 65 minutes after the start of the hearing, with additional 10 and 5-minute recesses for clarifying exhibits.

Case No.: **07F-H067015-BFS**

Complaint:

Source of Law:

Discussion: The Office of Administrative Hearings is in receipt of Petitioner's Motion for Reconsideration of his Motion to Strike Response (Answer) and Application for Entry of Default previously filed with the Department of Fire, Building and Life Safety. . . . By virtue of this Minute Entry, the Motion for Reconsideration, a copy of which is attached, is being referred to the Director of Fire, Building and Life Safety for disposition. (2/15/07 ME).

Holding: The Office of Administrative Hearings has received the February 26, 2007 Order issued by the Director of Fire, Building and Life Safety wherein a default decision in this matter was entered. Therefore, this matter is vacated from the docket of the Office of Administrative Hearings. (2/27/07 ME).

Comments: This case was an apparent default decision against the HOA. Petitioner filed a motion to reconsider (implying a decision against the petitioner was made) to strike HOA's response (invalidate the response), and sought an order of default. If the HOA doesn't respond, a default entry is permitted. Entry of default is filed with the Dept. of Fire, Building and Life Safety, not with OAH.

Further details not available at this time.

Scott Carpenter was the HOA attorney.

Case No.: **07F-H067016-BFS**

Complaint: HOA failure to maintain water irrigation system causing plants to die.

Source of Law: governing documents

Discussion:

Holding: ALJ will allow petitioner to clarify by adding more specificity to her claims as stated in her original petition, and the hearing for these will be set for another time.

On April 9, 2007, the Office of Administrative Hearings received Beverly Leinweber's withdrawal of the petition filed in this matter.

T**HEREFORE, IT IS ORDERED** vacating this matter from the docket of the Office of Administrative Hearings and dismissing Ms. Leinweber's petition without prejudice to filing a new petition. Done this day, April 10, 2007.

Comments: A memorandum, hearing brief, was submitted by HOA attorney.

Petitioner's claims, 3 claims, were dismissed because claims were just a statement of fact, and not a claim of a violation, or too ill defined a charge. ALJ would allow time to clarify petitioner's vague complaints. For example, count 1 simply said that, "the HOA is required to maintain landscaping" or "did not provide maintenance", which is a statement of fact and not a claim like, HOA failed to maintain landscaping under governing documents.

Also, ALJ will not address a violation that is no longer occurring, or occurred prior to the new law becoming effective. That is, violations occurring prior to the new law are not under OAH jurisdiction.

ALJ took a good deal of time to explain what petitioner failed to provide in her petition. However, **Arizona is a "notice pleading" state** where details of the complaint do not need to be made with specificity in the complaint filing, raising a concern that ALJ's insistence on specificity may be contrary to Arizona R. of Civ. Procedure. Petitioner seemed confused as to what she must do for the next hearing.

"Vacating" the case amounts to a "non-case". "Dismissing without prejudice" allows the petitioner to re-file a complaint on the same issues.

ALJ order with respect to second motion for a continuance:

However, the Motion indicates that Respondent's counsel accepted legal representation of this matter when he would physically not be available to attend the hearing, thereby creating the scheduling conflict. Under the circumstances, the Administrative Law Judge finds good cause has not been presented to continue the hearing and the Motion is denied without waiting to receive a response from Petitioner. Respondent has sufficient time to arrange for its legal representation.

The Administrative Law Judge will not consider any future continuance requests filed by Respondent unless the grounds for a continuance are other than those raised in the previously filed motions.

HOA attorney is Scott Carpenter. Mr. Corbin represented the HOA at the Hearing.

Hearing lasted just over an hour.

Case No.: **07F-H067017-BFS**

Complaint: Numerous complaints (20): HOA election process violations and eligible to vote; failed to maintain; sloppy minutes and HOA records, etc.

Source of Law: declaration; bylaws

Discussion: The Petition contains 20 allegations of wrongdoing by Respondent, with multiple subsets under most of the allegations.

1. The tribunal granted Respondent's motion for summary judgment as to Petitioner's allegations number 7, 15, 18, and the first bullet point of 20, which reads: "Frank Frangul pushed Barry Smith out the door at the January 11, 2005 Board Meeting."

2. Respondent was not required to provide Petitioner with a lawyer in this matter under its Directors and Officers Liability insurance policy ("D&O insurance").

3. Respondent did obtain proper D&O insurance.

4. A multiple property owner is not totally disenfranchised for voting purposes for being in arrears for a specific lot. A multiple property owner may still vote via their lots in good standing.

5. Respondent was not required to conduct a runoff election for the 2006 election. The ballot for Lot 351 did not change the election results.

6. Respondent is found to maintain Respondent's common areas in a reasonable manner.

7. Respondent's board did not fail to uphold their fiduciary duties relative to the property management contract. Further, Respondent is not required to have a comprehensive landscaping contract as alleged by Petitioner.

8. Respondent is found to have given proper notice of special board meeting as required.

9. Petitioner failed to establish his right to record board meetings using a tape recorder.

10. Petitioner failed to establish that Respondent was required to publish articles he authored in its newsletter. While Petitioner may feel

that his articles are helpful, Respondent should be able to control the content of its newsletter.

11. Respondent's property management company is found to have failed to timely provide Petitioner with requested documents in December 2006.

Holding:

1. Respondent violated by provisions of Bylaws Section 2 by not properly and timely counting the ballot for Lot 351, which did not affect the outcome of the 2006 board election.
2. Respondent violated the provisions of Bylaws Article IX by failing to allow Petitioner to timely review the delinquency report used for the 2006 board election.
3. The Administrative Law Judge concludes that Petitioner failed to sustain his burden of proof on the remaining issues set forth in his Petition.
4. The Administrative Law Judge concludes that Petitioner is not the prevailing party in this matter and that he is not entitled to reimbursement of his $550.00 filing fee paid to the Department from Respondent, pursuant to A.R.S. § 41-2198.02(A).

IT IS ORDERED that Respondent be admonished that it must assure that future election ballots are properly counted so that no member eligible to vote is disenfranchised, regardless of whether it will affect the outcome of the election, and must assure that CPMC, or any successor property management company, timely complies with Article IX of the Bylaws.

Comments:

In my opinion, this was not a proper and effective use of OAH. The petitioner should have filed separate petitions on non-related charges against the HOA, rather than make a hodge-podge petition.

HOA attorney filed a **motion to dismiss** on certain counts in the complaint, and a motion for **summary judgment** for other counts, each 8 pages. Summary judgment was denied. Apparently, the case is still alive.

ALJ informed parties that the Rules of Civil Procedure, while not required by OAH, nevertheless could serve as guidance for the ALJ. What we are seeing is CAI attorneys bringing civil court tactics to AOH as part of their very strong desire to win regardless of a fair hearing, or whether or not justice would be best served.

Petitioner was outspoken critic if board and decided, as pro-HOA interests advise, to run for the board. He challenged the election procedures and results, and other "wrongs".

HOA attorney opening argument: lectured the ALJ about how the ALJ was required to reach his decision – burden of proof. Also, that the

petitioner was not harmed, or the breach was not material in nature, and that **the statutes (ARS 10-3830 and 3842, nonprofit corporations) presume that the board acts in good and with the best interest of the association in mind.** The directors are not professionals, just volunteers, and are not expected to be perfect.

Attorney then stated the equivalent of seeking a directed verdict, that is, the petitioner failed to show any of the claimed violations and that the complaint be dismissed.

HOA attorney could not stay to cross-examine a witness and asked for a continuance, at the additional expense of the witness who took a vacation day, and at the additional expense to OAH. If the witness could not return, then her testimony was asked to be stricken from the record. Well, talk about heavy handedness! A continuance was granted.

At the continuance, the Rossmar & Graham property manager, who testified that in her opinion the HOA failed to act to protect property values or to act in good faith toward the homeowners, failed to show. Sadly, the petitioner failed to subpoena this very important witness. Since she was not crossed examined by HOA attorney, all her testimony was stricken.

As to why she failed to appear, the petitioner informed the ALJ of a call from Curtis Ekmark to Rossmar Pres. Henly (?) 2 days prior to the hearing, and that prior to that the witness was prepared to attend during her lunch break time period. Petitioner reports that, "for business reasons and stuff that she wasn't going to be here." The Ekmark attorneys at the hearing only said that they were not personally aware, but heard from some third party that this did indeed occur. "I don't know anything about it. I know there were discussions between them, but they talk all the time," replied HOA Ekmark attorney, who added, " I don't know anything particular about that." Petitioner had to proceed by calling the HOA's property manager witness as a hostile witness.

Petitioner was advised that he could not raise issues or represent the interests of other homeowners unless he was the attorney for those other homeowners. He did raise questions of the correctness of certain HOA document submissions by the HOA, questioning their authenticity. **In closing arguments, petitioner listed a number of instances where the HOA and Rossmar ran a loose operation violating governing procedures and state laws.**

HOA attorney closed with admission of some errors and the law doesn't requires boards to be perfect, but that these errors were not arbitrary and capricious, or willful, or continually performed (she covered the legal requirements for negligence and breach of director conduct). She asked that the 17 counts in the complaint not at all addressed by petitioner in the

hearing be dismissed (petitioner disagreed). The HOA should not be regarded as required to by law to be perfect.

Ms. Krupnick of Ekmark law firm, was one of the two attorneys representing HOA. This hearing lasted just short of **9 hours** on 2 separate days, with a substantial amount of time devoted to sorting out the 100 plus exhibits.

In my view, if this were one of the 2 cases used by DFBLS as a justification for the $2,000 fee increase, it was presumptuous and premature. This case is a unique case that does not warrant a hasty, ill conceived, generalized response to a perceived potential huge increase costs for HOA adjudication.

Case No.: **07F-H067019-BFS**

Complaint: Numerous (13): Board spent HOA money for personal benefit of board members without holding meetings, without a vote, and without proper authority.

Source of Law: statutes (ARS 33-1248); governing documents

Discussion: Based on the Findings of Fact set forth above, the Administrative Law Judge concludes that Mr. Swinehart met his burden to prove that the Association violated statute and/or Spanishbrook's governing documents with respect to petition items 3, 4, 5, 6, 7, and 8. Conversely, Mr. Swinehart failed to demonstrate that the Association violated statute and/or Spanishbrook's governing documents with respect to petition items 1, 2, 9, 10, 11, 12, and 13.

In the instant matter, the Administrative Law Judge concludes that Mr. Swinehart prevailed with respect to the most significant set of issues presented, and therefore is entitled to an award of his filing fee.

The Board's repeated failure to have conducted open meetings in compliance with statute, the Declaration, and the Bylaws warrants the imposition of a civil penalty under A.R.S. § 41-2198.02.

Holding: **IT IS ORDERED** that Mr. Swinehart's petition is granted in part. Not later than sixty (60) days from the date of this Order, the Board shall, in compliance with all applicable statutes and the Association's governing documents, meet and address the outstanding issues of the sprinkler repair, the special assessment, and the delegation of authority to Colby.
IT IS FURTHER ORDERED that not later than forty-five (45) days from the date of this Order, Spanishbrook shall pay to the Department a civil penalty in the amount of $500.00.
IT IS FURTHER ORDERED that not later than forty-five (45) days from the date of this Order, Spanishbrook shall pay $550.00 to Mr. Swinehart as and for his filing fee.

Comments: **ALJ stated that damages are not awarded by OAH.**

Must read ALJ detailed discussion of the issues in his decision.

The HOA (condo) representative is allowed to remain for the entire hearing even though he will be called as a witness. He can be anyone so appointed by the HOA. Evidence can only be presented with respect to claims stated in the petition, and no new claims asserted by new evidence.

AG opinion as to what constitutes a meeting was introduced, because directors met with the Chairman of the committee and discussed business, but HOA alleged "not a meeting." HOA argued that these

closed meetings fell within statutory exceptions – emergency meetings. Importantly, the HOA attorney maintains that although a meeting was not held as required, a notice of assessment increases was mailed to each member as a "ballot", and is therefore a valid increase. He suggested that to avoid a troublesome, contested meeting that would require police enforcement to attend, the board decided not to hold the meeting.

Board spent some $2,800 on a project, which decided on in a closed meeting. Money was paid to a board member who did not do the work, violating the governing documents. Petitioner tried to call a meeting for the board to answer questions. Bylaws required a vote of the members for amendments and rules.

Petitioner appears to have failed to link incidents, the facts, to any claimed violation in the petition to support his arguments by a burden of the evidence. **Petitioner must substantiate his claims that the acts and incidents presented show a violation of a statute or governing document provision.** Petitioner demonstrated a misinterpretation of the statutes and governing documents.

In closing arguments, petitioner argued an intentional infliction of emotional distress, which is a tort, seeking damages. ALJ stated that this is outside OAH jurisdiction. He also argued mismanagement by the board, which in itself is not actionable.

HOA argued that the statutes cited by petitioner did not apply to the condo since it was formed prior to the cited statutes.

This was a 6-½ hour hearing.

Case No.: **07F-H067020-BFS**

Complaint:

Source of Law:

Discussion:

Holding:

Comments: Pre-hearing conference ordered by ALJ to set hearing date in view of schedule conflicts. Scheduled medical treatment forced a July - August hearing date.

Parties advised that Item #4 of complaint is questionable. Also, verbal abuse complaint is not valid for a civil penalty under OAH. ALJ was attempting to save time by explaining the process to both parties at this conference rather than to needlessly take up hearing time.

Case No.: **07F-H067021-BFS**

Complaint: Bad faith by HOA for not promptly processing insurance claim

Source of Law:

Discussion: By stipulation of the parties reached during the hearing, Respondent agreed to pay the $1000.00 deductible and the depreciation cost for Petitioner.

Holding: The stipulation of the parties regarding costs associated with repair of Petitioner's interior wall resolves Petitioner's claim. There is no violation of the C,C & R with respect to Respondent's obligation to repair Petitioner's interior wall damage.

Respondent did not violate either its general obligation to landscape and maintain the common areas, under C,C & R, Article VIII, Section 6; or its specific obligation to maintain the natural vegetation in the sloped Common areas at least quarterly, as required by the Architecture and Landscaping Regulations and Guidelines (Exhibit P13).

Respondent did not act unreasonably or in violation of the C,C & R in failing to take more intrusive and costly measures to bring the Easterbrook property into compliance.

Following a discussion on the record prior to commencement of the hearing, this allegation, #1 relating to painting the garage door, was dismissed pursuant to an agreement of the parties.

As to issue #5, the issue was no longer in dispute.

Office of Administrative Hearings does not have legal authority to award attorney fees and costs to a party in this proceeding.

Comments: **In this case, the homeowner won the real issue of getting paid her $1,000 deductible by the association, but lost the remaining complaints.**

Essential complaint was that delays and initial failures to respond to her roof/wall problem resulted in financial costs and other hardships, and that such failure was a failure to act in good faith.

Issue #5: Issues with neighbor regarding roof repairs is a separate issue. Insurance claim for interior damages, relating to roof and common wall as a result of a tree falling on the roof. HOA refused to file claim. Yet, as of the hearing date, Farmers Ins. has provided a claim check for interior damages as a result of recent storm only. Petitioner incurred additional costs to force the claim, **and she wants to be paid.** Original neighbor did

not fix repairs, and house was sold twice. Roof is not being repaired. New neighbor plans to fix the roof, so petitioner will be "made whole".

Petitioner wants $1,000 deductible to be split by HOA and homeowner, as provided in CC&Rs. Is the common "touching" 2 houses a common wall, thereby invoking the split of the deductible costs?

ALJ can only issue a penalty against the HOA, and not damages for HOA bad faith. **Any penalty is paid to the General Fund and not to the Petitioner.** Petitioner wanted her costs for attorney fees, etc will not be awarded by ALJ – outside OAH jurisdiction. **OAH does not award attorney fees or other costs – just a return of filing fee**.

Only the issue of reimbursement of deductible to Petitioner was heard. No "bad faith" issues would be heard. Petitioner wanted judgment for possible mold when interior is repaired. ALJ cannot hear "what if" possibilities (need to file suit if mold is actually found to exist).

Issue #4: While HOA agreed to allow the antennae, petitioner still is being held in violation of the Rules (which means loss of certain privileges and voting). Settled and not heard.

Issue #3: Failure of HOA to trim trees. Quarterly maintenance is not the same as quarterly tree trimming. Allowed for hearing.

Issue #2: Damage caused mold. HOA was required to intercede according to CC&Rs. Allowed for the hearing.

Issue #1: Paint colors. Special consideration for board member. ACC guidelines permit discretion, which was not abused. ALJ will not entertain issues with other homeowners, unless petitioner represents these other homeowners. Not heard.

Note: The first 48 minutes was more like a pre-conference hearing where the ALJ clarified the issues and which were suitable for ALJ adjudication. Only 3 of the 6 counts (issues) were heard.

Carolyn Goldschmidt is the HOA attorney. She repeatedly brought up "legal issue", which was beyond the jurisdiction of OAH. For example, "Is the board responsible for interceding in neighbor disputes?"

This was a 4 ½ hour Hearing.

Case No.: **07F-H067022-BFS**

Complaint: Submission of petition not included on annual ballot

Source of Law: CC&Rs & bylaws

Discussion:

Holding: A.R.S. Title 10 governs non-profit corporations in Arizona. Petitioner's proposed amendment to the TEPOA By-Laws would have the effect of abrogating the Articles of incorporation in violation of A.R.S. Title 10. See: A.R.S. 10-3801.B. and C. This limitation is similar to the relationship between a statute law and a constitutional provision. A statute cannot abrogate the constitution, in much the same way a By-Law cannot abrogate the Articles of Incorporation. Thus, as a matter of law, the TEPOA Board did not act improperly in declining to place the Petition on the ballot, unless and until the Articles of incorporation would be amended to allow it. ORDER: Based on the above, the Petition is hereby dismissed.

Comments: The logic of the ALJ escapes me in this case. Petitioner sought an amendment to articles when board informed him that articles allow it to charge any capital assessment without any homeonwer vote. Baord refused to place HOA petition signed by a quroum of homeowners to place the isue before the next baord meeting. Board refused and did not. (So much for the new proxy law).

ALJ ignored HOA CC&Rs and bylaws and decided it simply didn't make any difference since articles are articles. He ruled on the wrong issue!!

<u>Hearing info:</u>
Petitioner did not make any attempt to obtain any knowledge or information relating to the OAH hearing process, and has no idea as to what is required or how to proceed. ALJ tried to explain to Petitioner how to proceed with respect to agreed upon evidence; otherwise he must prove his allegation.

A bylaw amendment to restrict board capitol spending on a project was not placed on the ballot because HOA felt it violated CC&Rs and state laws. Petition of some 400 members was submitted to members for inclusion on HOA annual election ballot, but was not included on ballot. Petitioner did not hear from the HOA on the ballot question. Board "accepted" and voted on the petition, but did not approve the petition as a ballot issue since they felt it would violate state laws. Petitioner did not understand the meaning of the board's "no" vote.

Petitioner wants board members to pay any penalties out of their own pockets.

HOA attorney argues that board must act in accordance with the nonprofit corporation act in contrast to governing documents. She argues that the articles of incorporation grant the board the power to make changes to bylaws, subject to vote of the members, referring to nonprofit corporation statutes relating to nonprofits and never once mentioning CC&Rs. Is she confusing Articles with CC&Rs? She objects to petition that would restrict board's powers, and as such would violate state laws giving sole power to the board to manage.

Carolyn Goldschmidt for the HOA.

Case No.: **07F-H067023-BFS**

Complaint: Board failed to place member petition on annual ballot.

Source of Law: statutes (ARS 33-1803, 33-1805); governing documents

Discussion: ALJ says his authority is bound by ARS 41-2198.02; that is, to force compliance with the laws and documents, and the right to charge HOA with a penalty. ALJ advises petitioner that an adverse decision -- petitioner failed to comply with CC&Rs -- may result in a removal of the wall at the discretion of the HOA.

ALJ suggested the parties come to some settlement as proposed by HOA to modify walls as mutually agreed that included half-payment by the HOA. ALJ will vacate the case subject to a signed settlement agreement, pursuant to a "stipulation of the parties." He would not require fees to be paid by HOA or to levy any penalty, subject to receiving a settlement agreement.

Holding: This matter proceeded to a hearing on April 11, 2007. Petitioner and Respondent negotiated a settlement at the hearing, which was to be summarized in writing for signature of the parties. A written stipulation having been filed in this Office, on April 30, 2007, which resolves the issues between the parties,

IT IS HEREBY ORDERED vacating the hearing in this matter.

Comments: The issue relates to an agreement between homeowners over a "shared wall", and the HOA nullification of the agreement. This is a "neighbor" dispute over common walls with the HOA adding additional conditions and restrictions that turned into a "can of worms".

HOA motion to dismiss was denied.

ALJ summarized the issues as follows: Did petitioners obtain approval prior to starting construction? Was approval of all affected neighbors (3) obtained as per ACC guidelines? HOA letter appears to have approved construction, after the fact, but asserted additional conditions. Conditions imposed required petitioner to meet city code, yet the imposed conditions violated city code.

Petitioner complained that there were no written agreements to rely on between the neighbors or HOA "meetings", just conversations. So they filed this complaint to clarify the issues. Also, prior approval was given and then the HOA changed its mind. Petitioner relied on developer's guidelines as the HOA standard, but after transition to non-declarant control, HOA maintained that HOA rules took affect. However, HOA

guidelines were “thrown out” because they violated city code, and so, petitioner maintained, the developer’s was the only guidelines in effect.

Petitioner objected to the procedural manner of the ARC “interference” when it held one-on-one meetings without all involved neighbors in attendance. Furthermore, ARC has no enforcement authority, only the board. ARC did not provide records for petitioner review. Petitioners were denied attendance at any ARC meetings.

Carolyn Goldschmidt for HOA. A 5-hour hearing.

Case No.: **07F-H067024-BFS**

Complaint: Board violations of CC&Rs and bylaws

Source of Law: CC&Rs & bylaws

Discussion: HOA attempted to settle, but homeowner said board refused to discuss settlement. ALJ advises petitioner as to the scope of his jurisdiction, and that the counts in the complaint are outside his jurisdiction: Replace board, reset CC&Rs and bylaws, no absentee ballots. Settles with prejudice – can't raise them again.

Holding: Under the terms of that agreement, which was memorialized on the record, Respondent acknowledged that some technical violations of the documents governing the Association had been alleged in the Petition, and that Respondent had already instituted procedural changes which would prevent a recurrence. Respondent further agreed to pay Petitioner's filing fee in this matter.

Petitioner acknowledged that, as a result of the agreement reached by the parties, he would not proceed further against Respondent regarding any of the allegations in the Petition.

Comments: The ALJ informed the petitioner that HOA cases are final decisions that cannot be appealed. He is correct in that they cannot be appea**led to the Agency, but fails to say that it can be appealed to the Superior Court.**

> ARS 12-904 Judicial Review of Administrative Decisions
> A. **An action to review a final administrative decision shall be commenced by filing a complaint within thirty-five days from the date when a copy of the decision sought to be reviewed is served upon the party affected**.

Mulcahy does not correct the ALJ (in other cases we've seen the HOA attorney advising the ALJ as to how he is to make his decision). Petitioner than decides to enter into a settlement agreement.

Expensive case that lasted only 10 minutes (Consider the 3 other cases that were vacated).

Beth Mulcahy for the HOA.

Case No.: **07F-H067025-BFS**

Complaint: no annual audit; falsified annual reports; failure to provide financial records; others

Source of Law: Title 10, corporate law; ARS 33-1805; CC&Rs, bylaws

Discussion:

Holding:

Comments: Complaint about false financial reports violates title 10, not title 33, Ch 16, and not OAH jurisdiction, but was allowed to be admitted for OAH jurisdiction.

Typical small HOA run by the directors as a social club, without knowledge or skills to properly run the HOA under their legal requirements and obligations.

Exhibits for annual report with Corporate Commission and corporate records were presented showing different amounts. HOA responded that an error with an un-reconciled report was the reason for the difference, and the errors were subsequently corrected.

HOA was unresponsive to questions regarding expenditures, and that stated expected expenditures never materialized. HOA did not provide corporate records on request. Plaintiff could not support HOA requirements to provide un-requested annual reports if not attending the annual meeting. HOA offered current "practice" and did not reply with governing documents. **Where does the money go? Homeowners get no answers and no records.**

As to claim of failing to obtain an annual audit, if required by CC&Rs, Plaintiff stated, "I understand why they don't do it, too costly." HOA stated, "It was common practice not to do it. Small HOAs just do a compilation as common practice. Too costly to do" [Is the fairly common wording placed into CC&Rs as a misleading assurance to induce a buyer to purchase the property in the HOA?]

Plaintiff filed suit in spite of the fact that she did not have current copy of governing documents. A claim of "falsified" requires proof of intentional and deliberate actions by HOA to deceive, and not mere error.

Case No.: **07F-H067026-BFS**

Complaint: HOA appropriated part of his lot for a garage as common area

Source of Law: statutes; declaration

Discussion: On March 29, 2007, the Office of Administrative Hearings issued an Order denying Petitioner's request for a stay. As of this date, Petitioner has failed to either confirm or withdraw the Motion to Dismiss as required by the Order issued by this Office on March 23, 2007.

Holding: Therefore, **IT IS ORDERED** granting Petitioner's Motion to Dismiss without prejudice and vacating the hearing set for April 25, 2007. **IT IS FURTHER ORDERED** denying Respondent's Motion that the dismissal be with prejudice.

Comments: **Petition vacated. Petitioner lost his $2,000 filing fee as punishment.**

Homeowner filed OAH case #026 on Feb. 17th, 2 days after the fee increase to $2,000 from $550. He went to the Tucson office where he was told that it only handles mobile home problems, and that he had to file in Phoenix. That was on Feb 14th, the day before the fee increase. There was no public announcement, notice or hearing concerning the increase.

Homeowner paid the increase because he had a cloud on his title, similar to what has resulted in OAH case 007 where the HOA appropriated homeowner sidewalks. He said that the developer went bust and did not construct garages on the homeowner lots, and now the HOA has declared these un-built slabs to be part of the common area. Leo had to pay the fee, he said, because of the high stakes involved, and he did not want to risk losing in civil court as a result of legal technicalities.

Petitioner filed a motion to dismiss; ALJ advised him of the loss of his $2,000 and gave him until April 3rd motion to dismiss.

Case No.: **07F-H067027-BFS**

Complaint: repeated HOA repairs to leaking condo roof caused mold to develop;

Source of Law: CC&Rs

Discussion: Petitioner was understandably frustrated with the repeated water leaks into her unit, and the resulting damage to the unit's interior walls and ceiling. However, Respondent did "maintain, repair, replace, restore, operate and manage" Petitioner's roof and exterior walls as it was required to do under the Declaration. Furthermore, there is nothing contained within the applicable documents or statutes governing the Association to suggest that Respondent bears any responsibility to correct damage to Petitioner's interior walls or ceiling.

Likewise, there is nothing in those documents and statutes which creates any obligation on Respondent with respect to the mold that subsequently developed inside Petitioner's unit or for health problems she may attribute to that mold.

Holding: Based upon the foregoing, it is ordered denying the Petition.

Comments: In the absence of governing document obligations**,** the Petitioner needs to show evidence of neglect, and with that comes a requirement of a duty of care.

Case No.: **07F-H067028-BFS**

Complaint: homeowner failed to maintain her yard -- gazebo;

Source of Law: CC&Rs

Discussion:

Holding:

Comments: Only issue before the ALJ was that Neighbor complained to HOA about appearance of Plaintiff's backyard – furniture/gazebo was within setback. HOA then fined Plaintiff for violations. What was the meaning of "structure" in CC&Rs restrictions on "no structures are permitted"?

Plaintiff failed to subpoena witnesses and HOA objected as hearsay.

Plaintiff cites cases, without naming them, court opinions on how to interpret wording of documents – intention of parties, everyday meaning of words, etc. She inherited home from father and proceeded to fix it up since it was in bad shape. The neighbor attempted to dictate how Plaintiff was to decorate her property. Soon, they became not too friendly.

ALJ did not want to hear background "causes", just the facts about receiving a fine from HOA. HOA "notice " failed to provide specifics, the gazebo as cause, to Plaintiff who attempted to clarify what was the problem under the CC&Rs, and how the gazebo was a problem. HOA decision, citing another part of CC&Rs, was described as "an error" by HOA attorney.

HOA attorney continued to interrupt Plaintiff, yet she, not the judge, repeatedly chastised Plaintiff for speaking too soon and to wait for the judge to speak.

Plaintiff threatened with age restriction violations. HOA is exempted age restricted HOA – must have a resident over 55 – was not part of Petition.

Carolyn Goldschmidt is the HOA attorney.

Case No.: **07F-H067029-BFS**

Complaint: the HOA board, upon advice of attorney, interpreted CC&Rs with an uncommon meaning;

Source of Law: CC&Rs; case history.

Discussion: Following the discussion in executive session, the Board, **upon recommendation of its attorneys**, [emphasis added] passed a Resolution interpreting Section 11.02 to mean that, rather than requiring an affirmative vote of at least 80% *of the entire membership of the Association* to amend the Declaration, only an affirmative vote of at least 80% of the members voting, either in person or by absentee ballot, *at a meeting* to amend the Declaration would be required.

Although testimony at the hearing made for a compelling argument that homeowner associations should be wary of making the ability to amend their governing documents too strenuous, it does not obviate the fact that the existing Declaration represents a contract between the Association and its 1,322 members – a contract upon which each of those individual owners had a right to rely. Furthermore, the Board's "interpretation" of Section 11.02 had the effect of allowing as few as 106 members of the association to make significant changes to the contract governing all 1,322 of its members. That was a dramatic change from the Board's belief, prior to the passage of the Resolution, that an affirmative vote of at least 1,058 members of the Association would have been necessary to amend the contract which governed all the Association's members.

Article 11, Section 11.02 of the Declaration was not ambiguous on its face. Its meaning was clear, even to the Board prior to October 16, 2006. It was not a proper subject for interpretation under Article 14, Section 14.01, and the Resolution changing the interpretation of Section 11.02 was an invalid exercise of the Board's authority under the Declaration.

The pertinent portion of Section 11.02 provides:

…the Declaration may be amended by the affirmative vote of owners holding at least eighty percent (80%) of the total voting power in the Association at a meeting duly called pursuant to the Articles and Bylaws for the adoption of the amendment.

Petitioner argued that the meaning of Section 11.02 is clear. Respondent argued that Section 11.02 is ambiguous because inclusion of the phrase "at a meeting" suggests that only 80% of the total voting power represented at that meeting would be required to amend a provision of the Declaration.

In support of that position, Respondent argued that "The 'total voting power *at a meeting*' is quite different from 'total voting power.'"

Holding:

IT IS ORDERED vacating the Board's Resolution of October 16, 2006, by which the Board interpreted the meaning of Article 11, Section 11.02 of the Declaration.
IT IS FURTHER ORDERED vacating any amendments to the Declaration, passed after the Board's Resolution of October 16, 2006, and which were based upon the affirmative votes cast by 80% of the members, either in person or by absentee ballot at a meeting called for the purpose of amending the Declaration.
IT IS FURTHER ORDERED that Respondent shall reimburse the filing fee paid by Petitioner in the amount of $2,000.00.

Comments:

This is an important case reflecting 1) HOA attorney "collusion" with the HOA board, and 2) the meaning of contracts and everyday understanding of contractual terms. I say "collusion" because the attorneys fully know the law and how the courts interpret the contractual meanings of the terms therein, yet, regardless of the above, they appear to assist the HOA in its aims and goals.

The initial HOA attorney, Ekmark Law firm, prematurely filed a motion to dismiss forgetting to count the 5-day mailing allowance that is standard for court filing – 5 days are tacked on to specified 5 day response time to allow for delivery of mail. Did these learned, CAI lobbyist attorneys forget the law?

The new law firm for the HOA was Carpenter, Hazelwood. Carpenter is, and has been, the other long-time CAI lobbyist in Arizona.

Case No.: **07F-H067034-BFS**

Complaint: landscaping, interpreting and variances from the guidelines;

Source of Law: CC&Rs

Discussion: On September 13, 2006, Petitioner wrote a letter to the Committee requesting a formal appeal of its decision and explaining why Petitioner felt that the Committee should reconsider the request to allow artificial turf. Exhibit P3. In addition to environmental and health concerns associated with natural turf, Petitioner indicated his belief that a precedent had been set to allow artificial turf because Respondent had previously allowed artificial turf to be substituted for natural turf at another residence within the planned community.

At the hearing on this Petition, Respondent acknowledged that there was one homeowner in the community that had been allowed to install artificial turf in her front yard due to health reasons. That exception, however, was granted by the previous Board of Directors and was believed to have been a response to an Americans with Disabilities Act (ADA) claim presented to that Board by the homeowner.

The authority for the Committee to exercise such broad discretion in approving or disapproving landscape features is found in Article VII, Section 7.2 of the Declaration . . . .

The Committee did not approve Petitioner's request to use artificial turf. Clearly, the Declaration gives the Committee broad discretion to deny such a request. The only limitation on the Committee's exercise of that broad discretion is found in the sentence "Approval shall not be unreasonably withheld."

Finally, the fact that there had been a variance from a strict application of the Guidelines in the past does not create a legally sufficient basis to justify Petitioner's position that the Declaration and Guidelines can no longer be used to prohibit future use of artificial turf.

A variance granted by the Board to a single homeowner does not meet the "frequent violations" standard cited by the court in *Burke, supra.* Consequently, that previous, lone variance does not preclude the Committee from denying Petitioner's request.

Holding: For all the reasons stated above, the Petition is denied.

Comments: **none.**

Case No.: **07F-H067035-BFS**

Complaint: Terravita voting delegate system violates AZ law prohibiting proxy voting;

Source of Law: ARS 33-1812; governing documents

Discussion: Respondent [HOA] also argues that prohibiting delegate voting would be an unconstitutional impairment of the contractual rights of the Association and its Members. Setting aside the obvious fact that an association's governing documents are hardly products of the typical give-and-take contract negotiation that ordinarily occurs between 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 could those rights and interests be compromised by requiring important association decisions to be based on a vote of all of its members?

Respondent's attempt to differentiate the delegate voting system from the use of proxies is a classic "distinction without a difference." The voting delegates were "proxies," and, as such, violate the clear language and intent of A.R.S. §33-1812A. (p.6).

Holding: Based upon the foregoing, **IT IS ORDERED** that Respondent abide by A.R.S. §33-1812A, which prohibits votes cast pursuant to a proxy. **IT IS FURTHER ORDERED** that Respondent reimburse the filing fee paid by Petitioner in the amount of $550.

In footnote 5 to this order: *"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."* [Emphasis added].

Comments: This case reflects the extent to which CAI member attorneys will go to back their HOA client regardless of R. of Civil P. 11(a) that requires that "*and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law . . . and is not inter-posed for any improper purpose*". I believe that the HOA law firm, Ekmark, had to defend its decisions to allow or not oppose the HOA's decision to proceed with the election in question in spite of its public statements concerning proxy voting.

At the hearing, there were 4 HOA attorneys present, and 2 management firm employees, although only one attorney ever spoke to the judge. Did the HOA foot the bill for these attendees?

The homeowner complaint simply stated: After termination of the period of declarant control, votes allocated to a unit (Lot) were cast in the association's election for 3 board members were cast pursuant to a (one or more) proxy. HOA attorneys responded with a 2-¾ inch filing with the captioned case number relating to another OAH case.

Questionable actions related to delayed and incorrect OAH postings. HOA filed papers with BFLS department rather than with OAH, yet they were forwarded to OAH. HOA used long-term resident petitioner's incorrect zip code. HOA's motion for summary judgment was entered as "motion for summary suspension" and petitioner did not receive the document for over 2 weeks. Other filings by Ekmark law firm had to be requested by petitioner at the hearing since he had not received them.

The Terravita HOA President was twice subpoenaed to appear, but failed to appear. Court action for the failure was avoided by the ALJ declaring that her testimony was not really needed. Petitioner, Bill Brown, filed his objection to not being able to having this witness not testify. When questioned by the ALJ, the HOA attorney merely replied, "She's his witness not ours. It's his responsibility." The attorney did not offer any excuse that they were aware of the witness' reluctance to appear and had homeowner failed to maintain her yard -- gazebo strongly advised her to appear.

As occurred in other cases, the HOA attorney filed, at the end of the hearing, a legal memorandum with the ALJ to help him understand the issues. Petitioner also received the 9-page memorandum at this time, but he insisted on time to respond to the memo before the judge decided. He was granted 20 days.

On any appeal, whether at OAH or in Superior Court, the trial record is sent to the appeals court to be used in its determination of the appeal. In its determination, the appeals process will examine whether or not parties raised or objected to issues at the trial court that are now being raised in the appeal court, and if not, they cannot be considered on appeal. Homeowners must respond in answer to any HOA filing.

The ALJ decision is must reading since the judge, in my opinion, is wondering why the attorneys did not concede, as a matter of straightforward law, that the election violated the law. And why the HOA spent this time and money on such a case. See Discussion above for examples of such analysis by the judge.

HOA attorneys were from the Ekmark law firm – Krupnick was not the lead attorney.

Case No.: **07F-H067037-BFS**

Complaint: conditional ACC approval;

Source of Law: CC&Rs

Discussion: Petitioner challenged the Committee's notice of violation, claiming that, under the Guidelines, the Committee had only two choices available when an application was submitted: approved or disapproved. Exhibits P2 and P3. He argued that the form he received back from the Committee had been checked next to the line "Approved," and that, if either of the options he had indicated on his application diagram did not meet with the Committee's approval, the Committee's only choice was to indicate "Disapproved" on the form, and direct that the application be resubmitted in conformity with suggestions made by the Committee.

Respondent argued that the Committee's action with respect to Petitioner's application, although confusing in some respects, was perfectly clear with respect to the approved location for the cooler.

Clearly, both the Declaration and the Guidelines contemplate that the Committee may approve applications subject to certain conditions being satisfied by the applicant. It would be contrary to the obvious intent of the documents and would not serve the legitimate interests of either Respondent or the Association's members to interpret those documents as strictly as Petitioner suggests.

Inherent in any contract, and particularly one between neighbors, is a spirit of mutual cooperation and reasonableness. Homeowner association committees and boards are generally comprised of volunteers who frequently possess neither the time nor the expertise to act with the technical precision suggested by the Petition filed in this case. More importantly, the community documents which govern in this case simply do not require such precision.

Petitioner's first argument, while bolstered somewhat by the subsequent revision of the application form to delete the Committee's option of granting conditional approvals, is, nevertheless, in conflict with the language and intent of both the Declaration and the Guidelines.

Holding: For the reasons stated above, **IT IS ORDERED** denying the Petition.

Comments: The fact that the HOA subsequently revised the guidelines to make Petitioner's installation a non-violation was ignored by the ALJ. All the Petitioner had to do was to resubmit his plans and all would have been OK. It doesn't appear that we have a hostile board here.