



5419 E. Piping Rock Road, Scottsdale, AZ 85254-2952  
602-228-2891 / 602-996-3007  
info@pvtgov.org http://pvtgov.org

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**Arizona Laws Subservient to Private Agreements:**  
**Does the Law of the Land Extend to Homeowners in HOAs?**

**A. Introduction**

As of September 2006, Arizona permitted HOA disputes to be heard by an administrative law judge of the Office of Administrative Hearings. In one of the first complaints, OAH # 07F-H067007-BFS (2007), filed by a homeowner against his HOA in accordance with Arizona's new experiment permitting administrative law judge adjudication of HOA disputes, the ALJ upheld an amended CC&RS. The decision reflects the commonly accepted doctrine that private CC&R agreements will prevail over the Arizona Constitution and statutes.

One of the first complaints, OAH # 07F-H067007-BFS (2007), heard before an administrative law judge in Arizona's new experiment in bringing justice to HOA disputes involved a homeowner who filed a complaint about the taking of his sidewalk property of some 20 years - among other things. The HOA amended the CC&Rs and appropriated homeowner sidewalks since, it was argued by the HOA, the HOA was already maintaining them as required by the CC&Rs. There were no deeds signed by any homeowner, just an amendment deemed valid since it met all the requirements of the CC&R amendment procedure.

The decision failed to acknowledge that the homeowner at his hearing raised the question of the validity of portions of the lengthy amendment to the CC&Rs. The ALJ did not address the purpose and validity of the amendment in his decision, which stated that the homeowner failed to "*present any substantive evidence*" and that,

"[S]uch concerns [by Petitioner] are ultimately irrelevant to the determination of this matter, which involves not the substance of the amendments but the manner in which those amendments were adopted".

The homeowner alleges in his Petition that (emphasis added),

The Board of Directors exceeded its authority and **did not act in good faith** when it promoted, adopted and recorded, on 8/31/06, a completely **new Declaration which fundamentally and unnecessarily changed the governance** and operating structure of the Association in favor of the Association.

## **B. Petitioner statements made at the hearing**

The OAH laws in Arizona provide for the public release of the hearing audiotape that is part of the Hearing record. (The January 3, 2007, under Documents for OAH case #07F-H067007-BFS, Doc. No. 159189, on the OAH website)

In his Hearing statements, Petitioner:

1. Informs the ALJ that the original CC&Rs of 1983 did not claim ownership of the sidewalks, that he indeed paid for and owns the sidewalk property, **and never conveyed the sidewalks to the HOA**. And asks for documentation reflecting a conveyance to the HOA. (Hearing tape at 0:37:20 to 0:43:43; 2:15:04 to 2:16:25).
2. Refers to a violation of §6.10 of the *Restatement (Third) of Property: Servitudes* -- and reads the section aloud -- **referring to a unanimous vote requirement for any amendment restricting a homeowner's property or civil rights, or fundamentally changes the character of the original agreement**. The ALJ asked for a clarification of the Petitioner's citation. (Hearing tape, 1:07:30 to 1:10:00) And again at 2:58:20.

Not cited by the Petitioner in his testimony, but applicable here.

1. Section 6.7(3) of the Restatement, on the other hand, states that a common interest association does not have inherent authority to restrict occupancy of its lots, providing: Absent specific authorization in the declaration, the common-interest community does not have the power to adopt rules, other than those [designed to protect the common property], that restrict the use or occupancy of, or behavior within, individually owned lots or units.

We agree with the Restatement that such a fundamental restriction of the individual owners' expected property rights must be set forth in the Declaration with sufficient specificity that purchasers are on notice that the occupancy of their property could be severely restricted.

(*Wilson v. Playa de Serrano*, CA-CV 2005-0072 (Ariz. App. Div. 2 2005).

2. Arizona statutes regarding transferring real property:  
[ARS 33, Property, Chapter 4, Conveyances and Deeds, Article 1, Formal Requirements 33-401. Formal requirements of conveyance: writing; subscription; delivery; acknowledgment; defects](#)  
A. No estate of inheritance, freehold, or for a term of more than one year, in lands or tenements, shall be conveyed unless the conveyance is by an instrument in writing, subscribed and delivered by the party disposing of the estate, or by his agent thereunto authorized by writing.  
B. Every deed or conveyance of real property must be signed by the grantor and must be duly acknowledged before some officer authorized to take acknowledgments.

....

33-402. Forms for conveyances; quit claim; conveyance; warranty; mortgage

The following or other equivalent forms varied to suit circumstances are sufficient:

1. To quit claim:

For the consideration of \_\_\_\_\_, I hereby quit claim to A.B. all my interest in the following real property (describing it).

2. To convey:

For the consideration of \_\_\_\_\_, I hereby convey to A.B. the following real property (describing it).

3. To convey and warrant:

The same as the preceding form, adding "and I warrant the title against all persons whomsoever" (or other words of warranty).

4. To mortgage:

The same as to convey, adding the following: "To be void upon condition that I pay, etc."

### **C. HOA statements made at the Hearing:**

Furthermore, the HOA secretary stated at the Hearing (emphasis added):

1. The board's awareness **that the property was not in the common area**, Tract A, and was **not seeking to take his property** (Hearing tape at 1:09:30; 1:11:29).
2. But, **"you may own the land but the HOA must maintain it ... for security reasons"**. (Hearing tape at 1:10:45).

### **D. HOA attorney involvement**

At several points in the Hearing, the review of the amendment and involvement by the HOA's attorney is mentioned by the HOA, including his opinion that "the amendment was lawful." (Hearing tape at 1:28:45). The founder of the law firm has been active at the Arizona legislature for years, and has repeatedly opposed homeowner rights reform bills. He is the CAI lobbyist for the Arizona chapter, and a member of its College of Community Association Lawyers.

### **E. OAH Decision**

The ALJ maintains in his conclusion that (Conclusions of Law, p.7 – 8) (emphasis added),

1. **In this proceeding, Mr. DeBoer bears the burden to prove, by a preponderance of the evidence, that the Association violated Article XI Section 3 of the Declaration .**
2. A preponderance of the evidence is 'such proof as convinces the trier of fact that the contention is more probably true than not.'
3. Mr. DeBoer alleged in his petition that the board 'exceeded its authority and did not act in good faith when it promoted, adopted and recorded, on 8/31/06, a completely new Declaration which fundamentally and unnecessarily changed the governance and

operating structure of the Association in favor of the Association'. The evidence was to the contrary to this allegation.

4. Mr. DeBoer may disagree with the substance of those amendments, but such disagreement does not render the amended Declaration invalid. Nor did Mr. DeBoer **present any substantive evidence (or relevant legal authority) to support his assertion** that the Board exceeded its authority or failed to act in good faith during the revision and approval process.

The ALJ misstates Petitioner's statements at the Hearing in ¶ 28 and 29 of his decision, failing to make note of Petitioner's arguments regarding a taking of homeowner's properties (emphasis added):

28. At hearing, Mr. DeBoer addressed numerous concerns that he has with the amendments that were made to the Declaration. The gravamen of Mr. DeBoer's testimony is that the amended Declaration grants substantial additional powers to the Board that may be abused and with which he, as a property owner, vehemently disagrees (ref. Footnote 4).

29. The Administrative Law Judge has considered Mr. DeBoer's concerns, but finds that **such concerns are ultimately irrelevant to the determination of this matter, which involves not the substance of the amendments** but the manner in which those amendments were adopted.

Footnote 4, p. 7:

4 Mr. DeBoer took issue with the following provisions, among others: (i) the definition of "common area"; (ii) the definition of "front landscape"; (iii) the definition of "multiuse easement"; (iv) the Board's authority to adopt rules and regulations; (v) the Board's right of entry and enforcement; (vi) third party rights to ingress and egress; (vii) maintenance of sidewalks and curbs; (viii) assessments (including road assessments); (ix) maintenance by owners (and enforcement rights attendant thereto); (x) architectural control; (xi) restrictions on motorized vehicles; (xii) noise restrictions; (xiii) ownership restrictions; and (xiv) amendments.

The ALJ ordered, "*The Association did not violate the terms of the Declaration in connection with the amendment and restatement of the Declaration. Therefore, as to this issue, Mr. DeBoer's petition is denied.*"

## **F. Conclusions**

The decision is based on conformity of the amendment procedures to the HOA's Declaration -- that private agreement not signed by any homeowner. In his decision, the ALJ ignores the substance of those amendments, and the Arizona Constitution and statutes that apply, thereby placing the Arizona Constitution and statutes subservient to private agreement Declaration. It reflects the same planned community focus on proper procedure - following the rules - over the laws of the land.

Based on ARS § 33-910(E), this decision may be appealed based on its nature:

1. arbitrary and capricious
2. contrary to law
3. abuse of discretion

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