

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Kurt Gronlund,

No. 17F-H1716024-REL

4 Petitioner,

**ADMINISTRATIVE LAW JUDGE
DECISION**

5 vs.

6
7 Cottonfields Community Association,

8 Respondent.

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11 Pending before the Office of Administrative Hearings is Cottonfields Community
12 Association's ("Respondent's") Motion for Summary Judgment and Kurt Gronlund's
13 ("Petitioner's") responses thereto on the issue of whether the Arizona Department of
14 Real Estate ("the Department") has jurisdiction to consider the merits of Petitioner's
15 Homeowners Association (HOA) Dispute Process Petition. Based on the undisputed
16 facts and legal analysis set forth below, the Administrative Law Judge recommends
17 that the Commissioner of the Department grant Respondent's motion for summary
18 judgment.

19 **UNDISPUTED FACTS**

- 20 1. Petitioner owns a home in and is a member of Respondent.
- 21 2. On or about December 11, 2001, the developer of the residential
22 development that became Respondent after homes were sold and the owner of the golf
23 course that was part of the residential development, a separate legal entity ("the Golf
24 Course Owner"), recorded a Reciprocal Easement and Maintenance Agreement ("the
25 REMA") at the Maricopa County Recorder's Office. Section 5.1 of the REMA provides
26 as follows:

27 Use Restriction. The Golf Course Property shall be used
28 solely and exclusively for Golf Course Use or as open space,
29 and for no other purposes. The Golf Course Owner shall
30 have the right, from time to time, in the exercise of its sole
and absolute discretion, to determine whether the Golf
Course Property (or any portion thereof) will be used for Golf
Course Use or as open space.¹

¹ Administrative record at 123, 131.

1 3. Article 12 of the REMA provides in relevant part as follows:

2 This Agreement may be terminated, canceled, changed,
3 modified or amended in whole or in part only by written and
4 recorded instrument executed by (i) The Golf Course Owner,
5 [and] (ii) the Board (acting on behalf of the Association)
6 Notwithstanding any contrary provision hereof: . . . (b) no
7 termination, cancellation, change, modification or
8 amendment of paragraph 5.1 or paragraph 5.3 of this
9 Agreement shall be made without the written approval
10 thereof by the number of Members (as defined in the
11 [Declaration of Covenants, Conditions and Restrictions
12 ("CC&Rs")]) required to amend the Declaration pursuant to
13 Section 13.2 thereof. . . .²

14 4. On December 11, 2001, the developer also recorded Respondent's CC&Rs.
15 Section 14.2 of Respondent's CC&Rs provides in relevant part as follows:

16 Amendment. Except as otherwise provided in this
17 Declaration and subject to the provisions of Section 14.17
18 below, this Declaration may be amended only by the
19 affirmative vote (in person or by proxy) or written consent of:
20 (a) Members holding not less than two-thirds (2/3) of all
21 Class A votes then entitled to be cast; and (b) Members
22 holding not less than two thirds (2/3) of all Class B votes
23 then entitled to be cast No amendment to this
24 Declaration shall be effective unless and until such
25 amendment is recorded.³

26 5. Section 13.2 of the CC&Rs provides as follows:

27 Release. Each Owner, Occupant, and other Person
28 acquiring any interest in the Property, or any part thereof,
29 does hereby release and discharge the City of Phoenix,
30 Declarant, each Declarant Affiliate, each Designated Builder,
31 each Designated Builder Affiliate, and each of their
32 respective employees, agents, invitees, licensees,
33 contractors, officers, directors, shareholders, affiliates,
34 successors and assigns, from any liability of any kind that
35 may arise at any time in the future from the use of the
36 agricultural Properties for farming or other agricultural
37 purposes and/or any of the other matters described herein.⁴

² *Id.* at 149.

³ *Id.* at 83.

⁴ *Id.* at 83.

1 6. Section 14.17 of the CC&Rs provides as follows:

2 Amendments Affecting Declarant, Golf Course Owner or
3 Designated Builder Rights. Notwithstanding any other
4 provision of this Declaration to the contrary, no provision of
5 this Declaration (including but not limited to, this Section)
6 which grants to or confers upon Declarant or any Designated
7 Builder any rights, privileges, easements, benefits or
8 exemptions (except for rights, privileges, easements,
9 benefits, or exemptions granted to or conferred upon
10 Owners generally) shall be modified, amended or revoked in
11 any way, so long as Declarant (or such Designated Builder,
12 as applicable) owns any portion of the Property, without the
13 express written consent of Declarant (and such Designated
14 Builder, as applicable). Notwithstanding any other provision
15 of this Declaration to the contrary, *no provision of this*
16 *Declaration (including but not limited to, this Section) which*
17 *grants to or confers upon the Golf Course Owner or the Golf*
18 *Course Property any rights, privileges, easement, benefits or*
19 *exemptions shall be modified, amended or revoked in any*
20 *way without the express written consent of the Golf Course*
21 *Owner.*⁵

22 (Emphasis added.)

23 7. On or about February 3, 2017, Petitioner filed a Homeowners Association
24 (HOA) Dispute Process Petition with the Department, alleging in relevant part as
25 follows:

26 [In] March 2011 the HOA board voted 3-2 to unilaterally
27 amend REMA 5.1's use restriction on the golf course
28 property without the required vote of the approximately 450
29 eligible class members by altering the legal description of the
30 golf course property and recording amendment 2 and 3
 reflecting those alterations on March 3, 2011 and May 16,
 2011 respectively. Despite this violation by the HOA board,
 the GC zoning of the golf course property provided
 homeowners with a last layer of protection for their property
 values. However, on Oct. 5, 2016, the HOA president
 stripped away that last layer of protection when he appeared
 before the City Council and represented that the
 homeowners favored a rezone from CG to Commercial.
 Relying on amendments 2 and 3, the City Council approved
 the rezone to Commercial

⁵ *Id.* at 89.

1 I respectfully request that the Administrative Court:

2 1. Find that REMA 5.1 may NOT be amended without the
3 vote required by REMA Article 12 and set forth in CC&Rs
4 14.2;

5 2. Find that Amendments 2 and 3 are void and
6 unenforceable; and

7 3. Order the HOA Board to remove amendments 2 and 3
8 from the record.⁶

9 8. Respondent filed an answer, denying any violation of the CC&Rs or
10 applicable statutes. The Department referred the matter to the Office of Administrative
11 Hearings, an independent state agency, for an evidentiary hearing.

12 9. On or about April 27, 2017, Respondent filed a motion for summary judgment.
13 The motion did not dispute the facts set forth in the petition and noted that in 2011,
14 Respondent's Board and the Golf Course Owner amended the REMA to revise the
15 definition of "Golf Course Property" set forth in Recital C of the REMA and that the
16 second and third amendments to the REMA had been recorded at the Maricopa County
17 Recorder's Office. Respondent also noted that in 2014, litigation arose between the
18 Association and the Golf Course Owner regarding the REMA and the validity of the
19 amendments in Maricopa County Superior Court Case No. CV2014-000639, that in July
20 2015, the Association and the Golf Course Owner executed a settlement agreement,
21 and that the lawsuit was dismissed with prejudice on August 7, 2015.

22 10. Respondent argued in the motion for summary judgment that the
23 Department could not determine the issues on which Petitioner requested relief
24 because the REMA was not a community document under A.R.S. § 32-2199.01(A) and
25 the Golf Course Owner was a third party over whom the Department lacked jurisdiction.

26 11. The Administrative Law Judge permitted Petitioner to file a response to the
27 motion for summary judgment. Petitioner did not dispute the additional facts noted in
28 Respondent's motion for summary judgment, but argued that because the REMA was
29 referred to the CC&Rs, the Department had jurisdiction to grant the relief requested.

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⁶ *Id.* at 25-26.

1 Petitioner also noted that Respondent's attorney had taken the position in Case No.
2 CV2014-0000639 that the second and third amendments were void and unenforceable
3 because the REMA was tied to the CC&Rs, thereby providing protection to
4 Respondent's members from a decision by the Golf Course Owner to use the golf
5 course for further development. Petitioner also stated that members of other
6 homeowners' associations in the Phoenix metropolitan area are in the process of
7 fighting efforts by developers to entice the associations' boards to allow golf courses to
8 be developed.

9 12. Oral argument on the motion for summary judgment was held on May 10,
10 2017. Petitioner presented testimony that other members relied on the CC&Rs and
11 REMA when they purchased their homes because they believed that the golf course
12 could not be developed without a two-thirds majority of members' approval.

13 **CONCLUSIONS OF LAW**

14 1. The CC&Rs speak for themselves. Although A.R.S. § 32-2199.02(A) allows
15 the Administrative Law Judge to "order any party to abide by the statute, condominium
16 documents, community documents or contract provision at issue and may levy a civil
17 penalty on the basis of each violation," she cannot prospectively resolve disputes under
18 the CC&Rs that have not yet arisen. Petitioner's petition challenges certain actions that
19 Respondent's board took in 2011, some six years in the past.

20 2. A.R.S. § 33-1802(2) provides that "[c]ommunity documents" means the
21 declaration, bylaws, articles of incorporation, if any, and rules, if any." Although the
22 REMA references the CC&Rs, or Declaration, it is not a community document as
23 defined in A.R.S. § 33-1802(2).

24 3. Petitioner seeks an order from the Department finding that the second and
25 third amendments to the REMA are void and unenforceable under the CC&Rs and
26 requiring Respondent to ask the Maricopa County Recorder to remove the recorded
27 second and third amendments.

28 4. A.R.S. § 32-2199.01(A) sets forth Department's authority to resolve disputes
29 between homeowners' associations and members of such associations, in relevant part
30 as follows:

1 For a dispute between *an owner and a . . . planned*
2 *community association* that is regulated pursuant to title 33,
3 chapter 9 or 16, the owner or association may petition the
4 department for a hearing concerning *violations of*
5 *condominium documents or planned community documents*
6 *or violations of the statutes that regulate . . . planned*
7 *communities. . . .*

8 (Emphasis added.) Respondent's board may have entered into contracts with the Golf
9 Course Owner to amend the REMA without a two-thirds majority vote of Respondent's
10 members, in violation of the CC&Rs. However, the relief that Petitioner seeks implicates
11 the Golf Course Owner's interests in its property and may affect the settlement that the
12 Golf Course Owner entered into with Respondent in August 2015 to resolve the
13 litigation about the two amendments. A.R.S. § 32-2199.01(A) does not give the
14 Department jurisdiction over disputes that implicate the rights of third parties.

15 5. Petitioner's concerns about development of the golf course may be well-
16 founded. However, under applicable statutes, at this time, his available remedies are to
17 elect a board that will better protect members' interest in maintaining the golf course, to
18 file suit in a judicial forum against Respondent and the Golf Course Owner, or to ask the
19 legislature to amend A.R.S. §§ 33-1802(2) and 32-2199.01(A).

20 **ORDER**

21 Based on the foregoing, it is recommended that the Complaint in this matter be
22 dismissed.

23 Done this day, May 11, 2017.

24 /s/ Diane Mihalsky
25 Administrative Law Judge

26 Copy mailed/e-mailed/faxed May 10, 2017 to:
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