

1 **Final agency action regarding decision below:**

2
3 **ALJFIN ALJ Decision final by statute**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 GEORGE F. ROSE AND CARMEN
8 GLORIA ROSE

9 Petitioners,

10 vs.

11 SUN CITY VISTOSO
12 COMMUNITY ASSOCIATION, INC.

13 Respondent,

No. 07F-H067003-BFS

**ADMINISTRATIVE LAW JUDGE
DECISION**

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17 **HEARING:** January 3, 2007.

18 **APPEARANCES:** George F. Rose and Carmen Gloria Rose appeared
19 personally. Sun City Vistoso Community Association, Inc. was represented by its
20 attorney, David A. McEvoy, Esq.

21 **ADMINISTRATIVE LAW JUDGE:** Brian Brendan Tully

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24 Based upon the evidence of record, the Administrative Law Judge makes the
25 following Findings of Fact, Conclusions of Law and Order:

26 **FINDINGS OF FACT**

- 27
28 1. George F. Rose and Carmen Gloria Rose ("Petitioners"), as Trustees of The
29 Rose Revocable Family Trust dated July 18, 1995 ("Trust"), are the record title
30 owners of a residence located at 14460 N. Choctaw Drive, Oro Valley, Arizona
("Lot 6a"). The Petitioners are the beneficiaries of the Trust.

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007
(602) 542-9826

- 1 2. The subject property was acquired by Warranty Deed dated June 24, 2004. The
2 Warranty Deed was "SUBJECT TO: Current taxes and other assessments,
3 reservations in patents and all easements, rights of way, encumbrances, liens,
4 covenants, conditions, restrictions, obligations and liabilities as may appear of
5 record."
6 3. At the time the Trust obtained title to the subject property, the property was
7 subject to the terms and conditions of the Sun City Vistoso Eleventh Amended
8 and Restated Declaration of Covenants, Conditions, Restrictions, Assessments,
9 Charges, Servitudes, Liens, Reservations and Easements ("Eleventh Amended
10 and Restated Declaration").
11 4. The Eleventh Amended and Restated Declaration was made effective on March
12 23, 2004 "by Sun City Vistoso Community Association, Inc. ("Respondent"), an
13 Arizona non-profit corporation as successor to the rights of Declarant from First
14 American Title Insurance Company, a California corporation, as Trustee, and by
15 Del Webb Communities, Inc., an Arizona corporation, and Del Webb Home
16 Construction, Inc., an Arizona corporation."
17 5. Article IV, Section 4 (a) of the Eleventh Amended and Restated Declaration
18 reads as follows:

19
20 **Walls, Fences and Landscaping**

21 No wall or fence of any nature shall be built, erected, placed or
22 permitted to remain on Lots or Parcels bordering any golf course
23 within a distance of fifteen feet (15') of the rear property line of a
24 height of greater than five feet (5') with any portion thereof in
25 excess of three feet (3') in height being limited to open wrought iron
26 construction. In the event a swimming pool is placed on a Lot
27 bordering the golf course, that portion of any fence which is in
28 excess of three feet (3') in height must be of wrought iron if it is
29 located within fifteen feet (15') of the rear property line.
30 Landscaping shall be planned for any Lot bordering a golf course
so as to avoid undue obstruction of the view of the golf course from
the Lots or other Common Areas bordering said golf course.
Specifically, but not to the exclusion of the general statement
above, no fence, wall, hedge, shrub or other planting which
obstructs sight lines at elevations higher than three feet (3') above
the finished floor grade of any Dwelling Unit bordering the golf

1 course shall be placed or planted by an Owner, the Association or
2 any homeowner association within fifteen feet (15') of the boundary
3 between the Lot or Common Area and said golf course. Other than
4 as initially installed by the Developer, no trees shall be permitted on
5 any Common Area bordering the golf course.

6 6. Petitioners' property is adjacent to a golf course maintained by Respondent for its
7 member homeowners. The property is located between the thirteenth and
8 fourteenth holes. Petitioners' property faces to the east, which is a portion of the
9 golf course that is natural desert.

10 7. By letter dated August 16, 2004, Scott G. Devereaux, Respondent's General
11 Manager, responded to Petitioners' request for Respondent's assistance with
12 their view of the playable portions of the golf course. Mr. Devereaux confirmed
13 that Respondent had removed vegetation from the common area between the
14 two holes directly behind their residence to the east and on the golf course itself.
15 He also confirmed that Petitioners had requested that their next door neighbors,
16 the Millers, remove vegetation in their backyard to improve Petitioners' view of
17 the 14th tees, which are located to the southeast of Petitioners' backyard. Mr.
18 Devereaux invited Petitioners to Respondent's Board of Directors' meeting on
19 August 24, 2004 to discuss the matter.

20 8. By letter dated August 16, 2004, Mr. Devereaux also wrote to Lawrence and
21 Anita Miller, Petitioners' next door neighbors to the south. Mr. Devereaux
22 informed the Millers that Respondent had been "requested to instruct you to
23 remove certain vegetation in your back yard." Mr. Devereaux advised the Millers
24 of the following:

25 Our governing documents (CC&R's) (sic), in part, state:
26 "Landscaping shall be planned for any Lot bordering a golf course
27 so as to avoid undue obstruction of the golf course from said Lot
28 and from any neighboring Lots." Your neighbors' view of the golf
29 course is primarily down the 14th fairway. This requires them to look
30 directly across your property.

9. Mr. Devereaux invited the Millers to Respondent's August 24, 2004 Board
meeting to discuss the matter.

1 10. At Respondent's August 24, 2004 Board meeting, Petitioners and the Millers
2 were given an opportunity to address the Board. The Board approved the
3 following motion: "1) Ask the Chairman of the Architectural Review Committee to
4 bring the two parties together in hopes of conflict resolution and 2) Have the
5 Board of Director's (sic) receive clarification from the Association attorney
6 pertaining to issues on the golf lots and their backyards."

7 11. The minutes of Respondent's September 14, 2004, reflect the following:

8
9 J) Unfinished Business – Unit 5 and 6a Views pertaining to golf
10 course lots. The two parties have not met, but wish for the Board to
11 meet with them. The attorney has reviewed the language pertaining
12 to this issue and is developing a reasonable interpretation. It is
13 recommended the item be postponed until the next Board meeting
14 allowing for necessary preparation to make a judgement (sic).

15 2. On or about October 19, 2004, Mr. Devereaux wrote a memorandum to
16 Respondent's Board of Directors regarding the view issue between Petitioners
17 and the Millers. Mr. Devereaux gave an analysis of Article IV, Section 4(a) of the
18 Eleventh Amended and Restated Declaration. Mr. Devereaux reached the
19 following conclusions:

- 20 • It is the responsibility of the Board to interpret the governing documents.
- 21 • In doing so, the Board should attempt to make reasonable interpretations.
- 22 • Views of golf course lots are site specific and should be determined on a case-by-case basis.
- 23 • In the case in front of you, the Association has made efforts to provide an unobstructed view of the 14th fairway from several reasonable locations in the Rose's backyard. This was done by trimming vegetation on the golf course (common land).
- 24 • It would seem unnecessary to instruct the Miller's (sic) to remove any of the vegetation in their backyard at this point in time.
- 25 • The Association will need to continue to maintain the established view by way of future maintenance and trimming.
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2 3. On or about October 19, 2004, Mr. Devereaux advised Petitioners and the Millers
3 in writing that the Board would address the golf course view dispute at its
4 October 26, 2004 meeting.

5 4. At Respondent's October 26, 2004 Board meeting minutes contain the following
6 entry:

7
8 H) Unfinished Business

9 1) Unit 5 & 6a Views – Mr. Rose spoke to his request for view
10 maintenance. Mr. Miller spoke to his perspective of the
11 issue.

12 **Motion by Sikkink for the Board to deny the request**
13 **from the unit 6a petitioners to require a neighbor to**
14 **remove shrubs to improve a view. The Board has taken**
15 **this action after listening to the petitions, reading and**
16 **rereading the appropriate CC&R's (sic) receiving legal**
17 **advice and in the belief that Association trimming of the**
18 **common area to the right of Unit 6a lot provided a view**
19 **for that lot, seconded by Natt.**

20 **Vote called by Frasca. Motion approved unanimously.**
21 **(Emphasis in the original).**

22 5. In March 2005, Respondent's membership was sent a ballot containing eight
23 changes to Respondent's governing documents proposed by the Board of
24 Directors. The issues on the ballot were Nominating Procedure, two items
25 concerning Directors' Terms of Office, Length of Contracts, Golf Views,
26 Borrowing Authority, Off Leash Dog Park, and Committees.

27 6. The documentation submitted to the membership with the ballot explained the
28 proposed change related to golf views:

29 There is little argument the present language is confusing, hard to
30 understand and difficult to interpret and enforce. This proposal
seeks to simplify the section by removing unnecessary language.
The basic intent remains that landscaping should be maintained so

1 as to avoid undue obstruction of the golf course for lots bordering
2 the golf course. Under the proposed change the Board of Directors
3 will determine whether a view is obstructed. (If approved, the Board
4 will create a Board policy further clarifying how a view is to be
determined).

- 5 7. Respondent's membership approved the ballot measure regarding the changes
6 to golf course view.
- 7 8. The Twelfth Amended and Restated Declaration of Covenants, Conditions,
8 Restrictions, Assessments, Charges, Servitudes, Liens, Reservations and
9 Easements ("Twelfth Amended and Restated Declaration") was made effective
10 on March 22, 2005, by Respondent's Board.
- 11 9. Article IV, Section 4 (a) of the Twelfth Amended and Restated Declaration
12 approved by the membership reads:

13 **Walls, Fences and Landscaping**

14 No wall or fence of any nature of a height greater than five (5) feet
15 shall be built, erected or placed within a distance of fifteen (15) feet
16 of the rear property line of Lots bordering the Golf Course. Any
17 portion of such wall or fence greater than three (3) feet in height
18 shall be limited to open wrought iron construction. Landscaping of
19 Common Areas and Lots bordering the Golf Course shall be
20 maintained to avoid undue obstruction of views of the Golf Course.
The Board of Directors shall be the final authority as to whether a
view is unduly obstructed.

- 21 10. By letter dated May 2005, Respondent's Board of Directors addressed the
22 subject of Common Area Vegetation & Landscaping with Respondent's
23 membership. The Board informed the membership that in July 2004 it voted to
24 eliminate a 1997 policy entitled "Common Area Policies, Procedures and
25 Request Form." The policy allowed members to enter into agreements with the
26 Board for a member to maintain portions of the Common Areas at the member's
27 expense. The Board was now asserting control over Respondent's Common
28 Areas.

1 11. On or about October 5, 2005, Petitioners submitted a completed Common Area
2 Vegetation Maintenance Request Form to Respondent. Petitioners made the
3 following request:

4
5 Please open as much view looking south from our golf course lot!
6 We are just north of the #14 tees. Remove 6' cholla, etc.

7 Steve, as a member of the nine-hole club, I like to watch people
8 tee-off! Please call me for specifics.

9 12. Respondent completed Petitioners' requested maintenance work on January 31,
10 2006.

11 13. On or about February 3, 2006, Petitioners submitted a completed Common Area
12 Vegetation Maintenance Request Form to Respondent. Petitioners made the
13 following request:

14
15 Trim and top off all small Mesquite trees and brush to Open our
16 view of the beautiful Catalina Mountains within the common area
17 directly East of our property; respecting the boundaries of the
18 properties to the North and South of our lot.

19 We choose to do this work ourselves and WE WILL NOT DISTURB
20 ANY OF THE CACTUS (CHOLLA, PRICKLY PEAR ETC.) We will
21 trim the Prohibited Desert Bloom as close to the ground as possible
22 and dispose of all cuttings as work progresses.

23 14. Mr. Devereaux made the following notation of Respondent's response to
24 Petitioners' request: "No action taken – not protection (sic) for mountain view –
25 letter sent."

26 15. By letter dated February 10, 2006, Mr. Devereaux denied Petitioners' February 3,
27 2006 request because "[M]ountain views were not protected by Del Webb and
28 there is no language regarding this in our governing documents."

29 16. By letter dated February 18, 2006, Petitioners respondent to the denial of their
30 February 3, 2006 request. They contended that Respondent's Development
Standards' intent is "to preserve the desert environment and architectural
character of the Sonoran Desert southwest, to maintain and enhance community

1 property values, and to respect the vistas and views of the mountain setting.”
2 Petitioners requested that their response be considered a resubmission of their
3 February 3, 2006 request.

4 17. By letter dated February 28, 2006, Mr. Devereaux acknowledged receipt of
5 Petitioners’ letter dated February 18, 2006 and indicated that Respondent would
6 review the information in it. However, Petitioners were reminded that they may
7 not do any trimming in the common area.

8 18. By letter dated March 18, 2006, Mr. Devereaux advised Petitioners that
9 Respondent’s Governing Documents do not provide for the protection of
10 mountain views. As to Respondent’s Development Standards, he wrote:

11
12 The Development Standards only apply to Lots and Parcels and do
13 not apply to any property owned currently by the Association
14 (including the golf course). The language outlined in paragraph 2 of
15 the introduction does not insure a mountain view. Rather, it is
16 simply a statement discussing in general why we have
17 Development Standards. There is no specific section of the
18 Development Standards pertaining to mountain views.

19 19. As to Petitioners’ claim that other members had been performing maintenance in
20 Respondent’s common areas, Mr. Devereaux pointed out that in 2004 the Board
21 rescinded the practice of members performing maintenance of Respondent’s
22 common areas, revoked all prior agreements with members to do so, and had
23 directed the general manager to assert control over Respondent’s common
24 areas. Mr. Devereaux concluded by informing Petitioners that the denial of their
25 maintenance request was still in effect.

26 20. On April 14, 2006, Mr. Devereaux had a telephone conversation with Petitioner
27 Gloria Rose concerning the mountain view issue. Mr. Devereaux indicated that
28 Respondent would be willing to open up Petitioners’ view of the golf course
29 directly behind their residence, but then let the area to the south behind the
30 Millers’ residence grow back naturally.

1 21. On or about April 14, 2006, Petitioner Gloria Rose submitted a Common Area
2 Vegetation Maintenance Request Form to Respondent requesting the following:

3
4 Open our view of the Golf Course! Our primary view of the Golf
5 Course is directly in back of our property (E). Including removal of
6 Desert Broom.

7 Please help opening our primary view of the Golf Course directly
8 (E) without negatively impacting the Golf Course. Thank You!

9 22. By letter dated May 8, 2006, Mr. Devereaux responded to Petitioners' Common
10 Area Vegetation Maintenance Request Form dated April 14, 2006. Mr.
11 Devereaux indicated that Respondent could assist Petitioners by trimming the
12 vegetation on the perimeter of the golf course behind their lot. He confirmed that
13 by agreeing to do that, Respondent would allow the golf course behind the
14 Millers' residence return to natural vegetation.

15 23. In May 2006, Respondent sent its members a letter reminding them to refrain
16 from doing any maintenance work in the common areas.

17 24. On or about October 20, 2006, Petitioners filed a Petition for Hearing and Answer
18 with the Department of Fire, Building and Life Safety ("Department"). Petitioners
19 allege that Respondent failed to enforce Article IV, Section 4 a) of the Eleventh
20 Amended and Restated Declaration and Development Standards.

21 25. Pursuant to statute, the Department referred Petitioners' petition to the Office of
22 Administrative Hearings, an independent agency, for formal hearing.

23 26. At the hearing, the parties agreed to an amendment naming Carmen Gloria Rose
24 as Co-Petitioner.

25 **CONCLUSIONS OF LAW**

26
27 1. Petitioners filed their petition against Respondent with the Department pursuant
28 to A.R.S. § 41-2198.01.
29
30

- 1 2. The Department referred this matter to the Office of Administrative Hearings for
2 hearing and the issuance of an Order, pursuant to A.R.S. §§ 41-2198.01(D) and
3 41-2198.02.
- 4 3. Pursuant to A.A.C. R2-19-119(B), Petitioner has the burden of proof in this
5 matter. The standard of proof is preponderance of the evidence. A.A.C. R2-19-
6 119(A).
- 7 4. Article XVII of the Eleventh Amended and Restated Declaration granted
8 exclusive authority to Respondent's Board of Directors to construe and interpret
9 the document. That section reads as follows:

10
11 Except for judicial construction, the Association, by its Board, shall
12 have the exclusive right to construe and interpret the provisions of
13 this Declaration. In the absence of any adjudication to the contrary
14 by a court of competent jurisdiction, the Association's construction
15 or interpretation of the provisions hereof shall be final, conclusive
16 and binding as to all persons and property benefited or bound by
17 the covenants and provisions hereof.

- 18 5. Article XVI, Section 2 of the Eleventh Amended and Restated Declaration
19 provided that it could be amended "with the approval of sixty percent (60%) of the
20 Owners voting in an election duly called in accordance with this Declaration or
21 the Bylaws." Respondent's members voted to amend the Eleventh Amended and
22 Restated Declaration, resulting in the Twelfth Amended and Restated
23 Declaration.
- 24 6. Petitioners' complaint that Respondent failed to enforce the provisions of the
25 Eleventh Amended and Restated Declaration is untimely, due to it having been
26 amended and superseded by the Twelfth Amended and Restated Declaration
27 and their failure to timely prosecute a civil claim while the Eleventh Amended and
28 Restated Declaration was effective. Petitioners' complaints are now moot
29 because of the Twelfth Amended and Restated Declaration.
- 30 7. Article IV, Section 4(a) of the Twelfth Amended and Restated Declaration
provides that "[l]andscaping of Common Areas and Lots bordering the Golf

1 Course shall be maintained to avoid undue obstruction of views of the Golf
2 Course.” It is concluded that Respondent has maintained the landscaping of the
3 common areas to avoid undue obstruction of Petitioners’ views of its golf course.
4 Petitioners have unrealistic and unreasonable expectations of golf course views
5 from their lot, especially pertaining to their view of the 14th tees to their southeast.

6 8. The Eleventh Amended and Restated Declaration, the Twelfth Amended and
7 Restated Declaration, and Respondent’s Development Standards do not grant
8 Petitioners any rights to mountain views from their property. Respondent has
9 been reasonable in maintaining the common area behind their house to the east
10 to avoid undue obstruction of Petitioners’ mountain views.

11 9. The evidence of record does not support Petitioners’ request for relief outlined in
12 their petition.

13 **ORDER**

14
15 IT IS ORDERED that Petitioners’ petition in this matter be denied. Pursuant to
16 A.R.S. § 41-2198.02(B), this Order is the final administrative decision and is not subject
17 to a request for rehearing.
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19 Done this day, January 23, 2007

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21 _____
22 Brian Brendan Tully
23 Administrative Law Judge
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Original transmitted by mail this
____ day of _____, 2007, to:

Robert Barger, Director
Department of Fire Building and Life Safety - H/C
ATTN: Joyce Kesterman
1110 W. Washington, Suite 100
Phoenix, AZ 85007

George F. and Carmen Gloria Rose
14460 N. Choctaw Drive
Oro Valley, AZ 85755

David A. McEvoy, Esq.
McEvoy, Daniels & Darcy, P.C.
4560 East Camp Lowell Drive
Tucson, AZ 85716

By _____