Final agency action regarding decision below:

ALJFIN ALJ Decision final by statute

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

SCOTT R. KETCHUM, Petitioner, vs. **SAN MARCOS MANOR HOMEOWNERS ASSOCIATION**, Respondent.	**No. 07F-H067005-BFS** **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: January 11, 2007 at 9:00 a.m.

APPEARANCES: Petitioner Scott R. Ketchum appeared on his own behalf; Respondent San Marcos Manor Homeowners Association ("the HOA") appeared through Kristen L. Rosenbeck, Esq., Mulcahy Law Firm, P.C.

ADMINISTRATIVE LAW JUDGE: Diane Mihalsky

The parties presented evidence and testimony on the issue of whether Respondent San Marcos Manor HOA acted appropriately in denying Petitioner Mr. Ketchum's request that it approve a play structure in his back yard. Based on the entire record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

RELEVANT CC&RS AND ARCHITECTURAL GUIDELINES

1. San Marcos Manor is a master-planned community that consists of 60 one- and two-story single-family residences. The developer initially recorded its Declaration of Covenants, Conditions, and Restrictions ("CC&Rs") on October 31, 1996. An

amendment to the CC&Rs that is not relevant to this matter was recorded on November 6, 1997.

2. The CC&Rs relevant to this matter follow:

2.1 Section 1.1 provides that "'Architectural Committee' shall mean the committee established by the Board pursuant to Section 3.1 of this Declaration."

2.2 Section 1.2 provides that "'Architectural Committee Rules and Guidelines' shall mean the rules adopted by the Architectural Committee, as said rules may be amended from time to time."

2.3 Section 1.14 defines "Improvement" as "buildings, roads, driveways, parking areas, fences, walls, rocks, hedges, plantings, planted trees and shrubs, and all other structures or landscaping Improvements of every type and kind."

2.4 Section 1.24 provides that "'Visible from Neighboring Property' shall mean, with respect to any given object, that such object is, or would be, visible to a person six (6) feet tall, standing on any part of such neighboring property at an elevation no greater than the elevation of the base of the object being viewed."

2.5 Article 3 relates to the "Architectural Committee" and provides in relevant part:

> Section 3.1. Establishment. The Declarant shall establish an Architectural Committee to perform the functions of the Architectural Committee set forth in this Declaration and to adopt the procedural rules and regulations for the performance of such duties, including procedures for preparation, submission and determination of the application for any approvals required by this Declaration. . . . The Architectural Committee Rules and Guidelines shall interpret and implement this Declaration by setting forth the procedures for Architectural Committee review and the standards for development within Dynamite Ranch. . . . Subject to the provisions of this Article, the decision of the Architectural Committee shall be final on all matters submitted to it pursuant to this Declaration.
>
> Section 3.2. Appeal. Any Owner aggrieved by a decision of the Architectural Committee may appeal the decision to the Board in accordance with procedures to be established by the Board. If the Board fails to allow an appeal or if the Board, after the appeal, again rules in a manner aggrieving the appellant, the decision of the Board is final. . . .

2.6 Section 7.7, concerning "Improvements and Alterations," provides as follows:

> No improvements, alterations, repair, excavations, landscaping or other work, including exterior paint, which in any way alters exterior appearance of any property or the Improvements located thereon, from its natural or improved state existing on the date such property was first conveyed in fee by Declarant to a Purchaser, shall be made or done without the prior written approval of the Architectural Committee, except as otherwise expressly provided in this Declaration. No building, fence, wall, landscaping, residence, or other structure shall be commenced, erected, maintained, improved, altered, made or done without the prior written approval of the Architectural Committee. No change or deviations in or from such plans and specifications once approved shall be made without the prior written approval of the Architectural Committee. All decisions of the Architectural Committee shall be final and no Owner or other parties shall have recourse against the Architectural Committee for its refusal to approve any such plans and specifications or plot plan, including lawn area and landscaping.

2.7 Section 13.10 provides for the binding effect of the CC&Rs, in relevant part as follows:

> By acceptance of a deed or by acquiring any interest in any of the property subject to this Declaration, each person or entity, for himself or itself, . . . binds himself . . . to all of the provisions, restrictions, covenants, conditions, rules, and amendments thereof. In addition, each such person by so doing thereby acknowledges that this Declaration sets forth a general scheme for the improvement and development of the Property . . . . Furthermore, each such person fully understands and acknowledges that this Declaration shall be mutually beneficial, prohibitive and enforceable by the various subsequent and future Owners . . . .

2.8 Section 13.17 provided for attorney's fees, in relevant part as follows:

> In the event the Association employs an attorney to enforce any lien granted to it under the terms of this Declaration, or to collect any assessments or other amounts due from an Owner, or to enforce compliance with or recover damages for any violation or noncompliance with the Project Documents, the offending Owner or other person or entity shall pay to the

> Association, upon demand, all attorney fees and court costs incurred by the Association, whether or not suit is filed, which fees and costs shall be secured by the assessment lien.

3. The original Architectural Guidelines, adopted in February 2001, and the revised Guidelines, adopted in April 2006, provided in relevant part as follows:

> GENERAL PRINCIPLES:
>
> The purpose of the Committee is to ensure consistent application of the design guidelines . . . .
>
> PROTECTION OF NEIGHBORS:
>
> The interest of neighboring properties must be protected by making reasonable provisions. The committee will take under consideration all aspects of the change requested and the impact on the neighboring properties, in some cases approval may be required from neighboring homeowners.
>
> DESIGN COMPATIBILITY:
>
> The proposed architectural change must be compatible with the design characteristics of the property requesting change.

4. With respect to "Rear Yard Landscape," the February 2001 Architectural Guidelines provided in relevant part as follows:

> Rear yard landscape design is per the discretion of each homeowner. . . .
>
> REAR YARD IMPROVEMENTS:
>
> Rear Yard improvements not exceeding the perimeter wall six feet (6') do not require committee approval.
>
> Example of items under six feet (6 ft) not requiring approval:
>
> Playground equipment
> Spas
> Built in BBQ – Must be setback 7 feet from perimeter wall
> Walls surrounding pool equipment
> Fireplaces
> Fountains
> Bird baths

5. With respect to "Rear Yard Improvements," the April 2006 Architectural Guidelines provided in relevant part as follows:

> Rear yard improvements exceeding the perimeter wall height require committee approval.
>
> Examples of items under the wall height not requiring approval:
>
> Spas
> Built in BBQ – must be setback seven feet from perimeter wall
> Walls surrounding pool equipment
> Fireplaces
> Fountains
> Bird Baths

6. The Landscape Design Standards attached to the February 2001 Architectural Guidelines provided that "[r]earyard landscape design is per the discretion of each homeowner as long as it does not visibly or functionally impact adjacent property owners."

7. The San Marcos Manor HOA Fine Policy Resolution of April 24, 2006 provided in relevant part as follows:

> The Board of Directors intends to impose monetary penalties as authorized by A.R.S. Section 33-1803. The Board of Directors, when imposing monetary penalties reserves the right to enforce the community's restrictions in any other legal manner. The following fine schedule is intended to be a guide only and is not intended to create any rights. The Board of Directors reserves the right to impose a monetary penalty on the first date of the violation to accrue the fine daily until the violation is cured, and to impose fines in amounts in excess of those set forth in the fine schedule.
>
> Each notice will inform the homeowner of the next set in the fine procedure.
>
> **COURTESY NOTICE:**
> An initial courtesy notice of the violation shall be mailed via regular mail to the homeowner requesting compliance within (14) days – **NO NOTICE OF FINE.**

SECOND NOTICE:
If violation still exists a second notice requesting compliance within (10) days shall be mailed via regular mail to the homeowner. **WARNING OF FINE** to be assessed with the second notice.

THIRD NOTICE:
If violation still exists a second notice requesting compliance within (7) days shall be mailed via regular mail to the homeowner. A **$25.00 FINE** will be assessed and due immediately with the third notice.

FOURTH NOTICE:
If violation still exists a third notice requesting compliance within (7) days shall be mailed via certified mail to the homeowner, return receipt requested. A **$50.00 FINE** will be assessed and due immediately with the fourth notice.

CONTINUING VIOLATIONS:
If the violation continues without resolution after the fourth notice, a **FINE OF $100.00** shall be assessed **every (7) days** until the violation is resolved. "In addition the Board shall have the right to remedy the violation and/or take legal action, the cost of which shall be billed to the homeowner and collected in the same manner as assessments."

BACKGROUND AND PROCEDURE

8. In April 2005, Complainant Scott Ketchum and his wife Krista Kay became members of San Marcos Manor HOA when they purchased a house within its boundaries from the previous owners. The previous owners had not completed front yard landscaping and had installed red paving bricks on the side of the house.

9. Mr. Ketchum and his wife have three children: a nine-year-old son, a seven-year-old son, and a five-year-old daughter.

10. Mr. Ketchum had admitted into evidence San Marcos Manor HOA's notice of violations to the previous owners in relevant part as follows:

10.1 On April 21, 2005, San Marcos Manor HOA sent three "friendly reminders" to the previous owners about "unapproved brick landscaping on the side of the home," debris from plant on gravel in front yard landscaping, and gates need repair/repaint.

10.2 On April 27, 2005, San Marcos Manor HOA sent an Affidavit & Disclosure Statement to the previous owners under A.R.S. § 33-1906 that "Gate needs to be stained," "Unapproved bricks in driveway," and "Wall in front of home near rocks needs to be painted."

11. On April 27, 2005, San Marcos Manor HOA sent Mr. Ketchum and his wife a Disclosure Notification, to which was attached copies of the CC&Rs, which it was "obligated to send . . . prior to the close of escrow according to Arizona Revised Statutes."

12. On May 20, 2005, San Marcos Manor HOA sent a letter to Mr. Ketchum and his wife, welcoming them and informing them of the $42.00 monthly assessment that was due on their lot. The letter was from Dodi Gorski, Community Manager.

13. Over the next seven months, Dodi Gorski on behalf of San Marcos Manor HOA gave notice of and Mr. Ketchum and his wife took steps to remedy certain violations of the CC&Rs, in relevant part as follows:

13.1 On May 24, 2005, Ms. Gorski notified Mr. and Mrs. Ketchum that their exterior front walls and gate needed repainting in certain specified colors.

13.2 On June 10, 2005, Ms. Gorski sent Mr. and Mrs. Ketchum a Friendly Reminder that "Weeds are beginning to accumulate on the property" and requested that Mr. and Mrs. Ketchum "remove them before they begin to spread."

13.3 On June 10, 2005, Ms. Gorski informed Mr. and Mrs. Ketchum that "[a]ll exterior changes must be submitted for approval prior to commencing any project" and that "[t]here is no record of approval for your change." Mr. Ketchum testified that the letter referred to his use of the colors specified in the May 24, 2005 letter to repaint the exterior wall and gate, which were constructed of wood and turned a different color than on his neighbors' property after he applied the specified stain.

13.4 On June 30, 2005, Ms. Gorski informed Mr. and Mrs. Ketchum that they must submit for approval the red brick that the previous owners had installed on the side of the house, because it had not been approved.

13.5 On July 6, 2005, a Friendly Reminder to "paint/repair gates on both sides of home."

13.6 On July 11, 2005, Mr. Ketchum submitted a request that the Architectural Committee approve the paving stones that the previous owner had installed in the east side of the house, in relevant part as follows:

> There was no indication at closing that any violation existed. I understand these paving stones have been there for over three years. I request the Board of Directors consider the time frame the paving stones have been installed without a violation sent to the previous owner. When I purchase[d] the house the paving stones were part of property and I had no knowledge they were a violation of the CC&Rs.

13.7 On July 12, 2005, Ms. Gorski informed Mr. and Mrs. Ketchum that the Architectural Review Committee had approved their request for the paving stones that the previous owners had installed.

13.8 On August 19, 2005, Ms. Gorski noted a miscellaneous violation of the CC&Rs and requested that Mr. and Mrs. Ketchum "paint/repair gates on both sides of home."

13.9 On August 19, 2005, Ms. Gorski noted a violation of the CC&Rs in that "[t]rash can [was] visible on non collection day" and requested that they store the trash can out of sight on non collection days.

13.10 On September 7, 2005, Ms. Gorski sent Mr. and Mrs. Ketchum a Friendly Reminder that "[w]eeds are beginning to accumulate on the property" and requested that they remove the weeds.

13.11 On September 9, 2005, the San Marcos HOA board issued a newsletter on the subject of "Gates," in relevant part as follows:

> Due to various reasons the redwood stain – latex formula – is not an appropriate color/tint for <u>all</u> gates. What may work for some does not for others. We would like to give you some options without dictating what you should purchase. . . .

LANDSCAPING IN FRONT AND BACK YARDS

14. On July 7, 2005, Ms. Gorski sent a Friendly Reminder to Mr. and Mrs. Ketchum that "[a] minimum of two trees are required for each front yard . . . according to the design standards of your association."

15. On August 25, 2005, Ms. Gorski sent a notice of violation of the CC&Rs in that they required "[a] minimum of two trees . . . for each front yard."

16. On December 7, 2005, Ms. Gorski informed Mr. and Mrs. Ketchum that the Architectural Committee had denied their request for front yard landscaping because "[g]rass in any form is not allowed on your particular lot" and pink bower vine and evergreen yellow bird of paradise were not on the approved list of vegetation.

17. On December 15, 2005, Mr. and Mrs. Ketchum submitted an Architectural Design Review Form for approval of "Landscape (Front Yard)."[1] The form indicated that the Architecture Review Committee conditionally approved the plan for the "Front yard only."

18. On December 27, 2005, Ms. Gorski informed Mr. and Mrs. Ketchum that the Architectural Review Committee had approved their request for landscaping with the condition that only the front yard was approved, per their architectural submission.

19. On December 28, 2005, Ms. Gorski sent a Friendly Reminder that the "[p]layset in the back yard [violated the] CC&R's," that "[a]ll exterior changes must be submitted for approval prior to commencing any project," and that "[t]here is no record of approval for your change."

20. On January 10, 2006, Mr. and Mrs. Ketchum responded to Ms. Gorski's Friendly Reminder about the playset, in relevant part as follows:

> We have gone through our copy of the San Marcos Manor CC&R's and are unable to find any reference to play equipment being erected in the backyard. We understand that if something is erected in any area, and is visible from neighboring property, it must be approved.
>
> Attached you will find letters from both of our neighbors saying that this play set is completely acceptable to both. We are also attaching photos from many different angles to show that this play set is barely visible form most locations in this subdivision. Also, from these photos you will be able to see the construction of this set is of high grade wood, and equipment, and should not be considered an eye sore for any one.

[1] This document was included in Respondent's exhibits, but not Petitioner's.

> Since moving in to our home we have strived to improve any and all situations that have been brought to our attention by the HOA, and also to those that were not brought to our attention when we purchased the property. We are willing to work out a reasonable solution with the HOA so that all parties can be satisfied. We hope to be given the same respect and hope for a quick resolution to yet again, another disturbing request.

Mr. Ketchum testified at the hearing that, because one of the neighboring houses is a rental, he did not obtain the residents' approval.

21. Mr. and Mrs. Ketchum attached to their January 10, 2006 letter an Architectural Design Review Form that requested approval of the "playset in backyard." Attached to the form was a two-dimensional plan of their house, which showed the location of a pool and playset in the backyard but did not show the dimensions of the playset.

22. Mr. and Mrs. Ketchum also attached to their January 10, 2006 letter a letter from Eric Rel, one of their next-door neighbors, stating that he "do[es] not see an obstruction of my view from Mr. Ketchum's swing set located in his back yard."

23. On January 31, 2006, Mr. Ketchum submitted another Architectural Design Review Form, requesting that the Architectural Review Committee approve the "Rainbow Play System." Mr. Ketchum attached to the form a schematic diagram of the play system, which showed that it was 17' long, 14½' deep, and 13½' high. The form shows that the Architectural Committee denied the request because:

> Visible from neighboring property areas; it can be seen over the wall. All examples in CC&Rs prohibit items that can be seen over the wall height. The association has consistently held to the standard that structures cannot be higher than wall height. Existing [illegible] must be modified to meet the above requirement.

24. On February 21, 2006, John Wahman, the new Community Manager for the San Marcos Manor HOA who replaced Ms. Gorski, informed Mr. and Mrs. Ketchum that the Architectural Review Committee had denied their request for approval of a back yard play set for the following reasons:

> Visible from neighboring property means it can be seen over the wall. All examples in the CC&R's prohibit items that can be seen over the wall height. The association has consistently held to the standard that structures cannot be higher than wall height. Existing structures must be modified to meet the above requirements.

25. On April 19, 2006, Mr. Ketchum responded to the denial, in relevant part as follows:

> I apologize for the length of time in responding, but I wanted to carefully review the CC&R's and architectural rules as to determine what options may exist in resolving the matter.
>
> The above referenced letter stated the play structure was denied because it is visible over the wall. I was unable to find in the CC&R's Article 7 titled 'permitted uses and restrictions' the prohibition that a structure can not be seen. I believe what was reference[d] in the letter is a definition and not a prohibition. The architectural rules also do not state a prohibition, specifically page 3 'rear yard improvements' not exceeding the perimeter wall six feet do not require approval. Clearly, this would mean structures that are visible would require architectural approval. In fact, architectural rule page 2 provides neighbors to be involved in the process approving structures.
>
> I am requesting reconsideration and approval based on the above findings. I am enclosing letters from my neighbors indicating no objections to my play structure. I am willing to meet and discuss the possibility of some screening. However, I am not willing to try to conceal it entirely as there is no requirement to do so.

26. On April 24, 2006, Mr. Ketchum submitted a third Architectural Design Review Form for the play system.

27. On May 4, 2006, Mr. Wahman informed Mr. and Mrs. Ketchum that the Board had denied their appeal, in relevant part as follows:

> As you were present at the open Board meeting, the Board is still holding to the wall height requirement on the items in the backyard. This means that you must actively resolve the height issue of the play structure. Although you state it is not in the CC&R's, it is in there that it must be approved. It was

> denied and the appeal to the Board was also denied. Everything was done properly. Even though you feel the height restriction is unfair, the Board, and therefore, the Association has consistently enforced the wall height requirement. Please address this issue by May 15, 2006.

28. On May 24, 2006, Mr. Wahman gave Mr. and Mrs. Ketchum a second notice that the play structure in their back yard was an unapproved architectural change that violated the CC&Rs, that "the new fine schedule goes in to effect June 9, 2006," and that, if the violation were not corrected, a "third notice with fine" would be sent.

29. On June 9, 2006, Mr. Ketchum responded to Mr. Wahman's letter, in relevant part as follows:

> The recorded declaration (CC&R's) does not prohibit play structures. The architectural guidelines do not prohibit play structures. In fact, play structures that are below the height of the wall [do] not require approval. I acknowledge my structure exceeds wall height thus requiring approval. No standards exist prohibiting my structure. The Board dos not have the authority to create a prohibition/restriction that does not exist in the CC&R's via the architectural guidelines. If the Board takes enforcement action without the proper authority they can be held individually responsible. I will defend my rights and will seek to recover all damages [incurred].
>
> However, I am willing to resolve this matter by adding some additional tree screening for concealment. The structure is not visible from the front of my home, but along 50th Street.

30. On June 14, 2006, Mr. Wahman on behalf of San Marcos Manor HOA sent a "3rd Letter" notifying Mr. and Mrs. Ketchum that the play structure constituted an unapproved architectural change, in violation of the CC&Rs, and imposing a $25.00 fine under A.R.S. § 33-1803.

31. On June 20, 2006, Mr. Ketchum informed San Marcos Manor HOA that he had "completed the architectural design review that was provided" and that he wished to appeal the $25.00 fine, because the Board "does not have the authority to deny the play structure."

32. On June 21, 2006, Mr. Ketchum again submitted an Architectural Design Review Form, requesting approval of an "Architectural Change."

33. On June 23, 2006, Mr. Wahman on behalf of the San Marcos Manor HOA responded to Mr. Ketchum's letter. Mr. Wahman enclosed in his response §§ 3.1 and 3.2 of the CC&Rs, which he said gave the Architectural Committee the authority to interpret the CC&Rs, §§ 13.10 and 13.17 of the CC&Rs, which "spells out your acceptance of the association and the right of the association to pass on any legal costs," and the fine and appeal policies. Mr. Wahman concluded that Mr. Ketchum's request for approval "does not really meet criteria" of the fine and appeal policies.

34. On June 30, 2006, Mr. Ketchum notified Mr. Wahman of HB 2824, which the governor had recently signed and "was needed for out of control homeowners associations such as San Marcos Manor HOA." Mr. Ketchum attached to his letter an article from the *Arizona Republic* entitled "Fighting for the 'little guys'" and the text of the amendment.

35. In a letter that was apparently mis-dated May 24, 2006 and entitled "4th Letter--$50 Fine Letter," Mr. Wahman on behalf of San Marcos Manor HOA referred to the notices sent 12/28/05, 6/13/06, and 6/20/06 about the "unapproved architectural change" that the playset represented, in violation of the CC&Rs and charged "an additional **$50.00 fine plus $9.42 for the certified mailing of this letter**."[2]

36. On June 27, 2006, San Marcos Manor HOA sent a letter to Mr. and Mrs. Ketchum regarding the "unapproved architectural change" that the playset represented. The letter referenced notices sent on 12/28/05, 6/13/06, 6/20/06, and 6/27/06 and charged "**an additional $100.00 plus $9.42 for the certified mailing of this letter**."[3]

37. On July 5, 2006, San Marcos Manor HOA sent a letter to Mr. and Mrs. Ketchum regarding the "unapproved architectural change" that the playset represented. The letter referenced notices sent on 12/28/05, 6/13/06, 6/20/06, 6/27/06, and 7/5/06 and charged "**an additional $100.00 plus $9.42 for the certified mailing of this letter**."[4]

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[2] This letter was included in Petitioner's exhibits, but not Respondent's.

[3] This letter was included in Respondent's exhibits, but not Petitioner's. Neither party offered into evidence a letter from Respondent dated June 20, 2006.

[4] This letter was included in Respondent's exhibits, but not Petitioner's.

38. On July 11, 2006, San Marcos Manor HOA sent another letter to Mr. and Mrs. Ketchum, notifying them that they had "been charged an additional **$100.00 plus $9.42 for the certified mailing of this letter**."

39. On July 18, 2006, San Marcos Manor HOA sent another letter to Mr. and Mrs. Ketchum, notifying them that they had "been charged an additional **$100.00 plus $9.42 for the certified mailing of this letter**."

40. On July 21, 2006, Mr. Ketchum sent a letter to Mr. Wahman, acknowledging receipt of "your latest dunning letter with escalating fine," reminding Mr. Wahman that he "was seeking a hearing before an administrative judge," and informing Mr. Wahman that he had gone to the Office of Administrative Hearings and had been informed "that at present no procedures have been implemented."

41. On August 1 and August 8, 2006, San Marcos Manor HOA sent two more letters to Mr. and Mrs. Ketchum regarding the "unapproved architectural change" that the playset represented. The letters referenced notices sent on 12/28/05, 6/13/06, 6/20/06, 6/27/06, 7/5/06, 7/11/06, 7/18/06, 7/24/06, 8/1/06, and 8/8/06 and each charged "**an additional $100.00 plus $9.42 for the certified mailing of this letter**."[5]

42. On August 14, 2006, Mr. Wahman on behalf of the San Marcos Manor HOA sent a letter to Mr. Ketchum, informing him that the board had "solicited legal counsel" and enclosing a letter from the Mulcahy law firm. Mr. Wahman further informed Mr. Ketchum:

> The board wants to reiterate its wish to resolve this and remind you that the offer to reach an accommodation is still available. As proposed all along, bringing the height down to closer to wall height, within 18 inches, is an option. This is an option you have refused to entertain to this point. If you wish to do so now, the board has given a deadline of the end of August to let them know. The fines will continue per the fine schedule until word is received. A short time frame to complete the approved height adjustment will be considered.

Mr. Wahman provided a copy of a legal opinion provided by the HOA's attorney, which concluded that "the Architectural Committee is within their rights to deny this application

[5] These letters were included in Respondent's exhibits, but not Petitioner's.

for a play structure which exceeds the fence line on this Owner's property." The attorney also advised that "[t]he Board may want to consider implementing an Architectural Guideline regarding play structures since it appears that this issue has come up in the past and will likely come up again in the future."

43. On August 24, 2006, Mr. Ketchum again requested that San Marcos Manor HOA approve the play structure and rescind all fines.

44. On August 30 and September 7, 2006, San Marcos Manor HOA sent a letter to Mr. and Mrs. Ketchum regarding the "unapproved architectural change" that the playset represented. The letter referenced notices sent on 12/28/05, 6/13/06, 6/20/06, 6/27/06, 7/5/06, 7/11/06, 7/18/06, 7/24/06, 8/1/06, 8/8/06, 8/15/06,[6] 8/29/06, and 9/6/06 and charged "**an additional $100.00 plus $9.42 for the certified mailing of this letter**."[7]

45. On or about October 2, 2006, Mr. Ketchum filed a petition for hearing against San Marcos Manor HOA with the Arizona Department of Fire, Building, and Life Safety under Section 1.2 and Article 3 of the CC&Rs and pages 1 and 3 of the Architectural Rules. Mr. Ketchum specified the following act by San Marcos Manor HOA as a violation the cited provisions of the CC&Rs and Architectural Guidelines:

1) Architectural Committee Rules requires rules to be adopted as to establish standards. No specific standards exist except to submit for architectural approval.
2) Article 3, Architectural Committee requires the adoption of rules consistent with the Declaration.
3) Permitted Uses and Restrictions, page 1 of the architectural rules establishes those changes or improvements requiring the approval of the architectural committee provided in Article 7 of the C.C.&R.'s. No prohibition of play structures exist.
4) Rear yard improvements, page 3 of the architectural rules provide play structures less than 6 feet do NOT require approval. Play structures over 6 feet are to be submitted for approval. However, no rules exist. Denial constitutes a prohibition that does not exist in the Declaration for play structures.

[6] No one offered the August 15, 2006 letter into evidence.

[7] These letters were included in Respondent's exhibits, but not Petitioner's.

46. On October 6 and October 11, 2006, San Marcos Manor HOA sent letters to Mr. and Mrs. Ketchum regarding the "unapproved architectural change" that the playset represented. The letters referenced notices sent on 12/28/05, 6/13/06, 6/20/06, 6/27/06, 7/5/06, 7/11/06, 7/18/06, 7/24/06, 8/1/06, 8/8/06, 8/15/06, 8/29/06, 9/6/06, 9/12/06, 9/19/06, 10/3/06,[8] and 10/10/06 and charged "**an additional $100.00 plus $9.42 for the certified mailing of this letter**."[9]

47. On November 3, 2006, the Arizona Department of Fire, Building, and Life Safety sent a copy of Mr. Ketchum's petition to San Marcos Manor HOA, informing it that, pursuant to A.R.S. § 41-2198.01(D), it was required to respond to the petition in writing.

48. On November 17, 2006, San Marcos Manor HOA's attorney filed a written response to the petition, denying that it had violated the charged sections of the CC&Rs and Architectural Guidelines and requesting that the petition be dismissed, that Mr. Ketchum be ordered to remove the play structure or lower it to below the height of the perimeter wall, and that the HOA be awarded the assessed fines, collection costs, and its attorney's fees and costs.

49. The Arizona Department of Fire, Building, and Life Safety referred the matter to the Office of Administrative Hearings and, on November 22, 2006, issued a Notice of Hearing, setting a hearing on January 11, 2007 at 9:00 a.m.

50. A hearing was held on January 11, 2007. Mr. Ketchum testified on his own behalf, presented the testimony of Larry Paprocki, a purported expert on HOAs, and had admitted into evidence 48 exhibits. San Marcos Manor HOA presented the testimony of Mr. Wahman and had admitted into evidence 16 exhibits.

ADDITIONAL HEARING EVIDENCE

51. San Marcos Manor HOA had admitted into evidence documents relating to three members' requests that the Architectural Committee approve play sets that exceeded 6' in height, all of which were denied, in relevant part as follows:

[8] No one offered the 9/12/06, 9/19/06 or 10/3/06 letters into evidence.

[9] This letter was included in Respondent's exhibits, but not Petitioner's.

51.1 On October 18, 2000, Kevin and Jennifer Smolkavski requested approval for a "play set for our 3 small children." The Committee denied the request with the additional comments:

> 1 play set put up 2 yrs. ago was not approved. (1) Need additional information: (A) Distance from all perimeter walls (2) Height at highest point (3) Height of platforms from ground (4) Color of canopy (5) Picture

The record does not reveal whether Mr. and Mrs. Smolkavski ever provided the additional information requested.

51.2 On February 10, 2002, Thomas Hack requested approval of a "playset for children," which would be constructed of wood at a cost of $1,500.00. The Committee denied the request because "[i]t shows 5' above the fence. It needs to be set back further & somehow lowered."

51.3 On April 29, 2003, Michael and Caroline Burns requested approval of a "wood playset" that would be 12' high, 14'10" wide, and 16' long. In a cover letter, Mrs. Burns offered to remove the "fort" during winter months and to provide "a petition stating that my neighbors do not mind the playset" and asserted that "the swingset without the tarp is barely visible from the front of the house." The request was denied; the committee's comments are not legible on the copy of the request admitted into evidence. On December 2, 2003, attorney Bob J. McCullough sent a letter to Mr. and Mrs. Burns on behalf of the HOA, in relevant part as follows:

> After prior violation notices, you were notified that the Board of Directors of San Marcos Manor [HOA] found the existence of the following condition at the residence of 28219 N. 50th Place, Cave Creek, Arizona 85331, which violated the CC&Rs: you have constructed a play structure without architectural approval in violation of Article 7, Section 7.7 of the CC&Rs. The play structure is not otherwise approvable and has been denied as it exists. You were notified that failure to comply within fourteen (14) days by removing the unapproved play structure would result in further action at your cost, including subsequent legal expenses incurred by the Association in this matter pursuant to Article 10, Section 10.5 and Article 13, Section 13.17.

> The time for your compliance has passed and legal expenses have already been incurred. In order to comply with the CC&Rs and limit the expenses incurred, you must immediately remove the unapproved play structure. If you fail to do so, the [HOA] will ask the Courts to resolve this matter.

52. Mr. Ketchum testified that, when he purchased his house, he had been told to consult Community Manager Ms. Gorski about any questions. Mr. Ketchum testified that he contacted Ms. Gorski in October 2005 about his plans for a play system in the back yard and she had told him, "We don't care what you put in your back yard as long as you don't obstruct your neighbor's view and they approve."

53. Mr. Ketchum testified that, after Ms. Gorski told him this, he understood that she had verbally approved the plans for the play structure. When he received the Architectural Committee's approval of the plans for his front yard only, it reinforced his impression that he did not need to obtain approval for the play structure.

54. Mr. Ketchum testified that he hired Rainbow to construct the play structure in his back yard. This would have been the weekend after Thanksgiving in 2005.

55. Although Mr. Ketchum testified on cross-examination that the first time he requested approval of the play structure was on January 10, 2006, on redirect he showed the Administrative Law Judge a request for approval of the "front and back yards" dated October 27, 2005, which was included in Mr. Paprocki's file and showed the location of the play structure. Mr. Ketchum testified that he would have faxed the request to the Architectural Committee on or shortly after that date. At one time, he had two requests for approval pending, one for just the front yard and one for both the front and back yards.

56. Mr. Wahman testified that Ms. Gorski had not left any forwarding address when she quit working as San Marcos Manor HOA's Community Manager. To rebut Mr. Ketchum's hearsay testimony about Ms. Gorski's alleged oral assurances, San Marcos Manor HOA had admitted into evidence a series of e-mails from Ms. Gorski to members of the Architectural Committee, in relevant part as follows:

56.1 On December 16, 2005, Ms. Gorski sent the plans that Mr. and Mrs. Ketchum had submitted in TIF format with the note, "they are requesting FRONT YARD ONLY."

56.2 On December 19, 2005, Committee member Luci Crackau noted that "[a]nything that grows or extends over the wall needs to be approved."

56.3 Ms. Gorski responded, "it is only the FRONT YARD that they are submitting for approval at this time."

56.4 On December 23, 2005, Ms. Crackau noted that the blueprint that Mr. Ketchum had submitted showed both the front and back yards.

56.5 Ms. Gorski responded that Mr. and Mrs. Ketchum only wanted to get the front yard done and would submit again for the back yard. The application form only referred to the front yard.

56.6 On December 26, 2005, Committee member Elliott Shapero stated that he would only approve the front yard. He suggested that, from now on, plans should only include changes that are to be made immediately. With respect to the play structure, he noted:

> The backyard playstructure is 'out' but should not be a problem since they, in essence, submitted it for approval and then installed it before receiving approval. We have agreed that the backyard landscaping is not our jurisdiction—except for play-structures and the like that affect the neighbors. Possibly, if they get permission from all of their neighbors…….. but, even then, it is against our guidelines. Dodi, this must be enforced as we have in the past.

57. Mr. Paprocki testified that, in 1982, he had been employed as a community manager by Marklin Properties, which was the developer of the Scottsdale Ranch planned community. He was the executive director for the HOA from 1983 to 1995. In 1995, he became the executive director of the Stonegate Community Association. For both associations, he oversaw the transition from developer control to homeowner control.

58. Mr. Paprocki testified that he also has been involved in the Community Association Institute (CAI), an educational body that trains homeowners, board members, managers, and attorneys as part of a national organization.

59. Mr. Paprocki testified that, in 2000, the superior court appointed him as a special master of HOA matters. He served in that capacity for 1½ years. He has been called as an expert in many cases involving HOAs.

60. Mr. Paprocki testified that he has known the Ketchums since 1986, when Mr. Ketchum's father was doing automotive work on vehicles owned by Scottsdale Ranch. In February or March of 2006, Mr. Ketchum brought this matter to his attention and asked him how to proceed.

61. Mr. Paprocki testified that he has reviewed the CC&Rs and Architectural Guidelines for San Marcos Manor HOA. He noted that, in 2006, the Committee had removed the reference to playground equipment as an example of a structure that did not require approval if it were less that 6' high. In his opinion, this was an amendment that signified a change.

62. Mr. Paprocki testified that the CC&Rs required members to submit a request to the Committee for approval of any backyard improvements that were higher than 6'. The HOA cannot categorically prohibit such improvements without amending the CC&Rs and Architectural Guidelines. If the HOA refused to exercise its discretion to even consider applications for approval of backyard improvements that exceeded 6' in height, its denials were arbitrary and capricious.

63. Mr. Paprocki testified that the legal opinion that Mr. Wahman provided to Mr. Ketchum clearly indicated that the HOA had addressed play structures in the past. Mr. Paprocki testified that, if the Architectural Review Committee intends to promulgate rules, they must be in writing to give adequate notice to the membership. The absence of a written rule does not allow unwritten rules to be promulgated as the situation arises.

64. Mr. Paprocki testified that HOAs must act on requests within a certain time. HOAs cannot partially approve applications.

65. Mr. Paprocki testified that, to deny an application for approval of a play system, the Architectural Committee must have adopted rules for granting variances. Mr. Paprocki suggested that the rules might concern height limitations, the height of platforms, and related restrictions. Each application would have to be reviewed on a case-by-case basis. Moreover, every subdivision is different. Subdivisions that have

one- and two-story houses can be less restrictive than subdivisions that have only one-story houses.

66. Mr. Wahman testified that he was employed by Planned Development Services. He had been the Community Manager at San Marcos Manor HOA since February 2006. His duties include weekly inspections and preparation of packets for the Board's meetings.

67. Mr. Wahman testified that, under the CC&Rs and Architectural Guidelines, the Architectural Committee has discretion to consider requests for approval as they come before it. In this case, the Board followed its appeal procedures. He is not involved in the review procedure, but communicates the Committee's decisions to members according to the Committee's instructions.

68. Mr. Wahman provided foundation for photographs of the play structure taken from both sides and the back of the Ketchums' house. The photographs show that the Ketchums' house has two stories. The play structure appears to be more than twice the height of the perimeter fence and is visible from all three vantage points, although foliage substantially obscures a portion of it from the back. The play structure is constructed of natural redwood and blue or green canvas awnings, in contrast to the houses, which are stucco and painted in shades of beige.

69. Mr. Wahman testified that the play structure s "way beyond acceptable." He testified that, throughout three or four board meetings during the finding of violation and appeal, the board invited Mr. Ketchum to compromise, but he refused to lower the height of the play structure.

70. Mr. Wahman testified that, as of the date of the hearing, $2,161.04 in fines had accrued against Mr. Ketchum on account of the Play Station. San Marcos Manor HOA had also incurred $2,651.43 in attorney's fees.

CONCLUSIONS OF LAW

1. Mr. Ketchum bears the burden of proof and must establish that San Marcos Manor HOA inappropriately denied his request for approval of the play structure by a preponderance of the evidence.[10] "A preponderance of the evidence is such proof as

[10] *See* A.A.C. R2-19-119; *see also Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952).

convinces the trier of fact that the contention is more probably true than not."[11] A preponderance of the evidence is "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."[12]

1. By accepting the deed of trust to his property, Mr. Ketchum agreed to be bound by the CC&Rs under Section 13.10 and Arizona legal authority.[13] By accepting a deed that incorporated the CC&Rs, Mr. Ketchum entered into a contractual relationship with San Marcos Manor HOA.[14] "The words in a restrictive covenant must be given their ordinary meaning" and "[t]he words themselves, within a restrictive covenant are the primary evidence of the meaning of such words."[15]

2. Because a play structure is a structure, it is an improvement as defined by Section 1.14 of the CC&Rs. Section 7.7 of the CC&Rs prohibited any improvement that altered the exterior appearance of the property unless the Architectural Committee approved it.

3. Section 3.1 of the CC&Rs established the Architectural Committee and authorized it to adopt guidelines and rules to guide it in approving or disapproving improvements that owners wished to construct on their properties. Pursuant to this authority, the San Marcos Manor HOA Architectural Committee adopted rules that required proposed architectural change to be "compatible with the design characteristics of the property requesting the change" and that rear yard improvements that exceeded the 6' height of the perimeter wall required Committee approval. Therefore, the CC&Rs

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[11] Morris K. Udall, ARIZONA LAW OF EVIDENCE § 5 (1960).

[12] BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

[13] *See, e.g., Duffy v. Sunburst Farms East Mutual Water & Agricultural Company, Inc.*, 124 Ariz. 413, 416, 604 P.2d 1124, 1127 (1979); *Murphey v. Gray,* 84 Ariz. 299, 305, 327 P.2d 751, 755 (1958).

[14] *See Pinetop Lakes Ass'n v. Hatch*, 135 Ariz. 196, 198, 659 P.2d 1341, 1343 (App. 1983).

[15] *Duffy*, 124 Ariz. at 416, 604 P.2d at 1127 (citations omitted).

and the February 2001 and April 2006 Architectural Guidelines required Mr. Ketchum to obtain approval for the 13½' high play structure that he had built in his backyard.

4. Ms. Gorski's alleged advice to Mr. Ketchum that San Marcos Manor HOA did not "care what you put in your back yard as long as you don't obstruct your neighbor's view and they approve" is consistent with the CC&Rs and Architectural Guidelines referred to above. Mr. Ketchum did not testify and there is no other evidence that Ms. Gorski specifically approved on behalf of San Marcos Manor HOA the 13½' play structure that Mr. Ketchum had built in his back yard. Even if she had, her oral approval would have contradicted the plain language of the CC&Rs and Architectural Guidelines and would have been utterly inconsistent with Mr. Ketchum's and San Marcos Manor HOA's previous course of dealing. Under the circumstances, Mr. Ketchum's claimed reliance on Ms. Gorski's alleged oral assurances was not reasonable.

5. Mr. Ketchum also could not rely on the Architectural Committee's approval of only the front yard landscaping as an implicit approval of his plans for the play structure in the backyard. According to the record, he testified that he had the play structure was built in late November 2005, but the Architectural Committee approved only the front yard landscaping on December 27, 2005. On this record, it appears that the Architectural Committee approved the request he made on December 15, 2005 for only the front yard landscaping, rather than the October 27, 2005 request, which the Architectural Committee did not apparently receive.

6. Mr. Ketchum therefore has not established that Ms. Gorski's statements or the Architectural Committee's approval of the front yard landscaping should estop[16] San Marcos Manor HOA from enforcing its CC&R's and Architectural Guidelines.

7. 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

[16] "Estop" means "[t]o stop, bar, or impede; to prevent; to preclude." BLACK'S LAW DICTIONARY, *supra,* at 551. "'Estoppel' means that a party is prevented by his own acts from claiming a right to detriment of other party who was entitled to rely on such conduct and has acted accordingly. *Id.* (citing *Graham v. Asbury,* 112 Ariz. 184, 186, 540 P.2d 656, 658 (1975)).

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.

8. 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.[17]

9. Mr. Ketchum therefore has borne his burden to establish that San Marcos Manor HOA acted inappropriately in denying his request for approval of the play structure he had constructed in his backyard. Neither applicable statute nor the CC&Rs empower Administrative Law Judge to approve play structure; she can only remand Mr. Ketchum's request for approval to the Architectural Committee to exercise its discretion to take action and approve or disapprove Mr. Ketchum's play structure under the factors set forth in under the CC&Rs and Architectural Guidelines.[18]

10. San Marcos Manor HOA has requested an award of all accrued fines and attorney's fees. But it has not paid any filing fee or filed any petition for affirmative relief, which A.R.S. § 41-2198.01(B) allowed it to do. The statutes and regulations governing procedure in the Office of Administrative Hearings do not provide for counterclaims in this type of proceeding.

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[17] *See, e.g., Rodriguez v. Herrera*, 72 F. Supp. 2d 1229, 1232 (D. Colo. 1999) (citing *Becerra-Jimenez v. INS*, 829 F.2d 996, 999 (10th Cir. 1987)).

[18] These considerations might include whether the relative height of the play structure compared to the perimeter wall and the degree to which it was visible from adjacent yards, whether the color and style of the play structure are compatible with Mr. Ketchum's house or other improvements in San Marcos Manor, or other considerations set forth in additional guidelines that the Architectural Committee may choose to adopt under the CC&Rs.

11. San Marcos Manor HOA did not prevail in this proceeding. Moreover, 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.[19]

12. San Marcos Manor HOA therefore has not established that it is entitled to any affirmative relief in this administrative proceeding.

ORDER

Based on the foregoing, **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.

IT IS FURTHER ORDERED, under A.R.S. § 41-2198.02, that Respondent pay to Petitioner the filing fee he paid to initiate his administrative complaint within forty (35) days of the date that this order is mailed, if no appeal is taken.

IT IS FURTHER ORDERED denying all other requests for relief made by either party.

[19] *See Semple v. Tri-City Drywall, Inc.*, 172 Ariz. 608, 611-612, 838 P.2d 1369, 1372-73 (App. 1992) (Prevailing party in administrative claim before Registrar of Contractors was not entitled to attorney's fees from its opponent under A.R.S. § 12-341.01(A) because administrative hearing is not an "action").

Done this day, January 30, 2007.

_____
Diane Mihalsky
Administrative Law Judge

Original transmitted by mail this
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