

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

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

4
5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 **STEVEN HEDDEN and PAUL RYAN,**

8 Petitioners,

9
10 vs.

11 **EAGLE MOUNTAIN COMMUNITY**
12 **ASSOCIATION,**

13 Respondent.

Nos. 07F-H067010-BFS
and 07F-H067011-BFS
(Consolidated)

ADMINISTRATIVE
LAW JUDGE DECISION

14
15 **HEARING:** January 30, 2007 at 9:00 a.m.

16 **APPEARANCES:** Petitioners Steven Hedden and Paul Ryan appeared through
17 Andrew D. Lynch, Esq.; Respondent Eagle Mountain Community Association (“the
18 HOA”) appeared through Beth Mulcahy, Esq.

19 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

20
21 The parties presented evidence and testimony on the issue of whether the
22 Respondent HOA acted appropriately in denying Petitioners Mr. Hedden and Mr. Ryan’s
23 request that it approve an electronic gate at the entrance to their shared driveway.
24 Based on the entire record, the Administrative Law Judge makes the following
25 Findings of Fact, Conclusions of Law, and Order.

26 **FINDINGS OF FACT**

27 **BACKGROUND AND RELEVANT CC&RS**

28
29 1. Eagle Mountain Community is a master-planned community in Fountain Hills
30 that consists of 580 homes, including 140 custom and 440 tract homes, and several
subdivisions, including Aerie Cliffs, Solitude Canyon, Crimson Canyon, Mira Vista, and
the Estates. Custom homes solely comprise Solitude Canyon, Crimson Canyon, Mira

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1 Vista, and the Estates; seventeen tract homes and three custom homes comprise Aerie
2 Cliffs.

3 2. Eagle Mountain is a gated community; both the custom and tract homes may
4 be accessed by two main gates, which are manned 24 hours a day.

5 3. The developer Eagle Mountain Investors, L.L.C. initially recorded its
6 Declaration of Covenants, Conditions, and Restrictions (“CC&Rs”) on February 7, 1995.
7 Title to common areas and the right and responsibility to enforce the CC&Rs has passed
8 to the HOA.

9 4. Article 11 of the CC&Rs concerns the Design Review Committee (“the DRC”)
10 and provides in relevant part:

11 Section 11.2 Purpose. The purpose of the Design
12 Review Committee is to maintain uniformity of architectural
13 and landscaping standards throughout Eagle Mountain and
14 thereby enhance the aesthetic and economic value of Eagle
15 Mountain. . . .

16
17 Section 11.4 Operation/Authority. It shall be the duty
18 of each Design Review Committee to consider and act upon
19 all proposals and plans submitted to it pursuant to this
20 Declaration. . . . If a Design Review Committee fails to furnish
21 a written decision within 45 calendar days after a complete
22 application has been submitted or resubmitted to it, then the
23 application as submitted or resubmitted, as the case may be,
24 shall be deemed approved. Each Design Review Committee
25 shall have broad discretionary powers in determining whether
26 an application is in conformance with the Residential Design
27 Review In addition, each Design Review Committee
28 may disapprove any application if it, in its discretion, believes
29 the applicant has not supplied sufficient or accurate
30 information for the applicable Design Review Committee to
exercise the judgment required by this Declaration. . . .

. . . .
11.7 Waiver. The approval by a Design Review
Committee of any plans, drawings or specifications for any
work done or proposed, or for any other matter requiring the
approval of the applicable Design Review Committee, shall
not be deemed to constitute a waiver of any right to withhold

1 approval of a similar plan, drawing, specification or matter
2 subsequently submitted for approval.

3 5. Petitioners own two adjacent custom homes on custom lots, Lots 14 and 15, in
4 the Aerie Cliffs subdivision. The homes share an approximately 300' long driveway off a
5 cul-de-sac. Because the driveway goes over a small hill, the homes cannot be seen from
6 the end of the cul-de-sac and the end of the cul-de-sac cannot be seen from the homes.

7 **BACKGROUND AND PROCEDURE**

8 6. On November 20, 2006, Petitioners through their attorney filed two Petitions for
9 Relief to the Department of Fire, Building & Life Safety under A.R.S. § 41-2198.01(B),
10 alleging that the HOA violated the CC&Rs §§ 11.2 and 11.4. Each Petitioner paid a
11 \$550.00 filing fee, for a total of \$1,100.00.

12 7. On December 16, 2006, Respondent HOA responded to the petitions, denying
13 that it had violated any CC&R or statute.

14 8. The Department of Fire, Building & Life Safety referred the matter to the Office
15 of Administrative Hearings and, on December 20, 2006, issued a Notice of Hearing.

16 9. A hearing was held on January 30, 2007. Petitioners testified and had
17 admitted into evidence eighteen exhibits. Respondent HOA presented the testimony of
18 Richard V. Kloster, Vice President of the HOA Board of Directors and a member of the
19 DRC, and Burt Fischer, President of the HOA Board of Directors, and had admitted into
20 evidence fifteen exhibits.

21 **THE PARTIES' COURSE OF DEALINGS**

22 10. On May 1, 2006, Petitioners submitted an Application for Architectural Plan
23 Review for a "Driveway Renovation." Petitioners described the planned renovation as
24 follows:

25 The gate will duplicate the look of the gated device located at
26 the entry to Crimson Canyon (see attached photos). Due to
27 the width of the private drive on Aerie Cliff, the gate will have
28 one opening but will comply with all fire, police, utility and
29 HOA requirements for entry. The gate will open away from
30 the street and will not encroach on to the public areas (see
attached site plans). The construction of the gate will be
funded by the above noted homeowners who will also pay for
ongoing maintenance.

1 Petitioners attached to the application a photograph of a double electronic gate and a
2 plan, which showed a 22' wide double gate on their common driveway, approximately 8'
3 from the common-area cul-de-sac.

4 11. The DRC met on May 10, 2006. Petitioners did not attend the meeting. The
5 meeting minutes reflect the Committee's action on Petitioners' application as "Electronic
6 gate **tabled**; must go to the Board for review." [Emphasis in original.]

7 12. Mr. Kloster testified that the DRC is composed of owners of custom and tract
8 homes. When the DRC first received Petitioners' application, it did not understand why
9 they wanted a second gate, since the two gates for the entire Eagle Mountain
10 development seemed to provide adequate security. No home on Eagle Mountain had a
11 private automatic gate on its driveway.

12 13. Because of the potential precedent that approval of the gate might set, Mr.
13 Kloster testified that the DRC felt it needed to hear from the Board. The DRC therefore
14 "resubmitted" the application to the HOA Board.

15 14. The HOA Board met on May 17, 2006. Petitioners did not attend the
16 meeting. With respect to Petitioners' application, the minutes stated:

17 *Electronic Gate Request from Parcel 7, lots 14 & 15: A*
18 *request was presented to the DRC at their last meeting to*
19 *install an electronic gate at the shared driveway. The request*
20 *was referred to the Board since there are no other private*
21 *gates in the community. The Board reviewed the request,*
22 *objected to the placement due to a neighbor making an*
23 *objection and also suggesting that there appears to be no*
compelling reason to allow such an installation. This decision
will now be referred back to the DRC.

24 15. Mr. Kloster testified that the Board had determined that approval of
25 Petitioners' application could form a precedent. In addition, Mr. Fischer on behalf of the
26 Board had spoken to Petitioners' close neighbors and determined that several objected to
27 installation of a private gate off the common-area cul-de-sac.

28 16. Mr. Kloster testified that the DRC requires a compelling reason to grant an
29 application for something that is novel or unusual, based on circumstances that require
30

1 special accommodation. A compelling reason is "something abnormal" about the
2 property.

3 17. On May 18, 2006, the HOA's General Manager Elaine Anghel sent an e-mail
4 to Petitioners, informing them:

5 It is highly unlikely that the request to install an electronic gate
6 at your driveway will be approved by either the DRC or the
7 Board. Neither the DRC, the Board or some of the affected
8 neighbors saw any compelling reason for the request.

9 I can tell you that it will formally be voted on at the DRC
10 meeting on June 14th, but it looks like this will be the
11 response.

12 18. On June 14, 2006, the Design Review Committee met. Petitioners were
13 present at the meeting. The minutes of the meeting provided in relevant part as follows:

14 Electronic gate **tabled**; must go to the Board for review.
15 Owner's reasons for request: only 2 custom lots without a
16 secondary gate and security/trespassing is an issue due to
17 the traffic that utilizes that area to turn around and back up.
18 Committee will ask owners to seek waivers from lots 12 & 13
19 and discuss at 6/21/06 Board meeting.

20 [Emphasis in original.]

21 19. Mr. Ryan testified that he was asked to wait in the lobby until the DRC called
22 him to speak in support of his request for an electronic gate. He explained why he
23 wanted an electronic gate and the members of the DRC asked him some questions about
24 fire codes and maintenance. Mr. Ryan testified that the DRC did not tell him that the
25 application was incomplete or even mention the word "waiver."

26 20. Mr. Ryan testified that the DRC did not deliberate in Petitioners' presence.
27 Mr. Ryan testified that Mr. Kloster escorted them out of the meeting, thanked them for
28 coming, and reiterated and that the application probably would not be approved. Mr.
29 Ryan testified that Mr. Kloster told them that some of their neighbors opposed the
30 application for a gate, but that he refused to identify the neighbors in opposition.

21. Mr. Hedden also testified that the DRC did not tell him at its June 14, 2006
meeting that the application was incomplete or mention the word "waiver." Mr. Hedden

1 testified that Mr. Kloster told them some neighbors objected to the gate, but that their
2 identities were “confidential.” Mr. Hedden testified that he first saw the minutes of the
3 June 14, 2006 DRC meeting in November or December 2006, after he and Mr. Ryan had
4 filed their petitions to the Department of Fire, Building, and Life Safety.

5 22. Mr. Kloster testified that the DRC had three major concerns about the gate at
6 the June 14, 2006 meeting: (1) Petitioners would need city approval to allow emergency
7 access; (2) Neighbors opposed the gate; and (3) Approval would set a precedent.

8 23. Mr. Kloster testified that, while Petitioners were present on June 14, 2006, the
9 DRC informed them that it needed something in writing from potentially affected
10 neighbors before it would consider the application. Mr. Kloster testified that he probably
11 used the word “letters” rather than “waivers.” At the end of the meeting, he thought that
12 Petitioners had been told that they would need to provide something in writing from
13 potentially affected neighbors for the DRC to move forward.

14 24. Mr. Kloster testified that the property manager prepares the minutes of
15 meetings based on her notes. She “may paraphrase” what committee members have
16 said. In this case, the statement that the DRC “will ask” Petitioners for waivers showed a
17 “poor choice” of words. Mr. Kloster testified that the minutes should have stated that
18 Petitioners had been instructed that their application was incomplete until they submitted
19 waivers from their neighbors.

20 25. Mr. Kloster admitted that, at its July 5, 2006 meeting, the DRC approved the
21 minutes for its June 14, 2006 meeting, which included the “poor choice” of words.

22 26. Mr. Kloster testified that the outcome of the June 14, 2006 DRC meeting was
23 to table the application to allow Petitioners to complete it. The DRC was “trying to be
24 lenient to homeowners” and to give them additional opportunity to complete their
25 application. Mr. Kloster testified that the DRC could not have issued a written decision on
26 June 14, 2006 because the application was incomplete.

27 27. On June 21, 2006, the HOA Board met. Petitioners were not present at the
28 meeting. The minutes included among the “Old Business” the following:

29 *Electronic Gate Request from Parcel 7, lots 14 & 15: A*
30 request was, once again, presented to the DRC at their last meeting to install an electronic gate at the shared driveway.

1 The decision was deferred to the Board, but the Board
2 deferred it back to the DRC. A denial will be sent by the DRC
3 due to the request being inconsistent with the community.

4 28. Mr. Kloster testified that the HOA Board did not take action because the DRC
5 was holding the application open to allow Petitioners to submit waivers from their
6 neighbors.

7 29. On July 5, 2006, the DRC met. Petitioners did not attend the meeting. The
8 DRC unanimously voted to disapprove Petitioners' application for a private electronic gate
9 on their shared driveway. The meeting minutes reflected that "Reflective signs were
10 recommended as an alternative."

11 30. Mr. Kloster testified that the DRC denied Petitioners' application at its July 5,
12 2006 meeting because (1) there was no gate on a private driveway in the entire
13 community; (2) security was already provided by the two main gates; (3) the DRC did not
14 want to set a precedent; and (4) the immediate neighbors opposed the gates.

15 31. Mr. Kloster testified that the neighbors' objections were based on the noise
16 and pollution caused by vehicles they feared would be backed up in the cul-de-sac,
17 waiting for access through the gate.

18 32. Mr. Kloster testified that neither the DRC nor the HOA Board customarily
19 disclose the names of neighbors who object to an application because they do not want
20 to incite feuds between neighbors. Mr. Kloster testified that the DRC took so long to
21 reach a decision because its members felt that performing the necessary due diligence in
22 considering Petitioners' application was important.

23 33. Mr. Kloster testified that he was familiar with § 11.4 of the CC&Rs. Mr.
24 Kloster regretted the length of time that the DRC took to consider sincerely all of the
25 implications of Petitioners' application, which he admitted was more than 70 days. The
26 DRC wanted to be fair to Petitioners and allow them to complete their application;
27 otherwise, it would have "dropped the hammer immediately." Mr. Kloster admitted that
28 the DRC had never informed Petitioners in writing that it considered their application to be
29 incomplete.
30

1 34. Mr. Ryan testified that, in early July 2006, Mr. Kloster called and told him that
2 the DRC had denied the application for a gate because it “could find no compelling
3 reason” to grant the application.

4 35. On July 7, 2006, Mr. Ryan sent an e-mail to Mr. Kloster and Ms. Anghel, in
5 relevant part as follows:

6 To date Steve Hedden and I have not received any written
7 response to our June 14, 2006 Design Review Committee
8 (DRC) request for a private gate While it is my
9 understanding (via a phone conversation with Dick Kloster)
10 that the request for the gate was denied, the lack of a timely
11 written response has pushed us into the late July timeframe
12 for any appeal to the Board.

13 Despite the current absence of a formal (DRC) response, with
14 stated reasons denying the gate request, we would
15 appreciate it if we could be put on the July Board meeting
16 agenda to offer our formal appeal. We would further ask that
17 a DRC letter, specifying the rationale behind the gate request
18 denial, be sent immediately so we may address any
19 objections directly to the Board.

20 Please be aware that while we are happy to comply with the
21 proscribed process for review and appeal, we are somewhat
22 dismayed by the time loss for the hearing process (a
23 minimum of 6 weeks). Additionally, since we strongly believe
24 our request is in keeping with the private gated guidelines,
25 practiced in the past for the “custom guideline lots” located in
26 the our [sic] adjacent developments (Crimson Canyon,
27 Solitude Canyon, etc.) we would like to inform you that legal
28 representation has been sought to insure that our rights as
29 property owners are protected. While we hope any legal
30 process proves to be unnecessary, we feel that the advice
and counsel of an HOA lawyer may be prudent, given the
preliminary verbal and email comments indicating a negative
predeliction [sic] of Board sentiment before an appeal is even
heard.

31 36. On July 11, 2006, Ms. Anghel on behalf of the Design Review Committee
32 sent a letter to Petitioners, formally denying their request for a private electronic gate, in
33 relevant part as follows:

1 Your request to install an electronic gate was disapproved.
2 The committee heard no compelling reason stated by the
3 owner that would overcome the esthetic detraction, potential
4 maintenance issues, noise of operation and additional access
5 restrictions created by constructing another gate in our
6 community. The owner should also be aware that two
7 neighbors in direct line of the proposed gate are not in favor of
8 its installation. A properly placed sign "Private Driveway – No
9 Trespassing" would be a more reasonable approach to
10 resolve the concern stated by the owner.

11 37. Petitioners appealed the DRC's denial to the HOA's Board. The Board
12 considered the appeal at its meeting on July 26, 2006. Petitioner Mr. Hedden attended
13 the meeting. The Board denied the appeal.

14 38. On July 31, 2006, Ms. Anghel wrote a letter to Petitioners, informing them
15 that, "[a]t the Board Meeting held on July 26, 2006, the Board denied your appeal of the
16 decision made by the Design Review Committee of a disapproval of an electronic gate at
17 your driveway."

18 **ADDITIONAL EVIDENCE ON WHETHER THE DRC SHOULD HAVE APPROVED THE PROPOSED**
19 **GATE**
20 **UNDER SECTION 11.1 OF THE CC&RS**

21 39. Petitioner Mr. Ryan testified that he has been a real estate appraiser since
22 1992. He has been a master appraiser for 10 or 12 years. He also owns a small real
23 estate company.

24 40. Mr. Ryan testified that different areas and lots in Eagle Mountain are defined
25 as tract or custom. Custom lots typically are bigger, have better views, and are more
26 expensive than tract lots. Different rules apply for DRC approval of homes on custom lots
27 than apply for approval of homes on tract lots.

28 41. Mr. Ryan testified that his custom homes has approximately 4300 square feet
29 and is valued at \$1.6 million, or about \$363 per square foot. The average custom home
30 in Eagle Mountain is in the "high three to four thousand" square feet. In contrast, the
average tract home has approximately 2000 square feet, with a value of \$275 per square
foot.

1 42. Mr. Hedden testified that his custom home has 6312 square feet and is worth
2 \$2.2 million. His custom lot is larger than Mr. Ryan's.

3 43. Mr. Ryan and Mr. Hedden both testified that all of the other custom homes in
4 Eagle Mountain have a second gate that the owners must pass through to reach their
5 homes, or are "double gated." Their homes are "surrounded" by double-gated custom
6 lots.

7 44. Mr. Hedden is an Executive Vice President of developer Classic Stellar
8 Homes, which built 17 of the tract homes in Aerie Cliffs and his own custom home.
9 Classic Stellar Homes did not build Mr. Ryan's custom home. Mr. Hedden testified that
10 Classic Stellar Homes never considered putting a gate at the entrance to Aerie Cliffs. He
11 admitted that all of the other secondary gates are at the entrance to subdivisions,
12 constructed on common areas. Mr. Hedden explained that Classic Stellar Homes did not
13 put a secondary gate at the entrance to Aerie Cliffs because the homes at the entrance
14 were "tract homes on masqueraded lots," where a secondary gate would not have
15 produced a sufficient return to justify the expense of construction.

16 45. Mr. Ryan testified that a private gate increases privacy, safety, and value.
17 Traffic commonly comes up the shared driveway off the cul-de-sac because people think
18 "the road goes through." In addition, because cellular phone reception is excellent on the
19 crest of the hill on the driveway, people will drive down the driveway to make calls.

20 46. Mr. Ryan admitted on cross-examination that his driveway was constructed of
21 concrete that was the same reddish color as the sidewalks and curbs in Eagle Mountain.
22 He admitted that the common streets are black asphalt, which is readily distinguishable
23 from the private driveways.

24 47. Mr. Ryan's three young grandchildren come to visit him. Mr. Hedden has two
25 daughters, aged 14 and 11. Both testified that they were concerned for the children's
26 safety when they played in the driveway, because people backing out the driveway
27 cannot see over the crest of the hill to children who may be playing there.

28 48. Mr. Ryan testified that he had considered posting a "No Trespassing" sign at
29 the end of the driveway. But, in his experience, such a sign does not work.
30

1 49. Mr. Ryan testified that the secondary gates to the other custom homes in
2 Eagle Mountain add additional value to those homes. He estimates that the proposed
3 gate would add 3% to the value of Petitioner's homes, or \$50,000 to the value of his
4 home and \$70,000 to the value of Mr. Hedden's home.

5 50. Mr. Ryan attributed the disparity between the values of the custom and tract
6 homes in Eagle Mountain in part to the presence of the secondary gate for the custom
7 homes.

8 51. Mr. Ryan testified that homes are valued in large part based one comparable
9 sales. It is therefore better for everyone to have more expensive homes in the
10 neighborhood.

11 52. Mr. Ryan testified that secondary gates had been constructed at the
12 entrances to the custom homes in the Estates, Solitude Canyon, and Crimson Canyon
13 subdivisions.

14 53. Mr. Fischer testified that Eagle Mountain includes a subdivision called Mira
15 Vista, which has only custom lots. Although the home values in Mira Vista are equal or
16 greater to the claimed values of Petitioners' homes, it does not have a secondary gate.

17 54. Mr. Ryan testified that, on average, only two vehicles a day came to his
18 home, in addition to himself. He does not run a business from his home.

19 55. Mr. Ryan testified that his shared driveway with Mr. Hedden is unique in
20 Eagle Mountain. No driveway shared by two custom homes is as long.

21 56. Mr. Kloster testified that three to five custom lots in Eagle Mountain were
22 accessed through shared driveways.

23 57. Mr. Fischer testified that the shared driveway between the custom lots Nos.
24 10 and 11 and Nos. 2 and 3 are at least as long as Petitioners' shared driveway.

25 58. Mr. Ryan testified that the occupants of at least 8 homes would be able to
26 see the proposed gate at the end of the cul-de-sac. The occupants of an additional 4
27 homes might be able to see the gate if they walked down their driveways and looked. He
28 testified that he never attempted to contact his neighbors to obtain their opinion because
29 he did not know which neighbors objected to the proposed gates.
30

1 59. Mr. Kloster testified that, whenever a homeowner approaches the DRC to
2 approve an addition or change, the first question the DRC asks is, "Have you talked to
3 your neighbors?" For example, the DRC will allow a homeowner to trim at his own cost a
4 tree that obstructs his view of the golf course, but only if his neighbors approve. When
5 the DRC asked a homeowner to consult his neighbors about a requested change, the
6 DRC usually tables the application for approval.

7 60. Mr. Fischer testified that he offered to talk to Petitioners' immediate neighbors
8 because Mr. Kloster was busier, since he serves on both the DRC and the HOA Board.
9 Petitioners have two neighbors in the cul-de-sac and three neighbors would look down on
10 the gate, plus one house under construction on Summer Hill street, which leads to the
11 cul-de-sac. Petitioners' immediate neighbor on lot 13 told Mr. Fischer that they had
12 informed him of their plans for a gate, and he did not have a problem with it. The owners
13 of lots 12, 6, 8, 9, and 39 saw no necessity for a gate and opposed it.

14 61. Mr. Kloster testified that residents' mailboxes are also located at the
15 secondary gates at the entrances to Solitude Canyon, Crimson Canyon, and the Estates.
16 If a request were made to put a gate at the entrance to Aerie Cliffs, the DRC would have
17 to explore where to put the posts, because, although there is common property on the left
18 side, an individual homeowner owns the property on the right side.

19 62. Mr. Kloster testified that that the only gate that the DRC has ever approved
20 on private property in Eagle Mountain is for a house whose design did not include a front
21 door. The gate is more like a security door for the house and does not allow vehicles to
22 drive through it.

23 **CONCLUSIONS OF LAW**

24 1. This matter lies within the jurisdiction of the Office of Administrative
25 Hearings and the Department of Fire, Building, and Life Safety.¹

26 1. Petitioners bear the burden of proof and must establish that the HOA
27 inappropriately denied his request for approval of the play structure by a preponderance
28 of the evidence.² "A preponderance of the evidence is such proof as convinces the trier

29 _____
30 ¹ See A.R.S. §§ 41-2198(3) and 33-1803.

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

1 of fact that the contention is more probably true than not.”³ A preponderance of the
2 evidence is “[t]he greater weight of the evidence, not necessarily established by the
3 greater number of witnesses testifying to a fact but by evidence that has the most
4 convincing force; superior evidentiary weight that, though not sufficient to free the mind
5 wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one
6 side of the issue rather than the other.”⁴

7 2. By accepting the deed of trust to his property, Petitioners agreed to be
8 bound by the CC&Rs under controlling Arizona legal authority.⁵ By accepting a deed that
9 incorporated the CC&Rs, Petitioners entered into a contractual relationship with
10 Respondent Eagle Mountain Community Association.⁶

11 3. “[A] servitude should be interpreted to give effect to the intention of the
12 parties ascertained from the language used in the instrument, or the circumstances
13 surrounding creation of the servitude, and to carry out the purpose for which it was
14 created.”⁷ “The words in a restrictive covenant must be given their ordinary meaning”
15 and “[t]he words themselves, within a restrictive covenant are the primary evidence of the
16 meaning of such words.”⁸

17 4. The CC&Rs contain no requirement that the DRC can only approve an
18 application if it finds a “compelling reason” for departing from the original community plans
19 or a prior practice. Neither applicable statute nor common-law authority supports such
20 requirement.⁹

21
22 ³ Morris K. Udall, ARIZONA LAW OF EVIDENCE § 5 (1960).

23 ⁴ BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

24 ⁵ 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).

25 ⁶ See *Pinetop Lakes Ass’n v. Hatch*, 135 Ariz. 196, 198, 659 P.2d 1341, 1343 (App. 1983).

26 ⁷ *Powell v. Washburn*, 211 Ariz. 553, 556-57, 135 P.3d 373, 376-77 (2006) (quoting RESTATEMENT
27 (THIRD)
OF PROPERTY: SERVITUDES § 4.1(1)).

28 ⁸ *Duffy*, 124 Ariz. at 416, 604 P.2d at 1127 (citations omitted).

29 ⁹ Cf. *Ivancovich v. City of Tucson Board of Adjustment*, 22 Ariz. App. 530, 535-36, 529 P.2d 242 (1975)
30 (holding that variance from zoning ordinance should only be granted under A.R.S. § 9-462.06(G) and (H)
if the applicant establishes “special circumstances” in that “the situation or condition of the property in
question is extraordinary and exceptional and that application of the zoning requirement would cause
peculiar and exceptional practical difficulties or exceptional and undue hardship.”).

1 5. But the record establishes that Petitioners chose to purchase custom
2 homes in a subdivision comprised mostly of tract homes, in which their two homes were
3 the only custom homes, in contrast to the majority of custom homes in Eagle Mountain,
4 which are located in subdivisions comprised solely of custom homes. The record
5 establishes further that all secondary gates were constructed in the common area, at the
6 entrance to a subdivision, rather than on private land for purely private purposes. The
7 record finally establishes that other custom homes in Eagle Mountain, including all of the
8 custom homes in the Mira Vista subdivision, lack a secondary gate.

9 6. Petitioners presented some evidence that the proposed gate may increase
10 the value of their properties, but presented no evidence that the proposed gate would
11 also increase the values of their neighbors' property. In fact, Petitioners admitted that
12 they failed to consider or consult the neighbors who would be affected by the gate. Their
13 failure demonstrates that they did not even intend to enhance the value of the Eagle
14 Mountain community as a whole, which § 11.2 of the CC&Rs requires.

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

20 8. However, Petitioners have established that the DRC did not furnish a
21 written decision within 45 days of the date that they submitted the application. Mr.
22 Kloster's testimony that Petitioners were told they needed to obtain something in writing
23 from their neighbors at the June 14, 2006 DRC meeting was credible. Mr. Kloster's
24 testimony that the delay was occasioned by the DRC's wish to ensure that it fully
25 considered the application and that it treated Petitioners fairly also was credible.

26 9. But the DRC eventually disapproved the application on July 5, 2006, even
27 though no waivers had been provided. The CC&Rs specify that, if the DRC "believes the
28 applicant has not supplied sufficient or accurate information," the DRC may disapprove
29 the application. The CC&Rs do not allow the DRC to hold in abeyance indefinitely any
30 application that it deems incomplete.

1 10. Therefore, under § 11.4 of the CC&Rs, the DRC’s admitted failure either to
2 disapprove Petitioner’s application on the merits or to disapprove it as incomplete in
3 writing within 45 days requires the application to be deemed approved.¹⁰

4 11. Although Petitioners prevailed in this matter, an administrative proceeding
5 is not an “action” such as to make attorney’s fees awardable under A.R.S. §§ 33-
6 1807(H) or 12-341.01.¹¹ Petitioners’ request for attorneys’ fees must therefore be
7 denied.

8 12. Petitioners have established that they are entitled to be reimbursed the
9 cost of their filing fees under A.R.S. § 41-2198.02(A).

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28 _____
29 ¹⁰ The Administrative Law Judge does not believe that the deemed approval will create a precedent that
30 will prevent the DRC disapproving similar applications under § 11.7 of the CC&Rs.

¹¹ 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”).

ORDER

1 Based on the foregoing, **IT IS ORDERED** granting Petitioners' Petition and
2 requiring Respondent to deem approved the application for the private gate at the end
3 of Petitioners' shared driveway.
4

5 **IT IS FURTHER ORDERED** that Respondent pay to Petitioners the filing fees,
6 \$550.00 each, for a total of \$1,100.00, that they paid to initiate these administrative
7 complaints within forty (40) days of the date that this order is mailed, if no appeal is
8 taken.

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

11 Done this day, February 14, 2007.

12
13 _____
14 Diane Mihalsky
Administrative Law Judge

15 Original transmitted by mail this
16 ____ day of February, 2007, to:

17 Robert Barger, Director
18 Department of Fire Building and Life
19 Safety - H/C
20 ATTN: Joyce Kesterman
21 1110 W. Washington, Suite 100
22 Phoenix, AZ 85007

23 Andrew D. Lynch, Esq.
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25 4434 N. 12th St., Suite 202
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29 3001 East Camelback Rd.
30 Suite 130
Phoenix, AZ 85016

31 By _____