

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 **FRED T. NEUMANN,**
8 Petitioner,

Docket No.: 07F-H067022-BFS

9 vs.

10 **TUCSON ESTATES PROPERTY**
11 **OWNERS**
12 **ASSOCIATION, INC.,**
13 Respondent

ADMINISTRATIVE
LAW JUDGE DECISION

14
15 **HEARING:** April 10th, 2007; 9:00 a.m.

16 **APPEARANCES:** Petitioner, Mr. Fred Neumann, appeared and represented
17 himself. Respondent, Tucson Estates Property Owners Association, Inc., was
18 represented by Ms. Carolyn B. Goldschmidt, Attorney-at-Law.

19 **ADMINISTRATIVE LAW JUDGE:** Grant Winston

20
21 The administrative hearing of this matter was held in the Office of Administrative
22 Hearings, Tucson. Testimony was heard and other evidence admitted to the record,
23 and, based on the entire record, the following Findings of Fact, Conclusions of Law and
24 Order are made.

25 **FINDINGS OF FACT**

- 26 1. Respondent, Tucson Estates Property Owners Association, Inc., (TEPOA) is
27 a planned community governing body in Tucson, Arizona.
- 28 2. Petitioner, Mr. Fred Neumann, during all time material hereto, was a resident
29 of Tucson Estates and member of TEPOA.
- 30 3. On March 13th, 2006, Petitioner submitted to the TEPOA Board at a regular
meeting of that body, a petition, signed by Mr. Neumann and hundreds of

1 other members of TEPOA, seeking to amend the TEPOA By-Laws in a way
2 that would require the TEPOA Board of Directors to obtain ratification of the
3 members for any capital expenditure that would exceed \$100,000.

- 4 4. On April 12th, 2006, in response to the submitted petition, the Board adopted
5 Resolution 0607. That Resolution referred to the TEPOA Articles of
6 Incorporation. The Articles incorporated TEPOA as a non-profit corporation
7 within the meaning of A.R.S. Title 10. The Articles vested in the Board the
8 power to make “payments and disbursements” in furtherance of its purposes,
9 which include, without limitation, capital expenditures. Thus, the Board, in
10 Resolution 0607, determined that, even in the event the members voted on
11 the question in the petition and approved it, its substance would violate the
12 Articles of Incorporation by having a mere By-Law abrogate Board authority
13 granted by the Articles of Incorporation, which take precedence over the By-
14 Laws.
- 15 5. Resolution 0607 did, however, make allowances to the Petition’s signatories
16 by declaring the Petition null and void, but holding in abeyance that
17 declaration until December 31st, 2007, during which interim the Petitioner and
18 other like-minded members could seek to change the Articles of Incorporation
19 in a way which would make the Articles amenable to the substance of the
20 petition if it were adopted as a By-Law. If, the Resolution continued, the
21 Petitioner and the other members succeeded in so amending the Articles
22 before December 31st, 2007, the submitted Petition would be put to a vote.
23 As of the hearing, the Articles had not been amended.
- 24 6. Petitioner filed the instant Petition on January 18th, 2007, complaining that the
25 Respondent failed to recognize a valid Petition, failed to notify the members of
26 it, failed to place it on the ballot, and declared it null and void.

27 **CONCLUSIONS OF LAW**

- 28 1. This administrative hearing was held under authority of and pursuant to
29 A.R.S. 41-2198.01, and A.R.S. 41-1092.
30

1 2. Petitioner has the burden of proof by a preponderance of the evidence.
2 A.A.C. R2-19-119.

3 3. A.R.S. Title 10 governs non-profit corporations in Arizona. Petitioner's
4 proposed amendment to the TEPOA By-Laws would have the effect of
5 abrogating the Articles of incorporation in violation of A.R.S. Title 10. See:
6 A.R.S. 10-3801.B. and C. This limitation is similar to the relationship
7 between a statute law and a constitutional provision. A statute cannot
8 abrogate the constitution, in much the same way a By-Law cannot abrogate
9 the Articles of Incorporation. Thus, as a matter of law, the TEPOA Board did
10 not act improperly in declining to place the Petition on the ballot, unless and
11 until the Articles of incorporation would be amended to allow it.

12 **ORDER**

13 Based on the above, the Petition is hereby dismissed.

14 Done this day, April 16th, 2007.

15
16 _____
17 Grant Winston
18 Administrative Law Judge

19 Original transmitted by mail this
20 ____ day of _____, 2007, to:

21 Robert Barger
22 Department of Fire Building and Life Safety - H/C
23 ATTN: Joyce Kesterman
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26 Tucson Estates Property Owners Association, Inc.
27 5900 W. Western Way Circle
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By _____