Final agency action regarding decision below:

ALJFIN ALJ Decision final by statute

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

LAURA FREY, Petitioner, vs. TUCSON ESTATES PROPERTY OWNERS ASSOCIATION, INC. Respondent.	**No. 07F-H067028-BFS** **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: June 13, 2007

APPEARANCES: Laura Frey, on her own behalf; Carolyn Goldschmidt, an attorney, on behalf of Respondent

ADMINISTRATIVE LAW JUDGE: Michael K. Carroll

On February 20, 2007, a Petition was filed with the Department of Fire, Building and Life Safety, pursuant to A.R.S. §41-2198.01B, in which Petitioner alleged six separate violations of planned community documents and state statutes by Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact:

(1) Petitioner is a homeowner in Tucson Estates and a member of the Tucson Estates Property Owners Association, Inc. (TEPOA).

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(2) On January 1, 2000, Respondent adopted new Declarations of Covenants, Conditions and Restrictions (Declarations) for Tucson Estates which terminated and replaced all previous recorded deed restrictions and/or declarations of covenants, conditions and restrictions for Tucson Estates. Exhibit R1.

(3) On October 12, 2004, the Board of Directors of TEPOA (Board) adopted a Resolution which acknowledged that, prior to that date, there were "many structures within the community that do not conform with [the] easement and setback requirements [of Section 8 of the Declarations]". The stated purpose of the Resolution was "to ensure the use of consistent methods for enforcing its CC&Rs." The Resolution declared that, "effective immediately: A request to replace, move or change an existing structure, that is not in compliance with current setback & easement requirements, shall only be approved if the new structure or change will fully conform to the current CC&Rs." Exhibit R12.

(4) In late 2005 or early 2006, Petitioner placed a portable gazebo in the rear yard of her residence. At some later time, she moved that gazebo to an area of her side yard which was within ten feet of her side property line.

(5) On March 28, 2006, Petitioner received a "First Notice of Violation" from the TEPOA Architectural & Building Sub-Committee (A & B Committee). That Notice informed Petitioner that she was in violation of Declarations, Section 8.3.1, which prohibited "all permanent or temporary structures" within ten feet from any side lot line. The Notice requested that Petitioner bring her property into compliance. That Notice was based exclusively on the placement of the gazebo within the ten-foot setback from Petitioner's east side property line. Exhibit P1.

(6) On April 12, 2006, Petitioner sent a letter to the A & B Committee in which she acknowledged that the gazebo was a "structure," but it was not the type of "structure" prohibited by Section 8.3.1 of the Declarations. In that letter, she equated the gazebo to "lawn furniture." Exhibit P4-1.

(7) On May 16, 2006, the A & B Committee sent Petitioner a "Second Notice of Violation," which again cited Section 8.3.1 of the Declarations and requested that she

"remove the structure in 10' setback eastside." That Notice also advised Petitioner that failure to comply with the notice could subject her to the imposition of fines. Exhibit R4.

(8) On June 8, 2006, the president of the Board sent Petitioner a document titled "Call to Hearing – Violation," in which Petitioner was again advised that she was in violation of Section 8.3.1 of the Declarations. The document requested Petitioner to appear at a "Special Hearing," on June 21, 2006, to determine "if a fine should be imposed and, if so, the amount of the fine." Petitioner was also informed in the document that she could "present any information to the Hearing Committee that [she] may have as to why the Association should not impose a fine." Exhibit R5.

(9) On June 21, 2006, Petitioner attended the Special Hearing during which she argued that the gazebo was not a "structure," but rather "lawn furniture." The hearing panel disagreed with Petitioner's characterization of the gazebo as anything other than a "structure," and informed Petitioner that she had 14 days to permanently remove the structure from the setback. See minutes of Special Hearing, June 21, 2006, Exhibit R6.

(10) On June 22, 2006, the president of the Board sent a letter to Petitioner in which she informed Petitioner that the Board had considered her "comments and the circumstances leading up to the violation" and determined that her property was not in compliance. The letter reiterated that Petitioner had "14 days within which to permanently remove the gazebo from the eastside setback." Exhibit R7.

(11) On August 7, 2007, the president of the Board sent another "Call to Hearing – Violation" letter to Petitioner, advising her that another "Special Hearing" had been set for August 23, 2007. That letter was sent by both first class and certified mail. The first class letter was not returned to TEPOA, but the certified letter was returned to TEPOA as "unclaimed." Exhibit R8. Petitioner testified that she never received the August 7, 2007 letter advising her of the Special Hearing.

(12) On August 23, 2007, the second Special Hearing was held. Petitioner was not in attendance. At that second hearing, the panel again found that Petitioner's property was not in compliance, and recommended that a fine of $10 per day be imposed beginning September 1, 2006, and that it continue until "the office is notified." See minutes of Special Hearing, August 23, 2006, Exhibit R9.

(13) On August 24, 2006, the president of the Board sent a certified letter to Petitioner informing her that, beginning September 1, 2006, she would "be assessed a fine of $10.00 per day for as long as [her] property continues to be in violation." The letter also advised Petitioner that, if the violation were resolved, she should notify the office because the fines would continue until the office was notified. The receipt for that certified letter was signed by Petitioner and returned to TEPOA. Exhibit R10.

(14) Between November 7, 2006 and January 5, 2007, three letters were sent by the associate manager of TEPOA to Petitioner advising her that her account with the Association was in arrears. Exhibits P10, 11 and 12.

(15) On January 6, 2007, Petitioner sent TEPOA a certified letter in which she denied receiving a request to attend a Special Hearing, denied having a gazebo in her yard, and stated that, if she did have a gazebo, she did not believe that it would violate either the letter or the intent of the Declarations. Exhibit P13-3

(16) On January 8, 2007, Petitioner sent a follow-up letter to TEPOA in which she informed the Association that a tree limb had fallen onto her gazebo in May, 2006, and that she had "planted an arbor and constructed a 'trellis'" to support vines she had planted within the setback. Exhibit P13-5. In that letter, Petitioner enclosed photos of both the destruction to the gazebo and the "arbor" which had replaced the gazebo in the setback. Exhibits P13-9 and P13-10. Other photos of the destroyed gazebo and arbor were also introduced into evidence at the hearing. Exhibits P16, 20, and 21. Additionally, evidence at the hearing established that the "skeleton" or sides of the destroyed gazebo had been used by Petitioner to construct the arbor.

(17) On February 6, 2007, the associate manager of TEPOA sent a letter to Petitioner, advising her that because her account was "seriously delinquent" the Association had revoked her right to use the common area recreational facilities. Exhibit P14. In November, 2006, Petitioner was precluded by the Association from voting for members of the Board.

(18) After Petitioner filed the Petition in this case, her rights to vote and use the common area recreational facilities were restored, and the daily fines were discontinued.

Conclusions of Law:

The Petition alleges six violations of documents and state statutes governing the operation of TEPOA:

1. She was charged $10 per day for a "nonexistent offense" and she had no way to contest the situation;
2. TEPOA failed to respond to written and verbal requests, or "inform her of any methods of contesting any of the situations;"
3. TEPOA "disallowed" her from using community property;
4. She was not allowed to vote in the 2006 Association election;
5. TEPOA was not consistent in its enforcement of the Declarations, and its interpretation of the Declarations regarding "structures" was not reasonable;
6. Her neighbor built a fence which blocked her view and decreased her property value without either the approval of or any action taken by TEPOA.

All of the allegations in the Petition, with the exception of the last, depend upon whether Respondent properly interpreted the term "structure," as it is used in Section 8.3.1 of the Declarations, and whether Respondent's subsequent actions in communicating with, and seeking compliance from, Petitioner were in violation of state statutes or documents governing the Association.

Allegation 5:

Both parties cited *Burke v. Voicestream Wireless Corp.II*, 207 Ariz. 393, 87 P. 3d 81 (App. 2004) to provide guidance as to whether the gazebo or arbor constituted a "structure" under the Declarations.

In *Burke*, the court considered whether a fifty-foot high cellular tower was a "structure" and, as such, violated deed restrictions which prohibited any structures on a lot, other than a main residence, a garage and a guest house. In concluding that the tower was a "structure" within the meaning of the restriction, the court relied upon *Horton v. Mitchell,* 200 Ariz. 523, 29 P.3d 870 (App. 2001).

In *Horton,* the court was asked to decide whether a road across one of the subdivision lots constituted a "structure" under deed restrictions which prohibited any structure other than those specifically delineated in the restrictions. The court began its analysis with a determination as to whether there was any specific language in the restrictions which revealed an intent to limit the term "structure" to anything other than

its ordinary meaning. After concluding that there was no such limiting language, the court held that a road fell within the ordinary meaning of the term "structure" and, as such, was prohibited by the restrictions.

Applying the *Horton* analysis to the facts of this case, the first inquiry is whether there is any language in the Declarations which limits the term "structure" to other than its ordinary meaning.

There is no definition of the term "structure" in the Declarations governing TEPOA. However, Section 8 of the Declarations, which is titled "Use of lots," contains several references to "structures." Section 8.1 provides, in part:

> No building, addition, fence, *accessory,* wall, paving, *TV/radio antenna, dish, tower or similar device or other structure* shall be commenced, erected or maintained, nor shall any addition to or change or alteration therein be made until the written plans and specifications showing the nature, kind, shape, height, materials, floor plans, location and approximate cost of *such structure* have been submitted to and approved in writing by the Association. [Emphasis added.]

Under this provision, it would appear that the gazebo or arbor, as Petitioner later characterized it, constitutes a "structure," at least with respect to the necessity to seek prior approval of the Association before it is erected, added to, changed or altered. Clearly, if an item as vague as an "accessory" or as relatively inconspicuous as a TV antenna is classified as a "structure," the gazebo, or even its current configuration as an arbor, is a structure.

However, Petitioner was not cited for her failure to seek prior approval of the Association. She was specifically cited under Section 8.3.1 of the Declarations which provides:

> 8.3.1 All lots in Tucson Estates shall have a minimum setback of 2 feet from the front Lot line and 10 feet from any side Lot line for all permanent or temporary structures or mobile homes in the Subdivision, including overhanging awnings, parking covers or eaves.

Petitioner argued that the specific reference to "overhanging awnings, parking covers or eaves" suggests that Section 8.3.1 was not intended to cover items such as gazebos or arbors placed within the ten-foot setback. The language of Section 8.3.1,

however, is inclusive, not exclusive. The fact that it makes reference to specific items that are intended for inclusion within the meaning of "structures" does not mean that Section 8.3.1 was intended to apply exclusively to those listed items. Were such exclusivity the intent of the drafters, the language "all permanent or temporary structures" in Section 8.3.1 would be superfluous. Furthermore, the expansive definition of the term "structure" in Section 8.1 does not contradict the use of that same term in Section 8.3.1. The language of 8.3.1 simply provides greater clarification of the term "structure" by suggesting that even items, attached to the residence and not in contact with the ground, are in violation of the Declarations if they protrude into the airspace defined by the setback.

As the court concluded with respect to the restriction in *Horton*, there is nothing in the Declarations governing TEPOA to suggest an intent to limit the term "structure" to anything other than its ordinary meaning. In the absence of language suggesting a contrary intent, the Court in *Horton* determined that the ordinary meaning of the term "structure" was that found in the dictionary – *i.e.* "something constructed."

Similarly, in this case, the gazebo, and later the arbor, was "something constructed," and, therefore, constituted a "structure" as that term is used in Section 8.3.1 of the Declarations.

Petitioner argued, however, that her gazebo/arbor was no different from many similar violations found throughout the subdivision. In essence, she argued that TEPOA's failure to apply similar enforcement for other setback violations in the subdivision constituted a waiver of TEPOA's right to enforce Section 8.3.1 against her.

The identical argument was raised by the tower owners in *Burke,* supra, who claimed that the failure to consistently enforce previous violations of the restrictions by other lot owners in the subdivision constituted an abandonment of those restrictions. In rejecting the tower owners' argument in *Burke*, the court relied upon a provision in the restrictions which stated that the failure to enforce the restrictions with respect to some of the properties in the subdivision was not a waiver of the right to enforce the restrictions as to other properties. The court held that the "non-waiver" provision in the

restrictions was controlling, notwithstanding the existence of previous violations in the subdivision that had gone unchallenged.

In this case, the Declarations governing TEPOA contain a similar clause:

> No Precedent. The failure by any land owner *or the Association* to enforce any restrictions conditions, covenant or agreement herein contained shall in no event be deemed a waiver of the right to do so thereafter as to the same breach or as to one occurring prior or subsequent thereto, nor shall such failure give rise to any claim or cause of action against the Association or such land owner.

Declarations, Section 11. Emphasis added. See also TEPOA Bylaws, Article XVII.

Furthermore, Section 11 of the Declarations was later reinforced by the Board in the October 12, 2004 Resolution (Exhibit R12), which acknowledged that there had been violations of the setback requirements in the past and declared an intention to consistently enforce those requirements in the future.

Consequently, Petitioner's gazebo/arbor was a "structure," as that term is used in Section 8.3.1 of the Declarations. Petitioner's failure to remove it from the setback was a violation of the Declarations.

Allegations 1 – 4:

Petitioner contends that TEPOA did not follow required procedural safeguards set forth in its governing documents or state statutes, and that TEPOA improperly imposed the fines and other sanctions against Petitioner as a means of forcing her compliance with the Declarations.

As to the procedural steps taken by TEPOA in seeking Petitioner's compliance, it is difficult to imagine a more comprehensive procedural scheme to protect homeowners from misinterpretations or overreaching by the Board or the Association.

Those procedures, which are listed in Article V, Section 5 B, C and D of the TEPOA Bylaws (Exhibit R13), were carefully followed in Petitioner's case; and Petitioner was given ample opportunity to contest both the conclusions of the A & B Committee and the hearing panel, and the action taken by the Board to enforce those conclusions.

Furthermore, the sanctions imposed against Petitioner by the Board were authorized under the documents governing the Association. The imposition of fines is authorized by TEPOA Bylaws, Article V, Section 5B (6) (b). The suspension of

privileges to use the recreational facilities is authorized by TEPOA Bylaws, Article V, Section 3 A (3), and Article IV, Section 3. Finally, the suspension of voting rights is authorized in TEPOA Bylaws, Article VIII, Section 5 C. That Section provides that only members of the Association who were current in paying assessments through the prior month are eligible to vote.[1]

The evidence presented at the hearing was insufficient to establish violations of community documents or state statutes with respect to Allegations 1 through 4 of the Petition.

Allegation 6:

Finally, Petitioner alleged that her neighbor constructed a portion of fence, along the property line separating their lots, without board approval. Evidence presented at the hearing, both through testimony and documentation (Exhibit R11), established that the homeowner on the lot adjacent to Petitioner's lot had obtained TEPOA's approval for the fence construction.

ORDER

Based upon the foregoing, it is ordered denying the Petition.

This Order is the final administrative decision and is not subject to a request for rehearing. A.R.S. §41-2198.02 (B).

Done this day, June 18, 2007.

_____
Michael K. Carroll
Administrative Law Judge

[1] Although the evidence at the hearing was unclear as to the precise date of the November, 2006 election and the status of Petitioner's account on that date, Petitioner's voting rights have since been restored and the issue is moot.

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

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