

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

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3 **ALJFIN ALJ Decision final by statute**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 PETER GOLIGHTLY

8 Petitioner,

9 vs.

10
11 WILL ROGERS EQUESTRIAN RANCH
12 HOMEOWNERS ASSOCIATION

13 Respondent

No. 07F-H067034-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

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17 **HEARING:** July 10, 2007

18 **APPEARANCES:** Peter and Mary Golightly, for Petitioner; Ron Turrell and Rick
19 Vanslyke, on behalf of Respondent.

20 **ADMINISTRATIVE LAW JUDGE:** Michael K. Carroll

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23 On May 2, 2007, a Petition was filed with the Department of Fire, Building and
24 Life Safety, in which Petitioner alleged that Respondent had violated its governing
25 documents by denying Petitioner's request to install artificial turf in the front yard of his
26 residence.

27 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

28 **Findings of Fact:**

29 (1) Petitioner owns and lives in a newly-constructed home in Will Rogers
30 Equestrian Ranch, a planned community. Petitioner is also a member of the Will
Rogers Equestrian Ranch Homeowners Association (Respondent), which governs the

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1 community pursuant to a Declaration of Conditions, Covenants and Restrictions
2 (Declaration). Exhibit R1.

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5 (2) In the fall of 2006, Petitioner requested approval from Respondent's
6 Architectural Committee (Committee) to install artificial turf in the front landscaped area
7 of his home.

8 (3) Petitioner's request was submitted pursuant to Landscaping Guidelines
9 (Guidelines) published by the Committee which require that all landscaping plans must
10 be approved by the Committee.

11 (4) The Guidelines require that "25 % of the landscapable area of the front yard"
12 must consist of "Turf." The Guidelines list the types and size of trees that are permitted
13 by the Town of Queen Creek, in which the planned community is located. They also list
14 the minimum number and size of plants and shrubs that must be contained in the
15 landscaping for the front yard, and the type, size and general color ("earth tone") of
16 decomposed granite or other landscape rock that is required. Finally, in order to "assist"
17 homeowners in choosing plants for their lots, the Guidelines contain a list of plant and
18 landscape materials used for the major streets maintained by the Association. Beneath
19 the list of plants used by the Association for major street landscaping is a list called
20 "Additional Material." One of the additional materials listed is "Turf-Bermuda Hybrid
21 'Midiron'." Exhibit P11.

22 (5) The Committee denied Petitioner's request to use artificial turf to satisfy the
23 25% "turf" requirement for front yard landscaping.

24 (6) On September 13, 2006, Petitioner wrote a letter to the Committee
25 requesting a formal appeal of its decision and explaining why Petitioner felt that the
26 Committee should reconsider the request to allow artificial turf. Exhibit P3. In addition
27 to environmental and health concerns associated with natural turf, Petitioner indicated
28 his belief that a precedent had been set to allow artificial turf because Respondent had
29 previously allowed artificial turf to be substituted for natural turf at another residence
30 within the planned community.

1 (7) On December 12, 2006, Petitioner attended a regular Association meeting, at
2 which Rick Vanslyke, the representative for Respondent's management company,
3 informed Petitioner that his request to use artificial turf had again been denied.
4 Petitioner asked for special consideration because of health reasons, and the members
5 of the Board of Directors (Board) invited Petitioner into an executive session to discuss
6 the issue. At that meeting, the Board expressed concern that other homeowners would
7 be upset if an exception were made for Petitioner, but, nevertheless, advised Petitioner
8 that it would reconsider the request and asked Petitioner to provide written verification
9 of his health problems. A week after that meeting, Petitioner sent a letter to the Board
10 in which his physician recommended that Petitioner be allowed to install artificial turf
11 due to his health problems. Exhibit P12.

12 (8) On April 3, 2007, Respondent, through its management company, sent a
13 letter informing Petitioner that his request to substitute artificial turf for natural turf was
14 again denied by the Committee. Exhibit P13.¹

15 (9) At the hearing on this Petition, Respondent acknowledged that there was one
16 homeowner in the community that had been allowed to install artificial turf in her front
17 yard due to health reasons. That exception, however, was granted by the previous
18 Board of Directors and was believed to have been a response to an Americans with
19 Disabilities Act (ADA) claim presented to that Board by the homeowner.

20 **Conclusions of Law:**

21 Petitioner argued that the Guidelines upon which the Committee relied in
22 reaching its decision do not prohibit the use of artificial turf.

23 The authority for the Committee to adopt landscape guidelines is found in the
24 Declaration (Exhibit R1).

25 Article VII, Section 7.1 of the Declaration, creates an Architectural Control
26 Committee "for the purpose of maintaining the architectural and aesthetic integrity and
27 consistency within the Project." Article VII, Section 7.2 of the Declaration grants the
28 Architectural Control Committee the authority to "adopt and amend, from time to time,
29 architectural control guidelines consistent with this section, the Project Documents, and

30 ¹ Although Exhibit 13 is addressed to Petitioner, the salutation in that letter refers to "Mr. & Mrs. Waltz."
At the hearing, that salutation was characterized as a clerical error.

1 any conditions imposed by the Town of Queen Creek...” Article V, Section 5.16 of the
2 Declaration provides that “the landscaping on each Lot must be installed and
3 substantially completed by the Owner in an attractive manner and *according to the*
4 *approved subdivision Landscape Guidelines...*” Emphasis added.

5 Petitioner argued that the Guidelines, adopted and published by the Committee,
6 are not specific as to what is contemplated by the term “turf,” and, therefore, cannot
7 constitute a basis upon which to deny his request to use artificial turf.

8 Petitioner is correct in his assessment that the term “turf,” as used in the
9 Guidelines, is ambiguous. “Turf” is not defined in the Guidelines. Furthermore, the
10 Guidelines contain only three references to “turf” under the general category
11 “Requirements and Specifications.”

12 The first reference requires “turf areas to be 25% of landscapable area of the
13 front yard.” The second reference is found under the heading “Irrigation System” and
14 states that “a drip irrigation system is strongly encouraged for all landscaping areas,
15 expect [sic] turf.” The final reference is found under the category of plants and materials
16 used by Respondent in landscaping areas along major streets in the community. That
17 reference simply states that “Additional Material” used in street landscaping included
18 “turf-Bermuda Hybrid ‘Midiron’.” The Guidelines do not specify or limit the *type* of turf
19 homeowners are required to use; they merely require that 25 per cent of the front yard
20 landscaping consist of “turf,” and point out that Bermuda Hybrid “Midiron” was the type
21 of “turf” used by Respondent in landscaping along the major streets.

22 Were Petitioner’s claim dependent only upon a strict interpretation of the term
23 “turf” as it is used in the landscape “Requirements and Specifications” section of the
24 Guidelines, it would be persuasive. However, the first sentence of the Guidelines
25 provides that “All landscape design plans must be approved by the Architectural
26 Committee...This includes the installation of all trees, shrubs, ground covers (*including*
27 *turf*) and hardscape materials.” Emphasis added.

28 The authority for the Committee to exercise such broad discretion in approving or
29 disapproving landscape features is found in Article VII, Section 7.2 of the Declaration,
30 which provides:

1 “No...landscaping or landscaping changes...shall be commenced...until
2 the plans and specifications showing the nature, kind, shape, size, height,
3 color, material...shall have been submitted to and approved by the
4 Committee.”

5 That section also provides:

6 Approval shall not be unreasonably withheld. However, the Committee
7 shall have the right to refuse to approve any Alteration² which is not
8 suitable or desirable in their opinion for aesthetic or other reasons, and
9 they shall have the right to take into consideration (i) the suitability of the
10 proposed Alteration; (ii) the material (including type and color) of which it
11 is to be built; (iii) the site (including location, topography, finished grade
12 elevation) upon which it is proposed to be erected; (iv) the harmony
13 thereof with the surroundings (including color and quality of materials and
14 workmanship); and (v) the effect of the Alteration as planned on the
15 adjacent or neighboring property (including visibility and view).

16 The Committee did not approve Petitioner’s request to use artificial turf. Clearly,
17 the Declaration gives the Committee broad discretion to deny such a request. The only
18 limitation on the Committee’s exercise of that broad discretion is found in the sentence
19 “Approval shall not be unreasonably withheld.”

20 At the hearing, Petitioner presented evidence and argument which suggested
21 that he believed the Committee’s approval of his request was “unreasonably withheld.”
22 Specifically, he claimed that the (1) the quality and appearance of the artificial turf he
23 intended to use was consistent with the aesthetic requirements of the Guidelines and
24 the Declaration; (2) his health and that of his wife prohibited them from being physically
25 able to maintain a natural lawn; and (3) another homeowner in the community with
26 similar health concerns had been allowed to use artificial turf to satisfy the front yard
27 landscaping requirements with respect to “turf.”

28 There was no dispute that the artificial turf, offered into evidence as Exhibit P7
29 and described in Exhibit P8, was realistic in appearance and of excellent quality. Mrs.
30 Golightly testified that one of the Board members had commented on the high quality of
the turf sample presented by Petitioner during the executive meeting with the Board on
December 12, 2006. Additionally, several photographs entered into evidence by

² Under Article VII, Sec. 7.2 of the Declaration, the term “landscaping” is included within the collective term “Alterations.”

1 Petitioner depict homes which exhibit an aesthetically pleasing use of artificial turf.
2 Nevertheless, the Board expressed concern at the executive session that the other 124
3 homeowners in the community, with the exception of one, had been required to comply
4 with the Committee's requirement of natural turf, and the Board was reluctant to create
5 additional exceptions. Such reluctance was not unreasonable.

6 As to Petitioner's health problems, the President of the Board, Ron Turrell,
7 testified that there would be little additional cost to Petitioner if he were to hire a
8 professional landscape service to maintain the relatively small area of natural turf
9 required in Petitioner's front yard, particularly in light of all the work that would be
10 required to maintain the other trees and plants in that yard. That analysis was not
11 unreasonable.

12 Finally, the fact that there had been a variance from a strict application of the
13 Guidelines in the past does not create a legally sufficient basis to justify Petitioner's
14 position that the Declaration and Guidelines can no longer be used to prohibit future use
15 of artificial turf.

16 Article VII, Section 7.3 of the Declaration provides:

17 VARIANCES

18 The Committee may (with Board approval in its sole discretion and in
19 extenuating circumstances) grant minor variances from the restrictions set
20 forth in this Article V...if the Committee determines that (a) either (i) a
21 restriction would create an unreasonable and substantial hardship or
22 burden on an Owner or (ii) a change of circumstances has rendered a
23 restriction obsolete and (b) the activity permitted under the variance will
24 not have a substantially adverse effect on other Owners and is consistent
25 with the high quality of life intended for the Project.

26 Under this provision, the Committee, with Board approval, clearly has the
27 discretion to grant or deny variances depending on the particular circumstances. That
28 the Committee ultimately chose not to grant a variance to Petitioner was within its
29 discretion. That denial was not unreasonable, particularly in light of the community's
30 historical interpretation of the term "turf" under the Guidelines.

Occasionally, documents which govern planned communities contain "non-
waiver" provisions stating that a failure to enforce any restriction shall not be construed

1 as a waiver of succeeding violations of that restriction. A review of the Declaration in
2 this case does not reveal the presence of such a non-waiver provision. However,
3 Arizona law provides:

4 In the absence of a non-waiver provision, particular deed restrictions will
5 be considered abandoned and waived, and therefore unenforceable, *if*
frequent violations of those restrictions have been permitted.

6 *Burke v. Voicestream Wireless Corporation II*, 87 P.3d 81, 207 Ariz. 393, 398 (App.
7 2004). Emphasis added.

8 A variance granted by the Board to a single homeowner does not meet the
9 “frequent violations” standard cited by the court in *Burke, supra*. Consequently, that
10 previous, lone variance does not preclude the Committee from denying Petitioner’s
11 request. Additionally, it is not unreasonable for the Committee or the Board to deny
12 Petitioner’s request for the simple reason that to do otherwise might, under *Burke*,
13 erode Respondent’s ability to require natural turf with respect to future, similar requests.

14 **ORDER**

15 For all the reasons stated above, the Petition is denied.

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

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19 Done this day, July 11, 2007.

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23 _____
24 Michael K. Carroll
25 Administrative Law Judge

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

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29 Department of Fire Building and Life Safety - H/C
30 Robert Barger

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By _____