

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 ANDREW HOLZMAN,

8 Petitioner,

9 vs.

10
11 EMERALD SPRINGS HOMEOWNERS
12 ASSOCIATION;

13 Respondent.

No. 08F-H089003-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

14
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16 **HEARING:** October 21, 2008

17 **APPEARANCES:** Andrew Holzman on his own behalf; Jason Smith, Esq. on
18 behalf of Emerald Springs Homeowners Association

19 **ADMINISTRATIVE LAW JUDGE:** Lewis D. Kowal

20
21 **RULING**

22 **Allegation of Violation of Sec. 3.16(1) of the Amended and Restated**
23 **Declaration of Covenants, Conditions and Restrictions for Emerald Springs**
24 **Homeowners Association (fences and walls starting 130 feet from the front**
25 **property line extending to the river may not exceed 4 feet in height and must be**
26 **of open type face fencing):**

27 The approval of a plan proposed by the owners of Lot 23 within the community
28 for a pool with a fence that is to be at least 5 feet in height by Emerald Springs
29 Homeowners Association ("Emerald Springs") is not a violation of the above-cited
30 provision because Emerald Springs has to comply with a La Paz County ("County")
ordinance requiring pool fences to be a minimum of 5 feet in height.

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007
(602) 542-9826

1 **Allegation of Violation of Sec. 3.27 of the Amended and Restated**
2 **Declaration of Covenants, Conditions and Restrictions for Emerald Springs (back**
3 **and front yard fences must not exceed 4 feet in height and be of open type**
4 **fencing; side yard fences must not exceed 6 feet in height and be constructed of**
5 **wood, concrete block or similar materials):**

6 The approval of a plan proposed by the owners of Lot 23 within the community
7 for a pool with a fence that is to be at least 5 feet in height by Emerald Springs is not
8 A violation of the above-cited provision because Emerald Springs has to comply with
9 the County ordinance requiring pool fences to be a minimum of 5 feet in height.
10 Additionally, with respect to side yard fences, there was no evidence presented that
11 established that Emerald Springs acted on a plan with respect to side yard fencing with
12 any specific height or construction materials.

13 **FINDINGS OF FACT**

- 14 1. At all times material to this matter, Andrew Holzman ("Mr. Holzman") lived at Lot
15 24 within the Emerald Springs community.
- 16 2. Mr. Holzman became aware that his neighbors, Waymen and Carolyn Dekens,
17 were planning extensive landscaping on their lot, Lot Number 23, the lot adjacent to Lot
18 24. Included in the landscaping was a pool with waterfalls, and a pool fence. Mr.
19 Holzman recalls seeing a plan about a year ago but does not recall if the plans
20 contained fencing. He does not believe that it did.
- 21 3. Prior to a Board meeting that occurred on June 21, 2008, Mr. Holzman met with
22 the Dekens and shared his concerns about the fence obstructing the view of the
23 Colorado River from his lot. According to Mr. Holzman, the Dekens agreed to move the
24 location of the pool and fence and represented that upon approval and construction of
25 the fence, the fence would be taken down. This discussion occurred a few days before
26 the Board meeting.
- 27 4. On June 21, 2008, the Board met and one of the items addressed was the pool
28 that the Dekens proposed to have installed on their lot.
- 29 5. The parties disagree as to what occurred during the June 21, 2008 meeting and
30 also disagree as to what is reflected in the minutes of the meeting.

1 6. Mr. Holzman appeared telephonically at the Board meeting and therefore could
2 not view what was physically presented and considered by the Board.

3 7. The minutes of the Board meeting indicates that a plan for a pool was
4 conditionally approved and that plans were available for the Board to consider.
5 Emerald Springs contended that there was no formal vote for approval of plans and that
6 no written plans were presented for Board approval. In contrast, Mr. Holzman
7 contended that the Board, by conditionally approving "plans", approved the construction
8 and installation of a pool and fence on Lot 23.

9 8. Emerald Springs presented the testimony of Sherri Mehrver ("Ms. Mehrver"), who
10 was president of the Board at the time and was present at the June 21, 2008 meeting.
11 Ms. Mehrver testified that the Board approved the concept of the Dekens having a pool
12 and that it was conditioned upon the Dekens obtaining engineering survey and
13 submission of landscaping plans. The Board discussed Mr. Holzman's concerns about
14 having a 5 foot fence that would obstruct his view. The Board had obtained a legal
15 opinion that the CC&Rs do not prohibit having a pool on a lot within the community.
16 The Board acknowledged during the meeting that a fence would have to meet the 5 foot
17 height requirement set by the County.

18 9. According to Ms. Mehrver, the Dekens did not obtain engineering survey.
19 Emerald Springs asserted that the Board did not approve the Dekens plans because no
20 plans were submitted. Ms. Mehrver testified that in the minutes of the June 21, 2008
21 meeting the statement that plans were available at the meeting meant that a diagram
22 that the Dekens had was presented.

23 10. Mr. Holzman contacted the Board numerous times requesting information and a
24 copy of the plans that were approved at the June 21, 2008 Board meeting. He did not
25 receive any representation from the Board that plans were not approved nor did he
26 receive any copy of plans.

27 11. Mr. Holzman acknowledged that he has not seen any plans the Dekens have for
28 their lot other than the one he saw a year ago which was not presented to the Board.
29 He is also unaware as to the plans the Dekens have with respect to the fencing other
30 than what was discussed in their meeting prior to the Board meeting.

1 12. The Board relied upon a July 17, 2008 email sent at 9:45 P.M. by Judy Jerrels
2 (“Ms. Jerrels”), Emerald Springs’ secretary stating that the Board expects to see revised
3 plans submitted by the Dekens on or before the next meeting in August. According to
4 the Board, that communication indicates that the Board did not adopt any plans for the
5 Dekens with respect to the pool.

6 13. In a July 17, 2008 email sent at 7:39 p.m., Ms. Jerrels stated that “the plans were
7 passed around at the meeting for the attending membership to view... . The owners
8 advised updated plans , with the concessions made at your request, taking items OUT
9 of the plans submitted to the Board, would be provided at or before the next
10 meeting.”...”County requirements have also been addressed.”

11 14. Based upon the minutes of the June 21, 2008 meeting, the communication sent
12 by Ms. Jerrel to Mr. Holzman, the Administrative Law Judge finds that on June 21,
13 2008, the Board conditionally approved plans for a pool to be installed on Lot 23 even
14 though it was contemplated that additional filings would be presented to the Board for
15 approval in the future. It is also found that the approval for the pool to be constructed
16 also involved a recognition and approval of a fence to around the pool to be at least 5
17 feet in height pursuant to County requirements.

18 15. The evidence does not clearly establish the details of what the Board approved
19 as being a plan proposed by the Dekens. However with respect to side yard fences,
20 there was no evidence presented that established that Emerald Springs acted on a plan
21 with respect to side yard fencing specifying any height or construction materials
22 specifically identified and addressed.

23 16. It was undisputed that the County requires that pool fences be at least 5 feet in
24 height.

25 17. Sec. 3.16(1) of the Amended and Restated Declaration of Covenants, Conditions
26 and Restrictions for Emerald Springs (“CC&Rs”) provides that fences starting 130 feet
27 from the front property line extending to the river may not exceed 4 feet in height and
28 must be of open face fencing.

29 18. Sec. 3.27 of the CC&Rs requires back and front yard fences must not exceed 4
30 feet in height and be of open type fencing; side yard fences must not exceed 6 feet in

1 height and be constructed of wood, concrete block or similar materials. Emerald Springs
2 passed a plan proposed by the owners of Lot 23 within the community for a pool with a
3 fence that is to be at least five feet in height.

4 **CONCLUSIONS OF LAW**

5 1. The weight of the evidence of record established that the Board acted
6 appropriately in approving the pool and fence on Lot 23 for the reason that despite that
7 the provisions of the CC&Rs that provide for a maximum height of 4 feet for a pool
8 fence as well as for a front and back fence or wall, the County requires a pool fence to
9 be at least 5 feet.

10 2. Emerald Springs cannot be compelled to abide by provisions within the CC&Rs
11 that are contrary to law and is required to comply with the County ordinance.
12 Under the circumstances presented, the Administrative Law Judge concludes that Mr.
13 Holzman is not the prevailing party because he cannot seek to have Emerald Springs
14 abide by the provisions of the CC&Rs that are at issue to the extent they are contrary to
15 law.

16 3. Although Respondent did not request attorney fees at the hearing, it did make
17 such a request in its Response to the Petition. An administrative proceeding is not an
18 "action" such as to make attorney fees awardable under A.R.S. § 12-341.01.¹ It is noted
19 that Respondent did not cite to any provision in its governing documents that provides
20 for an award of attorney fees or costs in a proceeding such as the instant one.
21 Consequently, Respondent did not establish an entitlement to its attorney fees or costs.

22 **ORDER**

23 **IT IS ORDERED** that no action is required of the Association with respect to Mr.
24 Holzman's Petition;

25 A party may appeal a final administrative decision pursuant to Title 12, Chapter
26 7, Article 6. See A.R.S. § 41-1092.08(H). A.R.S. § 12-904(A) provides, in pertinent
27 part, that: "[a]n action to review a final administrative decision shall be commenced by

28 . . .

29 ¹ See *Semple v. Tri-City Drywall, Inc.*, 172 Ariz. 608, 611-612, 838 P.2d 1369, 1372-73 (App. 1992)
30 (Prevailing party in administrative claim before Registrar of Contractors was not entitled to attorney fees from opponent under A.R.S. § 12-341.01(A) because an administrative hearing is not an "action").

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1 filing a complaint within thirty-five days from the date when a copy of the decision
2 sought to be reviewed is served upon the party affected. . . . Service is complete on
3 personal service or five days after the date that the final administrative decision is
4 mailed to the party's last known address.”

5 Done this day, October 28, 2008.

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7 _____
8 Lewis D. Kowal
9 Administrative Law Judge
10

11 Original transmitted by mail this
12 ____ day of _____, 2008, to:

13
14 Department of Fire Building and Life Safety - H/C
15 Robert Barger
16 ATTN: Debra Blake
17 1110 W. Washington, Suite 100
18 Phoenix, AZ 85007

19 Carpenter, Hazlewood, Delgado & Wood, PLC
20 Jason E. Smith, Esq.
21 1400 E. Southern Ave., Suite 400
22 Tempe, AZ 85282

23 Andrew Holzman
24 58 Downfield Way
25 Coto de Casa, CA 82679

26 By _____
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