

## THIA QUESTIONS FOR LEGAL COUNSEL

### COMPLAINT HANDLING

ISSUE / QUESTION	RELEVANT REQUIREMENT (D of R or other)	ADVICE	ACTIONS	NOTES
<p><b>1. What external statutes take precedence with regard to D of R's? Is there a hierarchy we can use in general?</b></p>	----	<p>The Board would need to look at each situation individually to see if there is a statute or ordinance that would control or trump the D of R.</p> <p>For example, in respect to Architectural control/structures, if Cave Creek allows a structure but the Association's governing documents do not, the Owner would still be required to adhere to the Association's guidelines. Many times an Owner would need approval from the City as well as approval from the Association. Just because the City approves something does not mean the Association must approve the structure.</p>		
<p><b>2. Grading of the lot and construction of a structure has been commenced without permitting or posting of said permit.</b></p>	<p>Para 1. - No structure of any kind shall be commenced, placed or architecturally modified in Tonto Hills until the design, location, and kind of materials to be used therein</p>	<p>If construction of the Lot has occurred in violation of the Declaration the Association can pursue its legal remedies against the Owner.</p>		

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	<p>have been approved by a majority of the Architectural Control Committee of the Tonto Hills Improvement Association</p>	<p>The right to levy monetary fines (penalties) against an Owner is not set forth in the Association's governing documents so I do not recommend taking that action at this time.</p> <p>However, the Board has the option of filing an Injunctive Relief Lawsuit in Maricopa County Superior Court requesting an Order from the Court compelling the Owner to adhere to the governing document provision. The lawsuit would also request the Court award the Association all attorney fees and costs.</p>		
<p>3. Commercial vehicles, construction trailers, dump truck &amp; heavy construction equipment are continually parked throughout the yard.</p> <p><b>Is construction equipment covered by the para?</b> <b>What defines a commercial vehicle?</b></p>	<p>11. No temporary building, shack, tent, trailer, or unsightly structure shall ever be erected or maintained in Tonto Hills; provided that nothing herein contained shall prevent the erection of a temporary shop or office structure by a contractor or builder during the actual bona fide construction of a permitted structure upon the premises. No garage, stable, or guest house, shall be</p>	<p>It is my opinion that to prohibit the items set forth in this question, the Association should amend the D of R, to specifically prohibit. However, the Association could amend the D of R to allow the Association to pass Rules and Regulations regarding construction which would then allow for Rules to be passed concerning</p>		

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	commenced or erected on any lot until the construction of the main building complying with these restrictions shall have been started thereon.	construction equipment.		
4. Violation of commercial signage; advertising graphics placed on numerous cars, trucks, trailers. <b>Does this apply to detail / decals on vehicles?</b>	Para 12. No billboard, sign board, or advertising of any kind shall be erected, placed, or permitted on any residential lot, except a sign not larger than five (5) square feet advertising that the premises are for rent or sale.	I don't believe paragraph 12 is applicable and I would not recommend regulating graphics/decals on vehicles. However, it is my opinion the D of R could be amended to restrict commercial vehicles.		
5. Owners have multiple pets, which are and have been left outside without supervision and constitute a disturbance to all as they bark continually. <b>Have owners requested permission to have pets? Is this a county animal control (MCDAC) issue? Regarding pets – Is the approval given for a “class” of pets (like dogs or cats), or for “specific” pets (like Fido or Spot)?</b>	Para 14. . . . All other pets of any kind whatsoever must have written permission from the Tonto Hills Improvement Association.	Based on the governing document provision the Owners must have approval to have any other type of pet (other than the horses specifically allowed). Based on this provision the Owners would need to seek Board approval before having a cat, dog, etc. However, whether the Association could take legal action against an Owner for violating this provision would depend on several factors including how long the Owner has had the pet. These violations will be examined on an individual basis given the specific circumstances.		

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		If the Board is considering amending the governing documents, it is common associations allow for domestic animals but may regulate the number of pets if the Association believes that is a concern.		
6. Multiple unsightly trash cans, receptacles and other construction debris have been and are left in front of the garage in clear sight of all neighbors and not screened by shrubbery or lattice work. <b>Is there an inherent allowance for ongoing construction? What is the time limit?</b>	Para 18. Any and all water, fuel and gas and/or other carts or receptacles not buried below the surface of the ground shall be completely screened by shrubbery or lattice.	I recommend that the Association amend its Declaration to specifically account for construction debris. It is my opinion 'receptacles' mention in paragraph 18 are not intended to apply to construction. The Association could attempt to regulate construction debris through paragraph 21 of the D or R (cited in question 7 below), however, that is a subjective standard and may be difficult to enforce in a Court as it is not known if a Judge would have the same interpretation.		
7. All cited and on-going violations constitute and contribute to a condition that depreciates the properties. <b>D of Rs is subjective here – how</b>	Para 21. No lot shall be used or allowed to become in such condition as to depreciate the value of adjacent property.	Please see answer above. I recommend the Association amend its Declaration to allow for the Board to pass Rules and Regulations (as well as for the ability to levy		

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define threshold where adjacent property value is depreciated?		fines for violations of the Declaration) and then the Board could have authority to adopt specific guidelines that would not be as subjective.		

**COMMERCIAL LOT DEVELOPMENT**

ISSUE/QUESTION	REQMN'T (if app)	ADVICE	ACTIONS	NOTES
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ISSUE/QUESTION	REQMN'T (if app)	ADVICE	ACTIONS	NOTES
<p><b>1. What defines a “business” for a residential lot? Does para 10 prohibit operation of a business from a home and/or just erecting a structure to conduct business?</b></p>	<p>Para 10. No structure shall ever be erected or placed on any residential lot in Tonto Hills which is designed for or adaptable to use as, or actually for, any business purpose whatever, including but not limited to; lodging, rooming, or boarding house, sanitarium, hotel, club, hospital, store, or shop.</p>	<p>Paragraph 10 does not prohibit an Owner from operating a business from his/her home, this paragraph just prohibits a business from being erected. If the Board would like to prohibit Owners from using their Lot as a business the D of R would need to be amended. However, Courts would be reluctant to prohibit all businesses. Rather, it is my opinion the Board could prohibit businesses that would be visible from other lots, increase traffic in the neighborhood, etc.</p>		
<p><b>2. Are our setbacks within the county setbacks?</b></p>		<p>I will need to do some further research on this question.</p>		
<p><b>3. Can they build a metal frame building or does it have to be block? (What is “Frame”?). Are steel buildings permitted on commercial lots?</b></p>	<p>Unless so placed to be at least 50’ from the side or rear line of the lot, no bldg. of wood or frame construction shall be placed or erected on any business lot.</p>	<p>In my opinion this section does not mean the construction <u>has</u> to be wood or frame, but you can only have wood or frame if it is placed at least 50’ from side as set forth in the D of R. The paragraph 1 of D of R still mandates architectural approval before a structure can be built so that could mean the architectural committee could</p>		

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		approve/disapprove other types of structures. I recommend amending the Declaration to give the Board broad authority to adopt Architectural Rules/Regulations.		
4. Can they move and replace plants with different plants in front of lot? ( Cave Creek Rd side )		Yes, as the D of R is currently written. I believe this could be regulated by amending the Declaration to allow for the Association to regulate landscaping		
5. Trash enclosure issue - does it <i>have</i> to be at back of lot?		Yes. Paragraph 17(d) states that at rear of lot there shall be a garbage container and that garbage must be placed in those containers.		
6. Parking per <b>county</b> regs can it fit , can it change ?		I will need the Association to clarify this question		

**GENERAL QUESTIONS**

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1. What statutes should we be familiar with?		The Association will be subject to Arizona's Non-Profit Corporation Act found in Title 10 of the Arizona Revised Statutes, Chapters 24 through 40.		
2. Clarity on distinction ( if there is one ) of AZ Planned Community Act and TH as a deed restricted community / improvement association.		In Arizona, certain real estate developments are considered planned communities and are therefore subject to the Planned Community Act, which is codified in Title 33, Chapter 16, of the Arizona		

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		<p>Revised Statutes. A.R.S. 33-1802 (4) sets forth the following definition of a planned community:</p> <p style="padding-left: 40px;">“Planned community means a real estate development which includes real estate owned and operated by a nonprofit corporation or unincorporated association of owners that is created for the purpose of managing, maintaining or improving the property and in which the owners of separately owned lots, parcels or units are mandatory members and are required to pay assessments to the association for these purposes...”</p> <p>In order for the Association to be considered a planned community, the Association must meet the following three criteria: the Association must own real property; the Association must have been created for the purpose of managing and maintaining the Association and property thereon; and members of the Association are required to pay assessments.</p>		

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		<p>I do not show that the Association owns any real property and therefore the Association would not be considered a Planned Community and therefore not subject to the Planned Community Act. <u>However, if my understanding is incorrect and the Association does own real property, please let me know.</u></p> <p>The reason I feel the Declaration must be amended to levy monetary penalties for violations of the governing documents is because the Non Profit Corporation Act does not specifically give that authority (however, if the Association was a Planned Community you could assess fines after notice an opportunity to be heard even if the authority was not set forth in the governing documents).</p>		
<p>3. The D &amp; R's lay out relatively specific "Master Plan" for the commercial zone - small lots assigned to common parking and access alleys. <b>Why should we consider any plans that do not coincide with that</b> (i.e. allow lots to create random cut throughs to the</p>		<p>The Association must adhere to what is in the D &amp;R.</p>		

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road etc				
4. What is THIA latitude in approving and enforcement of the stated “high class” business vision?		This is a Board/Architectural Committee decision with wide latitude. To help protect the Association I recommend amending the Declaration to allow for Architectural Rules and then the Board could set forth specific criteria defining ‘high class’		
5. With ownership cloud on the parking spaces - what options should THIA consider?		I will need some more information from the Board regarding how the parking is currently allocated. Pursuant to Amended Recorded at Docket 3667 at p 259, parking is allocated to certain Lots. Is the Association still interpreting that to mean communal parking?		
6. What is Impact of considering rezoning the entire commercial area?		Is the Board considering removing the entire commercial area to residential? I need some more information, but at a minimum the Declaration will need to be amended.		
7. What types of differences from D of R’s have to go to Board if a resident has any?		Can the Board please clarify this question.		
8. Who interprets the D of R’s or Bylaw’s when we may disagree with a builder/resident? This clause in the D&R gives	2- In event of any ambiguity in a provision of these restrictions, the interpretation of the BOD of the Association as to the	The Board of Directors will make the determination if there is a disagreement. However, if an Owner brought forward a legal challenge, a Judge will make the		

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<p>wide flexibility to the Board - as long as the Board does not violate AZ laws what is the down side of its use. (Preferably a better discussion than "someone might sue").</p>	<p>meaning intended shall prevail.</p>	<p>ultimate determine</p>		
<p>9. If we run into issues, what is the protocol to work out legally or otherwise?</p>		<p>If the issue is failure of an Owner to pay assessments, the D of R allows for a lien to be placed. Additionally, the Association could initiate a breach of contract lawsuit to recover past due assessments. The lawsuit would also ask for an award of attorney fees. Since the Association has the right to place a lien on the Lot if an Owner is delinquent in assessments, it is my opinion the Association can also initiate a foreclosure lawsuit.</p> <p>If the issue is compliance or violation of a use restriction the Board has the option of filing an Injunctive Relief Lawsuit in Maricopa County Superior Court requesting an Order from the Court compelling the Owner to adhere to the governing document provision. The lawsuit would also request the Court award the Association all attorney fees and costs.</p>		
<p>10. Does THIA have allowance to collect \$\$ (e.g., fees from</p>		<p>I will need to have some more information for questions 10 and</p>		

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external users of THIA website) to be put into the THIA general fund?		11.		
11. Do THIA budget allocations to the THVFD have to be designated as “donations”?				
12. If THIA wants to revise the D of R's, are there limits to the types of changes that can be made? Zoning? Business types? Property use restrictions? House colors? etc. If DoR's are changed, are existing residents grandfathered to current version?	3. .. may be changed in any way by votes of more than 50%..	<p>In order to amend the Association's Declaration, the amendment must be approved by more than fifty percent (50%) of the property owners.</p> <p>All of the items listed are items that can be included with Declaration amendments with the possible exception of the zoning issues. However, in respect to zoning additional city approval would be required. Additionally, since individuals bought the Lot in the Association with the expectation that they would be able to use as commercial use, a Court would most likely rule the Owner can continue to use for that purpose.</p> <p>Whether an individual is grandfathered in will depend on the specific restriction. For example, if the restriction involved paint colors it is my opinion that would apply only</p>		

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		when an owner needed to repaint a house.		
13. How interpret Sec 18? Specifically – “other tanks or receptacles”. Might this include trash receptacles?	Any and all water, fuel and gas and/or other tanks or receptacles not buried.. should be completely screened..	I believe that can be interpreted to include trash receptacles. I think the best way to protect from a legal challenge would be to amend the Declaration to give the BOD broad rule making authority and then the BOD could pass a rule interpreting that section.		
14. Who and how determine what “depreciates value of properties”?	21. No lot shall be used or allowed to become in such condition so as to depreciate the value of adjacent property.	This is up to the BOD to interpret. However, this is a subjective standard and ultimately if challenged by an Owner it would be up to a Judge to make the final determination. I recommend the Association amend its Declaration to allow for the Board to pass Rules and Regulations (as well as for the ability to levy fines for violations of the Declaration) and then the Board could have authority to adopt specific guidelines that would not be as subjective.		
15. Is it possible to change the current property zoning if you are not the property owner?		Please see above on Declaration amendment comment. If a property is currently zoned for commercial use the Association will most likely not be able to change that distinction.		
16. When a document is recorded to a deed, whether correct or incorrect, and if		The Declaration forms the contractual relationship between		

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<p>it is not disputed for one year, can it be changed, or is it deemed to be correct?</p>		<p>the Association and its members. In Arizona, the Statute of Limitations for breach of contract cases is six years.</p>		