

**Board of County Commissioners**

**Agenda Item Report**

**Agenda item #**\_\_\_\_

**Meeting Date:** March 6, 2018

**Presenter:** Sherry Daigle, County Clerk

**Submitting Office:**

**Subject:** Appellate Decision – Tzompa Appeal

Docket 2017-0006

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**Statement / Purpose:** Consideration of Appellate Decision of Teton County Commissioners

**Background / Description (Pros & Cons):** This matter came before the Board of County Commissioners of Teton County from an Appeal by Moises Tzompa and Adela Tzompa of an order dated August 16, 2017 entered after an administrative hearing before the Jackson/Teton County Housing Authority Board. The Tzompas appealed the decision to the Board of County Commissioners who reviewed the record on January 29, 2018.

**Attachments:** Proposed Amended Order

**Fiscal Impact:** N/A

**Staff Impact:** N/A

**Legal Review:** Order provided by Hearing Officer, Mike Barton

**Recommendation:** N/A

**Suggested Motion:** I move to approve the proposed Appellate Decision of Teton County Commissioners and Order as presented in the matter of the Appeal by Moises and Adela Tzompa, Docket 2017-0006.

TETON COUNTY BOARD OF COMMISSIONERS

TETON COUNTY, WYOMING

IN THE MATTER OF:  
MOISES AND ADELA TZOMPA,  
LOT 72, NOTICE OF VIOLATION  
OF SPECIAL RESTRICTIONS

DOCKET NO. 2017- 0006

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**APPELLATE DECISION OF TETON COUNTY COMMISSIONERS**

This matter came before the Board of County Commissioners of Teton County, Wyoming (“the Commissioners) from an appeal by Moises Tzompa and Adela Tzompa of an order dated August 16, 2017 entered after an administrative hearing before the Jackson/Teton County Housing Authority Board (“the JTCHA”).

**PROCEDURAL BACKGROUND**

The appellants, Adela and Moises Tzompa (“the Tzompas”), own a house built on Lot 72 in Melody Ranch, an Attainable Housing Lot subject to Special Restrictions for Melody Ranch Residential Unit Two Second Filing Subdivision (Attainable Housing Lots) (“Special Restrictions”).

On May 1, 2017, the JTCHA sent a Notice of Breach of Special Restrictions to the Tzompas alleging that they do not occupy their house at 4246 Melody Ranch Drive as their sole and exclusive primary residence at least nine months of each year (“the occupancy requirement”), as required by the Special Restrictions. The Tzompas contested the violation notice set forth in the Notice of Breach.

A hearing was held by the JTCHA Board on July 11, 2017. The three Board Members were Matt Faupel, Chairman, Amy Robinson, and Danielle Goldyn-Haigh. At

the conclusion of the hearing the Board made the finding that the Tzompas were in violation of the occupancy requirement. On August 16, 2017, the Board adopted its *Findings of Fact, Conclusions of Law and Order Finding Moises and Adela Tzompa in Violation of Special Restriction* (“the August 16, 2017 Order”).

The Tzompas timely appealed the August 2017 Order to the Commissioners, who heard the appeal at a public meeting on January 29, 2018. Present at the meeting were three of the Commissioners, Smokey Rhea, as Acting Chairperson, and Greg Epstein and Paul Vogelheim. The three Commissioners constituted a quorum. Also present was Hearing Officer Mike Barton, who officiated the proceeding in behalf of the Commissioners.

The Commissioners reviewed the record, read the briefs submitted by the parties, and heard oral arguments from counsel. At the conclusion of the hearing, the Commissioners voted 2-1 in favor of the Tzompas, and reversed the decision of the JTCHA Board. Based on their review, the Commissioners, among other things, determined that it is impossible to reconcile the evidence of the photo/video record which demonstrates that the Tzompas occupy their house virtually every night and leave early in the morning, with the testimony of the neighbors that the Tzompas do not live at their Melody Ranch house. The physical evidence, i.e., the photo/video record produced by the Housing Department corroborates the Tzompas’ testimony.

### **CONCLUSIONS OF LAW**

A. An administrative agency’s decision must be supported by substantial evidence. Substantial evidence is “relevant evidence which a reasonable mind might accept in support of the agency’s conclusions. “ Dunning v. Ankney, 936 P.2d 61, 63

(Wyo. 1997); Bonsell v. Wyo. Workers' Safety and Comp. Div., 2006 WY 114, § 8, 142 P.3d 686, 688-89 (Wyo. 2006) (boldface added). The Wyoming Supreme Court has also stated that substantial evidence “is more than a scintilla of evidence.” Bonsell, supra.

B. In this case, the Board's decision was not supported by substantial evidence. There is the photo/video summary, referenced above. As previously stated, the JTCHA Board failed to give the photo/video summary the weight to which it was entitled. In addition, during the deliberations by the JTCHA Board, one of the board members was openly skeptical about the Tzompas' work schedule, stating that “everyone gets a day off, no one works every day, and anybody that owned that home would have neighborhood parties. This statement is unsupported by the evidence submitted during the hearing.

The testimony of Moises Tzompa, Nelly Tzompa and James Triplett regarding the Tzompas' work schedule was consistent and uncontradicted. It was also supported by the low utility bills at their Melody Ranch house, their paychecks, and the trail cam video. The summary of the trail cam video clearly indicated that the Tzompas were leaving their house early each morning and that their vehicle was parked in the driveway at night. The Housing Authority Board failed to give this evidence the weight to which it was entitled.

C. There was also no substantial evidence offered to support the idea that the Tzompas made the daily evening drive over Teton Pass (and back again the following morning to Jackson) to sleep somewhere in Idaho while leaving their comfortable house in Melody Ranch sit empty.

D. The Board's Findings of Fact and Conclusions of Law are inadequate and do not comply with the requirements for a valid administrative agency decision in a contested case.

E. Section 10 of the Wyoming Administrative Procedures Act, W.S. § 16-3-110, which sets out the requirements for decisions in contested cases, provides explicitly, "Findings of fact if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." If findings are conclusory, they must be reversed. Disciplinary Matter of Billings, 2001 WY 81, ¶ 13, 30 P.3d 557 (Wyo. 2001) ("each ultimate fact or conclusion must be thoroughly explained in order for a court to determine upon what basis each ultimate fact or conclusion was reached"); State ex rel. Department of Transportation v. Legarda, 2003 WY 130, ¶ 13, 77 P.3d 708 (Wyo. 2003) ("It is insufficient for an administrative agency to state only an ultimate fact or conclusion"); Frankel v. Board of County Commissioners of Teton County, Wyoming, 2002 WY 13, ¶ 12, 39 P.3d 420 (Wyo. 2002). Particularly when the purported lack of credibility of a witness underlies the decision, detailed findings are necessary. Olivas v. State ex rel. Wyoming Workers' Safety and Compensation Division, 2006 WY 29, ¶ 16, 130 P.3d 476 (Wyo. 2006).

E. The Board's Findings of Fact and Conclusions of Law simply set forth the conclusory and ultimate finding that the Tzompas were not in compliance with the Special Restrictions' requirement that they occupy the Melody Ranch house for nine months of the year. Without any discussion or analysis of the underlying evidence, this conclusory finding is inadequate to support or to justify the Board's decision.

F. Twice during the hearing, Chairman Faupel stated that the Tzompas bore the burden of proof, and a similar statement was made by Ms. Golden-Haigh during the Board's deliberations. The Board's Findings of Fact and Conclusions of Law do not address the issue as to which party had the burden of proof. However, under Wyoming administrative law, the Faupel and Golden-Haigh assertions regarding the burden of proof are erroneous.

G. The Wyoming Supreme Court has held that determining the correct allocation of the burden of proof is an issue of law. JM v. Department of Family Services, 922 P.2d 219 (Wyo. 1996).

H. In this case, the burden of proof was upon the Housing Department. The Wyoming Supreme Court has held, "The general rule in administrative law is that, unless a statute otherwise assigns the burden of proof, the proponent of an order has the burden of proof. In general, an agency is the proponent of its orders, while an applicant for benefits or for a license is the proponent in eligibility determinations." Three Sons LLC v. Wyoming Occupational Health and Safety Com'n, 2007 WY 93, ¶ 17, 160 P.3d 58, 64 (Wyo. 2007). In JM, supra, 922 P.2d at 221, the Wyoming Supreme Court recognized that, especially when important rights are at stake, the agency should not be reluctant to assume the burden of proof at the hearing. Id., 922 P.2d at 222. When an agency has placed the burden of proof on the other party contrary to law, its decision must be reversed. Id., 922 P.2d at 224.

I. In this case, the Housing Authority was seeking an order finding the Tzompas in violation of the Special Restrictions. Accordingly, the Housing Authority

bore the burden of proof. To state that the burden of proof was on the Tzompas is reversible error. Therefore,

**IT IS ORDERED** that the decision of the JTCHA that the Tzompas do not occupy their house at Melody Ranch as their sole and exclusive residence at least nine months each year, as set forth in the Findings of Fact, Conclusions of Law and Order Finding Moises and Adela Tzompa in Violation of Special Restriction dated August 16, 2017, is hereby reversed.

BY THE BOARD OF COUNTY COMMISSIONERS OF TETON COUNTY,  
WYOMING

DATED this \_\_\_\_\_day of March, 2018.

\_\_\_\_\_  
SMOKEY RHEA

\_\_\_\_\_  
GREG EPSTEIN

\_\_\_\_\_  
PAUL VOGELHEIM

Attest:

\_\_\_\_\_  
Sherry L. Daigle, County Clerk

CERTIFICATE OF SERVICE

I hereby certify that on the \_\_\_\_ day of March, 2018, I sent a true and correct copy of the foregoing Transmitted Record, postage prepaid by U.S. Mail, addressed as follows:

Keith M. Gingery  
Teton County Attorney's Office  
PO Box 4068  
Jackson, WY 83001  
*Attorney for Jackson/Teton County Housing Department*

Kenneth S. Cohen  
Cohen Law Office, PC  
P.O. Box 2467  
Jackson, WY 83001  
*Attorney for Moises and Adela Tzompa*

Mike M. Barton, Hearing Officer  
ML Barton, PC  
185 Lincoln Street  
Lander, WY 82520  
*Hearing Officer*

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Sherry L. Daigle  
Teton County Clerk