

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2  
3 Myron H Colvin,  
4 Petitioner,  
5 vs.  
6 Tierra Del Sol RV Resort Association,  
7 Respondent

No. 19F-H19190064-REL-RHG

**ADMINISTRATIVE LAW JUDGE  
DECISION**

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8 **HEARING:** December 20, 2019

9 **APPEARANCES:** Petitioner Myron H. Colvin appeared on behalf of himself.  
10 Nicholas Nogami, Esq. appeared on behalf of Respondent Tierra Del Sol RV Resort  
11 Association.

12 **ADMINISTRATIVE LAW JUDGE:** Velva Moses-Thompson

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13 **FINDINGS OF FACT**

14 1. Petitioner Myron H. Colvin owns property in Respondent Tierra Del Sol RV  
15 Resort Association (Tierra Del Sol).

16 2. On or about September 12, 2018, Mr. Colvin filed a single-issue petition  
17 with the Arizona Department of Real Estate (Department). The petition contained an  
18 allegation that Tierra Del Sol violated section 4.3 of its (Covenants, Conditions, and  
19 Restrictions (CC&Rs).

20 3. On or about May 16, 2019, Mr. Colvin submitted a document to the  
21 Department and the Architectural Officer of Tierra Del Sol that provided, in relevant part,  
22 "I Myron Colvin am requesting a hearing by the full Board of Directors about my so call  
23 violation section 4.3 page 9 of the [CC&Rs]".

24 4. The original hearing on Mr. Colvin's petition was conducted on  
25 August 7, 2019. After the Administrative Law Judge issued a decision in that matter,  
26 Mr. Colvin requested a rehearing.

27 5. On or about October 29, 2019, the Department issued an order setting the  
28 above-captioned matter for rehearing on December 20, 2019, at the Office of  
29 Administrative Hearings (OAH) in Phoenix, Arizona.

1           6.     A rehearing was held on December 20, 2019.

2           7.     Mr. Colvin requested to install concrete pavers in the setback area of his  
3 Lot. Tierra Del Sol approved the request.

4           8.     On May 8, 2019, Tiera Del Sol issued a NOTICE OF VIOLATION to Mr.  
5 Colvin. Tierra Del Sol alleged that Mr. Colvin violated CC&R § 4.3 because the pavers  
6 installed by Mr. Colvin were not small enough to be removed by one person without the  
7 assistance of a mechanical device. Tierra Del Sol further advised that Mr. Colvin could  
8 correct the violation by removing the concrete from the setback area, or by cutting the  
9 concrete in the 3 foot setback into small 100 pound sections.

10          9.     Tierra Del Sol CC&R § 4.3 provides:

11                 **Lot Setbacks: Restrictions.** Each Lot shall be subject to a  
12 setback area across the front five (5) feet, on both sides three  
13 (3) feet, and the rear three (3) feet of each Lot. No permanent  
14 or temporary structures, improvements (other than  
15 landscaping), vehicles (other than golf carts and car dollies),  
16 Park Models or Recreational Vehicles shall be located within  
17 such setback area. A Recreational Vehicle, Park Model,  
18 Arizona Room, awning, shed, or any other permitted structure  
19 must be located on a Lot in compliance with setback  
20 requirements and rules of the Board, and in no event shall any  
21 Recreational Vehicle, its slide-out, or any Improvement, other  
22 than landscaping features which can be moved by one person  
23 unassisted by mechanical devices, encroach on or overhang  
24 any area designated in this Declaration as a lot setback.

25          10.    Mr. Colvin asserted that he had not violated CC&R § 4.3.

26 Mr. Colvin contended that Tierra Del Sol previously approved his request to place  
27 concrete pavers that would be cut into 3 x 5 ft pieces, into the setback of his Lot.

28          11.    Tierra Del Sol's position was that the only way that CC&R § 4.3 could be  
29 violated is if a person, owner, or entity placed an unapproved object or improvement in  
30 a setback area. Tierra Del Sol argued that the petition should be dismissed because  
Mr. Colvin did not even contend, nor provide any facts to establish that Tierra Del Sol  
placed an object or improvement in the setback area of a Lot. Tierra Del Sol further  
contended that the OAH did not have jurisdiction over Mr. Colvin's request for a  
declaratory judgment regarding the issue of whether Mr. Colvin violated CC&R § 4.3.

**CONCLUSIONS OF LAW**

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2 1. Arizona Revised Statutes (A.R.S.) § 32-2199(B) permits an owner or a  
3 planned community organization to file a petition with the Department for a hearing  
4 concerning violations of planned community documents under the authority Title 33,  
5 Chapter 16.<sup>1</sup> This matter lies with the Department’s jurisdiction.

6 2. Petitioner bears the burden of proof to establish that Respondent violated  
7 on its CC&Rs by a preponderance of the evidence.<sup>2</sup> Respondent bears the burden to  
8 establish affirmative defenses by the same evidentiary standard.<sup>3</sup>

9 3. “A preponderance of the evidence is such proof as convinces the trier of  
10 fact that the contention is more probably true than not.”<sup>4</sup> A preponderance of the  
11 evidence is “[t]he greater weight of the evidence, not necessarily established by the  
12 greater number of witnesses testifying to a fact but by evidence that has the most  
13 convincing force; superior evidentiary weight that, though not sufficient to free the mind  
14 wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one  
15 side of the issue rather than the other.”<sup>5</sup>

16 4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give  
17 effect to the intent of the parties.<sup>6</sup> “Restrictive covenants must be construed as a whole  
18 and interpreted in view of their underlying purposes, giving effect to all provisions  
19 contained therein.”<sup>7</sup> CC&R § 4.3 forbids the placement of structures, vehicles, or  
20 landscaping features in the setback area of a Lot, under certain conditions. Mr. Colvin  
21 did not even allege that Tierra Del Sol placed a structure, vehicle, or landscaping in the  
22 setback of a Lot. Mr. Colvin asserted that he did not violate Section 4.3 of the CC&Rs.

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24 <sup>1</sup> See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce  
25 the development’s CC&Rs

26 <sup>2</sup> See A.R.S. § 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74  
27 Ariz. 369, 372, 249 P.2d 837 (1952).

28 <sup>3</sup> See A.A.C. R2-19-119(B)(2).

29 <sup>4</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

30 <sup>5</sup> BLACK’S LAW DICTIONARY at page 1220 (8<sup>th</sup> ed. 1999).

<sup>6</sup> See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

<sup>7</sup> *Lookout Mountain Paradise Hills Homeowners’ Ass’n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. App. 1993) (quoted in *Powell*, 211 Ariz. at 557 ¶ 16, 125 P.3d at 377).



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