

1 shoulders of the paved roadways. The Association owns the paved roadways and about
2 8 inches of the unpaved roadways that are located on each side of the paved roadway
3 surfaces, running parallel to the paved roadways.

4 5. In 2020, James and Cynthia Norman (the Normans) purchased lot 1473
5 from its owner.

6 6. On or about October 22, 2020, the Normans submitted a request to the
7 Association's Architectural Committee to landscape the Common Area located at the
8 south of their lot. At the time, the Board of Directors (Board) was acting as the
9 Architectural Committee. Dean Meyers was a member of the Association's board at the
10 time that the Normans' submitted their request. Mr. Meyers is a professional
11 landscaper.

12 7. At the time that the Normans submitted the request, most of the homes in
13 the Association had landscaping in the Common Area adjacent to their home.

14 8. The Association approved the Normans' request.

15 9. The Normans hired Mr. Myers to place landscaping rocks in the Common
16 Area adjacent to their home.

17 10. On or about December 29, 2021, Ms. Clapp filed a petition with the ADRE.
18 Through the petition, Ms. Clapp alleged that the Association violated Section 2.2. of the
19 Association's CC&Rs when it approved the Normans' request to landscape the
20 Common Area at the south side of their lot.

21 11. The matter was referred to the Office of Administrative Hearings for an
22 evidentiary hearing.

23 12. On February 3, 2022, the ADRE issued a Notice of Hearing setting
24 Ms. Clapp's petition for hearing on March 9, 2022 at the Office of Administrative
25 Hearings in Phoenix, Arizona.

26 13. The Notice of Hearing shows that the issue set for determination was
27 whether Respondent violated section 2.2. of the Declaration. The Notice of Hearing also
28 provides that the dispute arises out section 2.2 and 2.2.1 of the Declaration, and the
29 Association's Architectural Guidelines.

30 14. A hearing was held on March 9, 2022.

1 15. At hearing, Ms. Clapp testified on behalf of herself. The Association
2 presented the testimony of Mr. Meyers.

3 16. Ms. Clapp has lived in Forest Trails since September of 2006.

4 17. Ms. Clapp testified to the effect that for several years she and other
5 individuals have parked their cars on an unpaved side of the road located at the south
6 of the Normans' lot to gain quick access to the forest. The trailhead is situated
7 approximately a mile from Ms. Clapp's residence. Ms. Clapp explained walked to the
8 trailhead from her home would increase her hike by approximately 2 miles round trip.
9 Ms. Clapp explained that before the Normans landscaped the Common Area at the
10 South of their lot, one or two cars could be seen parked in that area.

11 18. Ms. Clapp served on the Association's Board from 2007 to 2017.
12 Ms. Clapp was actively involved in community governance.

13 19. Ms. Clapp stated that in or around 2002 or 2003, the Association
14 determined that homeowners would be responsible for maintaining the Common Area
15 that the homeowner had received approval for landscaping. See Ms. Clapp's testimony
16 on the Hearing Audio (1200 2022-03-09).AAC) at 23:30 – 26:20).

17 20. Ms. Clapp stated that section 2.2 of the Declaration provides that the
18 Common Area is for the benefit of all members of the Association. Ms. Clapp believes
19 that the landscaping on the Common Area adjacent to the Normans' lot deprives her of
20 the benefit of easy access to the trailhead. Ms. Clapp stated that the Common Area is
21 not in its natural state. Ms. Clapp believes that as a result of the landscaping, the
22 Normans are the only people benefitting from the Common Area that lies at the south of
23 their lot. Ms. Clapp stated that because the Normans have landscaped the Common
24 Area at the south of their log, she parks further down on Serenity Way, a private street
25 in the Association, to access the trailhead.

26 21. Ms. Clapp asserted that the Board never voted on or approved the
27 Normans' request. Ms. Clapp contended that the Normans' submitted their request to
28 the Architectural Committee twelve days after they purchased their home.
29

1 22. Ms. Clapp believes that the Association is giving preferential treatment to
2 persons who play tennis over those that hike because the Association paved a parking
3 lot for its members to easily access the tennis courts.

4 23. On cross-examination, Ms. Clapp acknowledged that people can walk
5 through the Common Area. However, Ms. Clapp believes that someone might sprain
6 their ankle walking over the landscaped rocks to reach the unpaved area.

7 24. Mr. Meyers is a member of the Association's Board. Mr. Meyers's father
8 was the developer of Forest Trails. Mr. Meyers explained that his father cared about
9 Forest Trails. Forest Trails does not have sidewalks.

10 25. Mr. Norman talked to Mr. Meyers multiple times regarding landscaping the
11 Common Area at the south of his lot.

12 26. Initially, Mr. Norman bought individual boulders and placed them in the
13 Common Area at the south of his lot. However, Mr. Norman wanted to do something
14 nicer. Mr. Meyers installed more expensive rocks and matching gravel.

15 27. Mr. Meyers explained that most of the lots in the Association have
16 landscaping in the Common Area adjacent to their lots. Mr. Meyers explained that it is
17 difficult to determine where the property line ends for a lot and where the Common Area
18 begins.

19 28. Mr. Meyers explained that the Association required that its owners pay for
20 any damage caused by a snow plow, unless the person snow plowing, "does something
21 stupid."

22 29. Mr. Meyers explained that the Board voted unanimously to approve the
23 landscaping request submitted by the Normans. If the Board would have denied the
24 request, the Normans would have been the first lot owners to have been denied a
25 request to landscape the Common area. The Board did not consider the Common Area
26 to the south of the Normans's lot to be exclusively used for parking. Mr. Meyers
27 explained that the Normans do not have exclusive use of the Common Area because
28 anyone can access the Common Area.

29 30. Mr. Meyers testified to the effect that the number of homeowners who use
30 the tennis court is far greater than the number of homeowners who hike in the forest.

1 There is also a basketball court near the tennis court. Such facilities are not connected
2 to the trailhead. See Exhibit 16 and Mr. Meyers's testimony on the (Hearing Audio
3 Record at 1308 2022-03-09).AAC) at 52:30 to 55:04.

4 31. The Association has approved the requests of other homeowners to
5 landscape the Common Area adjacent to their homes. See Exhibits 10 and 11; See
6 Mr. Meyers's testimony on the Hearing Audio Record at 1308 2022-03-09).AAC at
7 54:15 to 58:56.

8 32. The Normans specifically asked for the approval of landscaping rocks
9 similar to their neighbor's home. See Exhibit 12 and Mr. Meyers's testimony on the
10 Hearing Audio Record at 1308 2022-03-09).AAC at 54:15 to 1:00:00 to 1:01:14.

11 33. Mr. Meyers explained that the Association is responsible for maintaining
12 the Common Area. See Mr. Meyers's testimony on the Hearing Audio Record at 1308
13 2022-03-09).AAC at 1:04:00 to 1:04:02. Mr. Meyers explained that the Common Area
14 adjacent to the Normans's home began to erode and eventually, the Association would
15 have been required to repair the area because it was frequently used for parking. See
16 id. The Association does not have police powers to keep the public from parking in the
17 Common Areas in the Association. However, Mr. Meyers explained that after the Board
18 began posting towing signs, it eliminated 98% of the problem. The closest open parking
19 area close to the trailhead is 30 feet away which is a third to a quarter of a mile. The
20 paved tennis court parking is approximately a mile and a half away. The trail that is
21 located in the forest is about 1 ½ to 2 miles each way. Mr. Meyers knows two people
22 who walk from their homes in Forest Trails to the trailhead.

23 34. Mr. Meyers is a general contractor and 95% of his business is conducted
24 in the Forest Trails. Mr. Meyers has been conducting business in Forest Trails since
25 1993. The Normans were not on the Board when they submitted the landscaping
26 application. Mr. Meyers believes that he declared a conflict at the time that the Board
27 considered the Normans' application. Mr. Meyers charged the Normans a normal fee to
28 perform the landscaping work.

29 35. The Board never considered the trailhead to be an amenity that it was
30 required to maintain.

1 36. Mr. Meyers explained that many lots have landscaping in the Common
2 Area adjacent to their lot that prohibits parking.

3 37. The Declaration, at Appendix A, Section 2.2., provides in relevant part as
4 follows:

5 Common Areas and Open Space. All tracts designated for
6 use as common areas and open space on the plat(s) and
7 easements for common areas and open space as shown on
8 the plat(s) shall be for the use and benefit of all members of
9 the Forest Trails Homeowners' Association and their guests
10 and invitees, including members by virtue of new land added
11 pursuant to Section 5.2 of [the Amended] Declaration. These
12 areas shall be left in their natural state, unless used for trails,
13 walkways, driveways, parking areas, appropriate signs,
14 recreational amenities, landscaping, and easements for
15 utilities (including cable television). All easements dedicated
16 on the plat(s) for driveways and emergency vehicle access
17 may be used for ingress and egress by any lot fronting
18 thereon.

19 38. The Declaration, at Appendix A, Section 2.21, requires the Association's
20 compliance with its Architectural Guidelines. The Association's Architectural Guidelines
21 provide, in relevant part, as follows:¹

22 Landscaping (hard and soft) of the unpaved area owned by
23 the Association between the lot line and the street
24 (approximately eight feet) is permitted only with approval of
25 [Architectural Control Committee, "ACC"]. Any approval by the
26 ACC of such landscaping will be conditioned on the property
27 owner being responsible for maintenance of this landscaped
28 area, but will not give the property owner exclusive use of this
29 Association property.

30 39. The Declaration, at Appendix A, Section 3.4, provides for the powers and
duties of the Association, providing in pertinent parts (emphasis added):

 Powers and Duties of the Association. It is the intention of the
Declarant that the Association own, repair, manage, operate,
and maintain the common areas and open space and
improvements thereon in the development known as Forest
Trails (all units), according to the plat or plats thereof to be

¹ See pg. 8 of the Architectural Guidelines.

1 placed in the office of the County Recorder of Yavapai County,
2 State of Arizona; and it is the intention of the Declarant to have
3 the Association supervise the performance of such duties, to
4 maintain and create active and passive facilities, to supply
5 basic services such as, but not limited to, groundskeeping,
6 road repair, and any other community facilities which the
7 Association deems necessary or advisable; and it is the
8 intention to give the Association the greatest possible
9 flexibility in management so that as much as possible of the
10 assessments collected pursuant to Section Four of [the
11 Amended] Declaration will be used for these purposes and not
12 be expended in administrative costs. Consistent herewith, the
13 widest possible powers are granted to the Association to
14 collect the monies necessary for its operation. The
15 Association shall have the following powers herein granted or
16 necessarily implied which it shall exercise in its sole
17 discretion, construing the powers herein granted and implied
18 to the broadest extent consistent with the best interests of the
19 members:

20 . . . 3.4.3 Employ or contract for water, area maintenance, and
21 renovation of common areas and open spaces (including all
22 tracts designated for that use), hiking and riding trails, and all
23 future tracts, common areas or open spaces of Forest Trails
24 Unit One or any units added pursuant to Section Five; and . .

25 . 3.4.9 Be the final judge of all aesthetic matters and act in its
26 sole discretion without liability to any member, with the
27 exception of those matters pertaining to architectural control,
28 which shall be the responsibility of the Architectural Control
29 Committee.

30 40. The Declaration, at Appendix A, Section 4.1, provides for the powers and
duties of the Association, in relevant part, as follows:

Common Area Maintenance.

For the mutual benefit of the owners of lots and tracts in Forest
Trails Unit One, and new lands subsequently added pursuant
to Section Five of [the Amended] Declaration, the Association
as owner of all tracts designated for use as common areas
and open space, for drainage purposes, or for private
roadways shall be responsible for the repair, maintenance,
management and operation of all tracts, riding and hiking trails

1 and open areas illustrated on the plat. Responsibilities of the
2 Association as set forth in [the Amended] Declaration and the
3 articles of incorporation and bylaws are intended to give the
4 Association maximum flexibility in management within
5 minimum administrative costs. The Association is granted the
6 power to collect from lot owners the monies necessary for the
7 performance of its specified duties.

8 **CONCLUSIONS OF LAW**

9 1. Arizona Revised Statutes (A.R.S.) § 32-2199(B) permits an owner or a
10 planned community organization to file a petition with the Department for a hearing
11 concerning violations of planned community documents under the authority Title 33,
12 Chapter 16.² Such petitions will be heard before the Office of Administrative Hearings,
13 an independent state agency.

14 2. Petitioners bear the burden of proof to establish that Respondent violated the
15 Act or Respondent's CC&Rs by a preponderance of the evidence.³ Respondent bears
16 the burden to establish affirmative defenses⁴ by the same evidentiary standard.⁴

17 3. "A preponderance of the evidence is such proof as convinces the trier of fact
18 that the contention is more probably true than not."⁵ A preponderance of the evidence is
19 "[t]he greater weight of the evidence, not necessarily established by the greater number of
20 witnesses testifying to a fact but by evidence that has the most convincing force; superior
21 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
22 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather
23 than the other."⁶

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25
26 ² See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce
the development's CC&Rs.

27 ³ 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
Ariz. 369, 372, 249 P.2d 837 (1952).

28 ⁴ See A.A.C. R2-19-119(B)(2).

29 ⁵ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

30 ⁶ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

1 4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give
2 effect to the intent of the parties.⁷ “Restrictive covenants must be construed as a whole
3 and interpreted in view of their underlying purposes, giving effect to all provisions
4 contained therein.”⁸

5 5. It is undisputed that Section 2.2 of the Declaration provides that the
6 Common Area shall be for the use and benefit of all members of the Association.
7 Futhermore, Section 2.2. allows the Common Area to be used for landscaping.
8 Petitioner has not established that the Association violated the Declaration when it
9 approved the Normans’ request to landscape in the Common area to the south of its lot.
10 Petitioner has not provided any legal authority to support its claim that the Common
11 Area to the south of the Normans’s lot must be exclusively used for parking.

12 6. Because Petitioner has not established by a preponderance of the evidence
13 that Respondent violated the Declaration or any statute, her petition must be dismissed.

14 **RECOMMENDED ORDER**

15 **IT IS ORDERED** that Petitioner Judy Klapp’s petition against Forest Trails
16 Homeowners Association is dismissed.

17 **NOTICE**

18 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties**
19 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04.**
20 **Pursuant to A.R.S. § 41-1092.09, a request for rehearing in this matter**
21 **must be filed with the Commissioner of the Department of Real Estate**
22 **within 30 days of the service of this Order upon the parties.**

23 Done this day, March 29, 2022.

24 /s/ Velva Moses-Thompson
25 Administrative Law Judge

26 Transmitted by either mail, e-mail, or facsimile March 29, 2022 to:
27

28 ⁷ See *Powell v. Washburn*, 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).

29 ⁸ *Lookout Mountain Paradise Hills Homeowners’ Ass’n v. Viewpoint Assocs.*, 867 P.2d 70, 75 (Colo. App.
30 1993) (quoted in *Powell*, 211 Ariz. at 557 ¶ 16, 125 P.3d at 377).

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