



1 6. On or about February 14, 2018, Petitioner filed a single-issue petition with the  
2 Department that alleged that Respondent's determination that Petitioner was  
3 responsible for the repair and maintenance of his architectural beams violated its  
4 Covenants, Conditions, and Restrictions ("CC&Rs") Article VI Section 1 and Article V  
5 Section 1.

6 7. Respondent filed a written answer to the petition, denying that it had violated  
7 any CC&Rs. Respondent stated in its answer that it was a condominium association.

8 8. The Department referred the petition to the Office of Administrative Hearings  
9 for an evidentiary hearing.

10 9. A hearing was held on May 30, 2019. Petitioner testified on his own behalf.  
11 Respondent submitted exhibits 1, 5, 6 and 8, and presented the testimony of Mary Lou  
12 Pace, community manager, Carol Nesland, the President of the Board of Directors, and  
13 Pamela L. Polo, the former property manager of Respondent.

14 **RELEVANT CC&Rs**

15 10. Respondent's CC&Rs provide, "WHEREAS, Declarant desires to provide for  
16 the construction thereon of a planned residential area consisting of townhouses,  
17 interspersed condominiums and common area, including without limitation open spaces  
18 and recreational facilities; and".

19 11. Article V of the CC&Rs is entitled Exterior Maintenance. Section 1 provides,  
20 "By Association. In addition to the maintenance upon the Common Area, the  
21 Association shall provide exterior maintenance upon each Improved Condominium Lot  
22 and Improved Lot which is subject to assessment hereunder, as follows: paint, repair,  
23 replace and care for exterior building surfaces and other such exterior improvements.  
24 Such exterior maintenance shall not include roofs, except in the case of Improved  
25 Condominium Lots; nor shall such exterior maintenance include glass surfaces, air  
26 conditioning units, trees, shrubs, grass, walks, driveways, parking areas, landscaping,  
27 improvements built or placed by an Owner within the patio or enclosed yard space, or  
28 repairs or replacements caused by any of the perils covered by a standard form fire  
29  
30

1 insurance policy with extended coverage endorsement thereon, or caused by flood,  
2 earthquake or other Acts of God.”<sup>1</sup>

3 12. Article VI of the CC&Rs is entitled Duties and Powers of the Owner’s  
4 Association. Section 1(c) provides “Exterior Maintenance. Maintain the exterior of the  
5 Living Units in the manner and subject to the limitations set forth in Article V.”<sup>2</sup>

6 13. Respondent’s CC&Rs Article I, sets forth definitions, including the definition  
7 of improved lot at section 9, which provides in relevant part as follows:

8 “Lot” shall mean any plot of land shown upon any recorded  
9 subdivision map of the Properties with the exception of the  
10 Common Area. An “Improved Lot” shall mean a Lot upon  
11 which has been completed a single family residence. Every  
12 Improved Lot, other than a Condominium Lot, shall be  
13 conclusively presumed for all purposes hereunder to include  
14 one Living Unit. In the case of a Condominium Lot, each  
15 Apartment Space shall, unless the context otherwise  
16 indicates, constitute a separate Lot for purposes of this  
17 Declaration.

#### 18 HEARING EVIDENCE

19 14. Ms. Lou Pace has been Respondent’s community manager for four years.  
20 Ms. Lou Pace explained that Respondent has consistently required homeowners to  
21 repair the architectural beams.

22 15. On or about January 3, 2019, Respondent’s community manager, Mary  
23 Lou Pace, sent an electronic mail message to Respondent’s members which included  
24 the following language, “Please remember that our CC&Rs require each owner to  
25 maintain their property including driveways, roofs, architectural beams and posts,  
26 garage doors, and walkways whether on common ground or within a lot line.”<sup>3</sup>

27 16. Ms. Polo was the prior community manager from 1984 to 2015. Ms. Polo  
28 asserted that historically, homeowners are required to repair the roof.

29 17. Ms. Nesland is the President of Respondent’s Board of Directors.

30 Ms. Nesland issued a newsletter to the members which provided, ““Please  
remember that our CC&Rs require each owner to maintain their property including  
driveways, roofs, architectural beams and posts, garage doors, and walkways whether

---

<sup>1</sup> See Respondent’s Exhibit 1.

<sup>2</sup> *Id.* at 4.

<sup>3</sup> See Exhibit 5.

1 on common ground or within a lot line.” Ms. Nesland stated that she distinguished  
2 architectural beams from the roof in the newsletter only to clarify that the repair and  
3 maintenance of the architectural beams are the responsibility of the homeowner. Ms.  
4 Nesland contended that architectural beams are a part of the roof. However, Ms.  
5 Nesland contended that the architectural beams are a part of the roof.

6 18. Ms. Nesland stated that Respondent is a planned unit development and  
7 never met the criteria for a condominium association. Ms. Nesland asserted that the  
8 developers never submitted a declaration of horizontal property regime.

9 19. Ms. Nesland asserted that Respondent does not own qualify as a  
10 condominium because its owners do not own an undivided interest in the common  
11 grounds.

12 20. Petitioner did not dispute that homeowners are responsible for the  
13 maintenance of the roofs under the CC&Rs. Petitioner contended that the architectural  
14 beams are not a part of the roof. Moreover, Petitioner contended that architectural  
15 beams are not listed in the exceptions under the exterior maintenance provision found  
16 in Article V, Section 1 of the CC&Rs. Petitioner argued that architectural beams are a  
17 part of the exterior and that Respondent is responsible for the maintenance of the  
18 exterior, which includes the architectural beams under CC&R Article V, Section 1 and  
19 Article VI Section 1(c).

### 20 **CONCLUSIONS OF LAW**

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

25 2. Petitioner bears the burden of proof to establish that Respondent violated its  
26 CC&Rs by a preponderance of the evidence.<sup>5</sup> Respondent bears the burden to establish  
27 affirmative defenses by the same evidentiary standard.<sup>6</sup>

28 <sup>4</sup> See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce  
29 the development’s CC&Rs

<sup>5</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  
30 Ariz. 369, 372, 249 P.2d 837 (1952).

<sup>6</sup> See A.A.C. R2-19-119(B)(2).

1 3. "A preponderance of the evidence is such proof as convinces the trier of fact  
2 that the contention is more probably true than not."<sup>7</sup> A preponderance of the evidence is  
3 "[t]he greater weight of the evidence, not necessarily established by the greater number of  
4 witnesses testifying to a fact but by evidence that has the most convincing force; superior  
5 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable  
6 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather  
7 than the other."<sup>8</sup>

8 4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give  
9 effect to the intent of the parties.<sup>9</sup> "Restrictive covenants must be construed as a whole  
10 and interpreted in view of their underlying purposes, giving effect to all provisions  
11 contained therein."<sup>10</sup> Article V, section 1 and Article VI, section 1(c) of the CC&Rs  
12 require Respondent to maintain the exterior of members' lots, with the exception of  
13 roofs and several other listed items. However, there is no exception for architectural  
14 beams.

15 5. Respondent specifically distinguished roofs from architectural beams in its  
16 newsletter. Although Respondent is not a condominium association, Respondent's  
17 CC&RS show that Respondent intended to construct condominiums. Ms. Polo provided  
18 testimony that the repair and maintenance of roofs have historically been the  
19 responsibility of the homeowners. However, Ms. Polo did not allege that historically,  
20 architectural beams were considered to be a part of the roof. Respondent did not  
21 establish by a preponderance of the evidence that the architectural beams are a part of  
22 the roof. The preponderance of the evidence shows that architectural beams are a part  
23 of the exterior. Therefore, Respondent is responsible for the repair and maintenance of  
24 the architectural beams pursuant to Article V, section 1 and Article VI, section 1(c) of the  
25 CC&Rs. Petitioner has established that Respondent violated the CC&Rs when it  
26 required him to repair the architectural beams attached to his home.

27  
28 <sup>7</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

29 <sup>8</sup> BLACK'S LAW DICTIONARY at page 1220 (8<sup>th</sup> ed. 1999).

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

<sup>10</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).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30

**ORDER**

**IT IS ORDERED** that Petitioners' petition is granted because he has established that Respondent violated CC&Rs.

**IT IS FURTHER ORDERED** that Respondent shall reimburse to Petitioner the \$500.00 that he paid to file his single-issue petition.

**NOTICE**

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

Done this day, June 19, 2019.

/s/ Velva Moses-Thompson  
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner  
Arizona Department of Real Estate

Transmitted US Mail to:  
Peter de Scheel  
7542 N Sacaton Rd.  
Scottsdale, Arizona 85258

Bradley R. Jardine, Esq.  
Jardine, Baker, Hickman & Houston, P.L.L.C.  
3300 N. Central Ave., Suite 2600  
Phoenix, AZ 85012