



1 enough to be removed by one person without the assistance of a mechanical device.  
2 Tierra Del Sol further advised that Mr. Colvin could correct the violation by removing the  
3 concrete from the setback area, or by cutting the concrete in the 3 foot setback into  
4 small 100 pound sections.

5 9. On or about May 10, 2019, Mr. Colvin filed a petition with the Arizona  
6 Department of Real Estate (DRE) which contained an allegation that Tierra Del Sol  
7 violated CC&R § 4.3.

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

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

14 12. A hearing was held on August 7, 2019.

15 13. Tierra Del Sol CC&R § 4.3 provides:

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

14. Mr. Colvin contended that Tierra Del Sol previously approved his request  
to place concrete pavers that would be cut into 3 x 5 ft pieces, into the setback of his  
Lot. Mr. Colvin asserted that he had not violated CC&R § 4.3.

1 15. Tierra Del Sol argued that the only way that CC&R § 4.3 could be violated  
2 is if a person, owner, or entity placed an unapproved object or improvement in a  
3 setback area. Tierra Del Sol asserted that the petition should be dismissed because  
4 Mr. Colvin did not even contend, nor provide any facts to establish that Tierra Del Sol  
5 placed an object or improvement in the setback area of a Lot. Tierra Del Sol also  
6 contended that the OAH did not have jurisdiction over Mr. Colvin's request for a  
7 declaratory judgment regarding the issue of whether Mr. Colvin violated CC&R § 4.3.

### 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.<sup>1</sup> This matter lies with the Department's jurisdiction.

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

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

23 4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give  
24 effect to the intent of the parties.<sup>6</sup> "Restrictive covenants must be construed as a whole  
25 and interpreted in view of their underlying purposes, giving effect to all provisions

26  
27 <sup>1</sup> See A.R.S. § 33-1803, which authorizes homeowners associations in planned communities to enforce  
the development's CC&Rs

28 <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  
Ariz. 369, 372, 249 P.2d 837 (1952).

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

<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).

1 contained therein.”<sup>7</sup> CC&R § 4.3 forbids the placement of structures, vehicles, or  
2 landscaping features in the setback area of a Lot, under certain conditions. Mr. Colvin  
3 did not even allege that Tierra Del Sol placed a structure, vehicle, or landscaping in the  
4 setback of a Lot. Mr. Colvin asserted that he did not violate Section 4.3 of the CC&Rs.

5 5. Mr. Colvin failed to establish that Tierra Del Sol violated section 4.3 of the  
6 Tierra Del Sol CC&Rs. To the extent that Mr. Colvin is requesting a declaratory  
7 judgment regarding his alleged violation, this tribunal does not have jurisdiction to make  
8 such a determination.

9 **ORDER**

10 **IT IS ORDERED**, the petition is dismissed.

11 **NOTICE**

12 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties**  
13 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S.**  
14 **§ 41-1092.09, a request for rehearing in this matter must be filed with the**  
15 **Commissioner of the Department of Real Estate within 30 days of the service of**  
16 **this Order upon the parties.**

17 Done this day, August 27, 2019.

18 /s/ Velva Moses-Thompson  
19 Administrative Law Judge

20  
21 Transmitted electronically to:

22 Judy Lowe, Commissioner  
23 Arizona Department of Real Estate  
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30 <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).