DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PINNACLE PEAK VISTAS III HOMEOWNERS' ASSOCIATON, an Arizona non-profit corporation,	)	No. 1 CA-CV 10-0604
	)	DEPARTMENT B
Plaintiff-Appellant,	)	**MEMORANDUM DECISION**
v.	)	Not for Publication (Rule 28, Arizona Rules of Civil Appellate Procedure)
DERAILED, LLC,	)	
Defendant-Appellee.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-024476

The Honorable John A. Buttrick, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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W E I S B E R G, Judge

¶1 Pinnacle Peak Vistas III Homeowners' Association (the "Association") appeals from the grant of summary judgment to Derailed, LLC ("Derailed"). The Association argues that the

superior court erred in concluding that none of the provisions of the Association's Declaration of Covenants, Conditions and Restrictions ("CC&Rs") or its Architectural Committee Rules ("Rules") (collectively "the governing documents") authorize the Association to require approval for installation of a sculpture on Derailed's property. For reasons that follow, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

¶2 The Association is a non-profit corporation whose members own property in a subdivision called Pinnacle Peak Vistas III. The Association's members, including Derailed, are subject to the CC&Rs and Rules.[1]

¶3 In 2006, Derailed placed in its front yard a metal sculpture of a saguaro cactus wearing sunglasses and holding an electric guitar that, according to the parties, is either 9 1/2 or twelve to fifteen feet tall. In October 2008, the Association wrote to Derailed and said that a recent inspection noted a violation on Derailed's property and listed the violation type as "ACC MOD – Not approved" without any further explanation. The letter asked that the sculpture be removed and added, "Please review the Architectural guidelines," without specifying which guidelines authorized the demand for removal.

[1]The Association adopted the Rules pursuant to authority granted in the Declaration.

Eleven subsequent notices of violation also failed to specify which provision of the CC&Rs or Rules Derailed had violated.

¶4 In June 2009, the Association's attorney wrote to Derailed and stated that Derailed had not sought "approval prior to making *any landscaping modifications or additions*" and that the CC&Rs allow "*[o]nly desert landscaping* in the front and side yard" without Architectural Committee approval. (Emphasis added.) The letter asserted without elucidation that the "governing documents prohibit *this type of sculpture.*" (Emphasis added.) Derailed responded that if the sculpture constituted a violation, many other violations were visible on neighboring properties and declined to remove the sculpture.

¶5 The Association filed an action for breach of contract against Derailed and sought injunctive relief forcing removal of the sculpture. Derailed moved for summary judgment on the grounds that the Association had no authority to prohibit the sculpture; that its actions were unreasonable, arbitrary, and capricious; and that the long delay in complaining about the sculpture demonstrated the unreasonable nature of the complaint. In response, the Association argued that Derailed had not sought approval for the installation "of any structure, building, sign, billboard, landscaping or other improvement or addition installed on the exterior of a lot." It cited a CC&R that required approval of "all landscaping plans" and argued that the

court should defer to the Architectural Committee's interpretation of the governing documents. It cited, among others, provisions governing "decorative architectural cast concrete products" and "unsightly objects or nuisances" and argued that Derailed had not submitted plans "for all landscaping and/or improvements, including the sculpture at issue." It also asserted that factual questions regarding the fairness of the enforcement action barred summary judgment.

¶6 At oral argument, the court asked Derailed's counsel about possible application of Rule 2.28 entitled, "Signs," which states: "No advertising signs, billboards, *unsightly objects*, or nuisances shall be erected, placed, or permitted to remain on any of the lots." (Emphasis added.) Counsel responded that the Association had not relied upon that Rule. When the court asked the Association which provision of the governing documents authorized regulation of sculptures, counsel cited Article 1, § 15 of the CC&Rs, which requires Committee approval of "all landscaping plans." He added, "This is part of landscaping," and that the court must consider "the totality of the documents," including the requirement that anything other than desert landscaping must be approved. Counsel also asserted that the Committee had "very broad authority to cover any exterior improvement" and that "[t]hese [comical-type] kind of sculptures must be prohibited . . . to protect . . . property values."

¶7 In its ruling, the court held that the governing documents did not either require Derailed to seek approval for a sculpture or prohibit a sculpture. The court also found that the sculpture was neither "landscaping" nor a "structure or dwelling" and that the Association had not argued that it was an unsightly object. It granted summary judgment to Derailed.

¶8 The Association moved for reconsideration and argued that it had "authority to regulate improvements" in front yards and that anything other than desert landscaping must be approved. The Association also asserted that it had cited Rule 2.28 in its response and its request for injunction and that whether the sculpture was unsightly posed a question of fact. The court asked Derailed to respond to the "unsightly object" contention, and Derailed noted that the Association's response contained no actual argument based on Rule 2.28 and that its Disclosure Statement[2] did not mention the Rule or identify any relevant exhibits or competent witness who would testify that the sculpture was unsightly.

¶9 After considering the motion and response, the court denied the motion. The Association timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

[2]The Statement repeatedly referred to the sculpture as an "unapproved structure" but not as an "unsightly object."

DISCUSSION

¶10 Summary judgment is appropriate when no genuine issue of material fact exists and "the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c). We view the evidence in the light most favorable to the non-moving party and review the award of summary judgment *de novo*. *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 199, ¶ 15, 165 P.3d 173, 177 (App. 2007). Proper interpretation of deed restrictions also poses a legal question subject to de novo review. *Johnson v. Pointe Cmty. Ass'n, Inc.,* 205 Ariz. 485, 490, ¶ 23, 73 P.3d 616, 621 (App. 2003)[3]; *Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1993).

¶11 The Association argues that the superior court erred in concluding that the governing documents do not regulate sculptures and that its ruling is contrary to the normal interpretation of restrictive covenants. In *Powell v. Washburn*, 211 Ariz. 553, 557, ¶ 14, 125 P.3d 373, 377 (2006), our supreme court acknowledged that restrictive covenants are no longer disfavored or interpreted to encourage the free use of land, and adopted the Restatement approach. Accordingly, we "give effect

[3]Contrary to the Association's argument, we do not defer to its interpretation of the CC&Rs. *Tierra Ranchos*, 216 Ariz. at 199, ¶¶ 17-19, 165 P.3d at 177; *Johnson,* 205 Ariz. at 489-90, ¶¶ 22-23, 73 P.3d at 620-21.

to the [parties'] intentions" based upon all of the documents and after considering "the purpose for which the covenants were created." *Id.* at 554, ¶ 1, 125 P.3d at 374; Restatement (Third) of Property (Servitudes) § 4.1 (2000).

¶12 Here, none of the governing documents mention sculptures, artwork, or statues. Thus, although we will not read a covenant in a way "that defeats [its] plain and obvious meaning," we also "should not give a covenant a broader than intended application." *Ariz. Biltmore Estates,* 177 Ariz. at 449, 868 P.2d at 1032 (holding that a large bus fell within restriction on parking of a "trailer, camper, boat or similar equipment").

¶13 The Association argues that by their plain language, the governing documents authorize regulation of all exterior modifications, including a sculpture. The CC&Rs' stated purpose is to "enhance[] and protect[] the value, desirability and attractiveness of the Subdivision." Article I § 15 states a desire to "preserve the present natural desert landscape," bars removal of desert growth, and allows restriction of "any activity which is allergy producing, contributes to odors, or otherwise would be inconsistent with the clean air and natural desert environment." The CC&Rs also adopt "use restrictions" on walls, fences, signs, landscaping, animals, and structures.

¶14 The Architectural Rules state they are to "maintain a high standard of architectural design and general construction . . . [and] to enhance the aesthetic desirability and compatibility and the structural soundness of all structures." They are to "preserve the natural features of each Lot, such as views, significant existing plant materials and washes." The Rules add use restrictions on sport courts, swimming pools, basketball hoops, satellite dishes, and storage tanks and allow "only desert landscaping" in the front and side yards.

¶15 The superior court reasoned that because none of these provisions mentions art or sculpture, and because the governing documents fail to define "landscaping," "landscaping" refers to such things as "grading, ground cover, plant materials and edging." *See, e.g., Royal Kunia Cmty. Ass'n ex rel. Bd. of Dirs. v. Nemoto*, 198 P.3d 700, 712 (Haw. Ct. App. 2008) (to landscape is to make land "more attractive by adding lawns, trees, bushes, etc."); Random House Webster's College Dictionary 743 (2nd ed. 1999) (landscaping improves the "appearance of . . . land . . ., as by planting trees, shrubs, or grass, or altering the contours of the ground"). The Association offered no evidence that the sculpture destroyed any vegetation, was allergy producing, or inconsistent with the desert environment. Because the Association failed to support its definition of "landscaping" as being anything other than "adding lawns, trees

or bushes" or "altering the contours of the ground," the court did not err in concluding that a sculpture cannot be regulated as "landscaping."[4] If the Association desires a broader definition of "landscaping," it is up to it to amend the governing documents accordingly.

¶16 The Association next argues that the sculpture is a "structure" subject to Article II § 1 of the Declaration, which requires approval of every "structure or dwelling of any kind," including its design, location, and materials. The superior court concluded that "a sculpture is not a 'structure or dwelling'" and that the term "structure" refers to enclosures.

¶17 Although the CC&Rs do not define "structure," that word appears in several provisions governing garages, guest houses, new construction, outbuildings, tennis courts, and such things as trailers, tents, shacks, and barns. None of these references include art or sculptures. *See, e.g., Parrish v. Richards,* 336 P.2d 122, 123-24 (Utah 1959) (tennis court and wire fence not covered by restriction on "structures," garages, dwellings, or buildings, which connote "solid construction" that blocks views or crowds the ground); *Leavitt v. Davis*, 136 A.2d

[4]Although the Association argues that if the sculpture is not landscaping, it cannot be "desert landscaping" and thus must have the Committee's approval, if the sculpture is not landscaping of any kind, the landscaping rules simply do not apply.

535, 537 (Me. 1957) (vehicles are not "structures," which connotes permanency). "Structure" has been defined as "[a]ny construction, production, or piece of work artificially built up or composed of parts purposefully joined together <a building is a structure>." Black's Law Dictionary 1436 (7th ed. 1999). As used by these CC&Rs and Rules, "structure" appears limited to something constructed that can be entered into or walked upon. We therefore agree with the superior court that this sculpture is not a structure.[5] *See generally,* Donald M. Zupanec, Annotation, *What Constitutes "Structure" Within Restrictive Covenant*, 75 A.L.R. 3d 1095 (1977).

¶18 The Association also cites for support the Committee's authority over "architectural design" and "general construction" of structures, but neither term suggests an intent to include sculpture or art objects. The Association points to Article II § 4 of the Declaration, which authorizes the Committee to adopt "written architectural standards and procedures" for plans and specifications submitted by homeowners and for the Committee's

[5]The out-of-state cases cited by the Association are inapposite. *See Skinner v. Henderson,* 556 S.W.2d 730, 733 (Mo. Ct. App. 1977) (swimming pool enclosure was a dwelling and shelter and thus a "structure"); *Shoreline Estate Homeowners Ass'n, Inc. v. Loucks,* 733 P.2d 942, 943 (Or. Ct. App. 1987) ("other structure" in the declaration included eight to ten foot satellite dishes bolted to cement pads); *Yorkshire Vlg. Cmty. Ass'n v. Sweasy,* 524 N.E.2d 237, 240 (Ill. Ct. App. 1988) (in-ground planter boxes were "structures"). Further, because the sculpture is not a structure, it is not regulated by § 2.3 of the Rules concerning the "number and height of structures."

review of the plans. But, again, this provision does not mention the regulation of sculptures. *See Wilson v. Playa de Serrano,* 211 Ariz. 511, 515, ¶ 16, 123 P.3d 1148, 1152 (App. 2005) (when declaration had no age-based occupancy limit, general provision allowing owners to adopt regulations did not authorize adding "fundamental" age-based restriction).

¶19 The Association additionally cites Rule 2.5, entitled "Architectural Style," which requires "[a]ll exterior designs . . . be characteristic of Southwestern architecture." This Rule allows limits on "use of decorative architectural cast concrete products, specifically columns and fountains, . . . visible from adjoining properties." But this sculpture does not fall within the language of Rule 2.5.

¶20 We next consider Article I § 13 of the Declaration and Rule 2.28. Both of these provisions forbid "signs, . . . billboards, *unsightly objects* or nuisances . . . on any of the lots." (Emphasis added.) The superior court's ruling noted that these provisions "came closest" to addressing sculptures but that the Association had not relied upon these provisions in demanding the sculpture's removal. The record reveals, however, that the Association cited these provisions, among many others, in the joint pretrial statement and in its response to Derailed's Motion for Summary Judgment. The Association did not characterize the sculpture as "an unsightly object," however,

until it filed its motion for reconsideration. As allowed by the superior court, Derailed responded to this argument, and the motion was subsequently denied. Derailed does not now assert that the Association waived the argument, and we may consider it on appeal. *Cf. Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, 240, ¶ 15, 159 P.3d 547, 550 (App. 2006) (if prevailing party could not respond to claim first made in losing party's motion for reconsideration, appellate court would not consider the claim).

¶21 On this record, summary judgment was inappropriate because the reference to "unsightly objects" may include sculptures such as the one on Derailed's land.[6] We therefore reverse and remand this issue to the superior court. However, we note that in its Motion for Reconsideration, the Association did not provide facts reflecting that it had ever exerted authority over the sculpture on this basis or that the Committee had ever even considered this question before the Association filed suit.

¶22 We further note that neither the Association nor the Committee may unreasonably apply or interpret the governing documents. *See Tierra Ranchos*, 216 Ariz. at 201, ¶ 25, 165 P.3d at 179 (approving Restatement view that associations must "act reasonably in the exercise of discretionary powers including

[6]We do not intimate whether the sculpture is "unsightly."

rulemaking, enforcement, and design-control powers" and must "treat members fairly"). Of course, whether the Committee has acted reasonably is subject to court review. *See id*. at 202, ¶ 28, 165 P.3d at 180 (reasonableness is usually a question for trier of fact).

¶23 Given its conclusions, the superior court understandably did not address Derailed's defenses based upon the Association's delay in challenging the sculpture's placement and allegedly singling out of the sculpture for unfair treatment vis-à-vis objects on other properties in the subdivision. *See, e.g., Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, 635, ¶ 9, 2 P.3d 1276, 1280 (App. 2000) (injunction is equitable remedy, and court properly considers delay in bringing enforcement action). These issues, too, may be re-asserted upon remand

CONCLUSION

¶24 For the foregoing reasons, we affirm the superior court's conclusions that the sculpture is not encompassed by the CC&Rs or Rules governing landscaping and structures. However, we reverse the grant of summary judgment to Derailed regarding the application of Article I § 13 of the Declaration and Rule 2.28. We remand for further proceedings consistent with this decision.

¶25 With respect to attorneys' fees, the Association requests its appellate fees pursuant to the Declaration and A.R.S. § 12-341.01.[7] However, it has not prevailed beyond obtaining partial reversal of the summary judgment on a single ground that may not prove to be ultimately decisive. We therefore decline to award it attorneys' fees at this juncture. If the Association ultimately prevails, the superior court may consider including attorneys' fees on appeal in any award of fees or costs. Also, we vacate the superior court's award of attorneys' fees and costs to Derailed as being premature. The Association is entitled to its costs on appeal, A.R.S. § 12-341, subject to compliance with ARCAP 21.

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/_____
DONN KESSLER, Presiding Judge

_/s/_____
DIANE M. JOHNSEN, Judge

[7]The statute gives the court discretion to award attorneys' fees to the successful party in a contested action arising out of contract.