IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Lee & Kim Edwards, Petitioner, vs. Scottsdale Embassy Condominium Association, Respondent	**No. 21F-H2120028-REL-RHG** **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: July 8, 2021

APPEARANCES: Terry Foster, Esq. appeared on behalf of Petitioner Lee & Kim Edwards. No one appeared on behalf of Respondent Scottsdale Embassy Condominium Association.[1]

ADMINISTRATIVE LAW JUDGE: Velva Moses-Thompson

FINDINGS OF FACT

1. The Arizona Department of Real Estate (Department) is authorized by statute to receive and to decide Petitions for Hearings from members of condominium unit owners' associations and from unit owners' associations in Arizona.

2. Respondent is a condominium unit owners' association (the Association or Respondent) whose members own condominiums in the Scottsdale Embassy Condominium development in Scottsdale, Arizona.

3. Petitioner owns unit 6937 in Scottsdale Embassy Condominium.

4. In 2020, the Association voted to charge its members an assessment based on each member's 1/26 interest in the common areas of the Association.

5. On or about November 20, 2020, Petitioner filed a single-issue petition with the Department alleging that Respondent had violated its Bylaws and Covenants, Conditions, and Restrictions (CC&Rs or Declaration) Article VI, Section 9, and Article IV, Section 1. The November 20, 2020 petition provided, in relevant part, as follows:

[1] At the start of the hearing, Petitioner's attorney notified the tribunal that Respondent's attorneys Beth Mulcahy, Esq. and Lauren Vie, Esq. had withdrawn from representation of Respondent. However, the attorneys did not file a withdrawal or otherwise notify the tribunal that counsel was no longer representing Respondent.

> Petitioners seek to enforce Article VI, Section 9 and Article IV, Section 1, of the CC&Rs and the By Laws and to require that the assessments be in compliance with the CC&R's, including the historical calculations for the past 40 plus years unless and until the CC&Rs are properly amended to reflect the Board's improper change to the historical calculations.

Petitioners continued to explain in the petition that the assessments were historically based on the square footage of each unit.

6. Respondent filed a written answer to the petition, denying that it had violated any CC&Rs.

7. The Department referred the petition to the Office of Administrative Hearings, an independent state agency, for an evidentiary hearing.

8. On January 5, 2021, the Department issued a Notice of Hearing setting the matter for hearing on February 9, 2021.

9. A hearing was held on February 9, 2021.

10. On February 19, 2021, the Administrative Law Judge issued a decision finding that the Board was the prevailing party.

11. On or about March 30, 2021, Petitioner filed a request for re-hearing. Petitioner alleged that Respondent had violated Arizona Revised Statutes (A.R.S.) section 33-1255 by requiring that its members pay an assessment based on each member's 1/26 interest in the common area of the Association.

12. A hearing was held on July 8, 2021.

13. Petitioner Lee Edwards testified on behalf of himself. Mr. Edwards explained that the Association had a long standing history of charging an assessment based upon the square footage of each homeowner's unit. Mr. Edwards explained that the 1/26 rate includes a charges for limited common elements, including patios and parking spaces.

14. Petitioner's position was that the 1/26 rate requires other homeowners to pay for limited common elements that is in direct violation of A.R.S. 33-1255.

15. The Declaration provides in relevant part as follows:

Article I, Section 3, defines “Common Area” and “Common Elements” as follows:

(a) The common elements shall include without limitation each multifamily structure (except for the units), the earth upon which the structure is located as set for in the legal description in ARTICLE I, Section 7, herein, the air space above the interior surface of the ceiling of the structure, all bearing walls, columns, floors, roofs, ceilings, slabs, foundations, storage spaces, **patios**, tanks, basements, exterior walls of each apartment and of the building, lobbies, entrance and e[ ]its or communication ways, the common compartments or installation of central services for public utilities, common heating and refrigeration units, reservoirs, water tanks, and pump servicing other than one apartment, all recreational facilities, lawns, pavement, trees and all other landscaping on the project in which the multifamily structures are located, pipes, ducts, shuts, conduits, wires, other installations of the multifamily structure wherever located, except the outlet thereof when located within the units, and all devices and premises designed for common use or enjoyment by more those owner or owners of a single apartment.

(**b) Restricted Common Area shall mean and refer to a separately designed and exclusive parking area for each unit as assigned by the Board of Directors.**

Pursuant to the Association CC&Rs Article I, Section 3(b), “unit” does not include those areas designed as common elements in Article I, Section 3.

Article I, Section 4, defines “unit” as follows:

“Unit” shall mean and refer to a separately designated and legally described freehold estate consisting of the apartment units in each multifamily structure, each separately shown, numbered and designated on the condominium plan shown on Exhibit “A”, hereof, and shall be a separate freehold estate consisting of the space bounded by and contained within and includes the interior surfaces of the perimeter walls, floors, ceilings, and windows and floors of each unit, each of such spaces being defined and referred herein as a :Unit:. Each unit shall include both portions of the building so described and the air space so encompassed, but those portions defined as the common elements as set forth in ARTICLE I, Section 3, are not part of the Unit.

Article I, Section 5 provides: The undivided interest in the general common areas hereby established and which shall be conveyed with each respective units shall be 1/26.

Article II, Section 5 provides, as follows:

The proportionate shares of the separate owners of the separate condominium in the profits and common expenses in the common areas, shall be the same as their respective interest in the common areas as set forth in Article II, Section 5.

Article II, Section 7 provides, as follows:

The proportionate shares of the separate owners of the separate condominium in the profits and common expenses in the common areas, shall be the same as their respective interest in the common areas as set forth in Article II, Section 5.

Article IV, Section 4 provides: Establishment, Basis and Maximum of Assessments. Declarant and the owner of each such unit, for themselves, their heirs, successors and assigns, further covenant that each unit shall be subject to an assessment in an amount to be determined by the Association in the following manner:

(a) Such unit's share of the actual cost to the Association of all repair, construction, replacement and maintenance of the general and **restricted common areas**, and other facilities and activities including but not limited to, mowing grass, caring the grounds, sprinkler system, and other charges required by this Declaration of Covenants, Conditions, and Restrictions;

(b) Such unit's share of the actual cost to the Association of such recreational facilities as may from time to be provided by the Association:

(c) Such townhouse unit's share of such sum as the Board of Directors of the Association shall determine to be fair and prudent for the establishment and maintenance, and other

> charges as hereinafter provided, fire and extended coverage insurance on the common areas, and a liability insurance policy in the fact amount of not less than $500,000.00, which policy, in addition to public liability shall cover repair and construction work to all of the assets and property to be maintained by the Association. The disposition of liability insurance proceeds shall be made upon majority vote of the Board of Directors but in all events shall be used to and for the purpose of the Association.
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> (d) Such unit's share of such additional sum as the Board of Directors of the Association shall determine to be necessary to meet primary purposes of the Association. ***Each unit's share shall be the same as its undivided interest in the common elements of the total amount determined under subparagraphs (a), (b), (c), and (d) above.***
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> Article VI, Section 9 provides, as follows:
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> **Both regular fees, assessments and special assessments must be fixed at a uniform rate for all units.**
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> Emphasis Added.

<u>CONCLUSIONS OF LAW</u>

1. A.R.S. § 32-2199(1) permits a condominium unit owner to file a petition with the Department for a hearing concerning the condominium association's alleged violations of the Condominium Act set forth in Title 33, Chapter 9. This matter lies within the Department's jurisdiction.

2. Petitioner bears the burden of proof to establish that Respondent violated the Declaration, the Bylaws, and A.R.S. section 33-1255 by a preponderance of the evidence.[2] Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.[3]

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[2] *See* 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).

[3] *See* A.A.C. R2-19-119(B)(2).

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

4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give effect to the intent of the parties.[6] "Restrictive covenants must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein."[7]

5. Petitioner failed to establish by a preponderance of the evidence that Respondent violated its CCRs, Bylaws, and A.R.S. section 33-1255. A.R.S. section 33-1255 does not apply to this matter because the Declaration requires that the Association charge an assessment to each member that is the equivalent of each member's undivided 1/26 interest in the total costs to the Association of several items including insurance, parking areas, and patios.[8] Consequently, the petition should be dismissed and Respondent is deemed to be the prevailing party in this matter.

ORDER

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[4] MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).
[5] BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).
[6] *See Powell v. Washburn,* 211 Ariz. 553, 556 ¶ 9, 125 P.3d 373, 376 (2006).
[7] *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).
[8] A.R.S. section 32-155 provides:

> **C. Unless otherwise provided for in the declaration all of the following apply:**
> 1. Any common expense associated with the maintenance, repair or replacement of a limited common element shall be equally assessed against the units to which the limited common element is assigned.
> 2. Any common expense or portion of a common expense benefitting fewer than all of the units shall be assessed exclusively against the units benefitted.
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> Emphasis added.

IT IS ORDERED that the petition of Lee & Kim Edwards is dismissed.

NOTICE

This administrative law judge order, having been issued as a result of a rehearing, is binding on the parties. A.R.S. § 32-2199.02(B). A party wishing to appeal this order must seek judicial review as prescribed by A.R.S. § 41-1092.08(H) and title 12, chapter 7, article 6. Any such appeal must be filed with the superior court within thirty-five days from the date when a copy of this order was served upon the parties. A.R.S. § 12-904(A).

Done this day, July 28, 2021.

/s/ Velva Moses-Thompson
Administrative Law Judge

Transmitted electronically to:

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