IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Brian D. Sopatyk, Petitioner, vs. Xanadu Lake Resort Condominium, Inc., Respondent.	**No. 21F-H2121065-REL** **ADMINISTRATIVE LAW JUDGE DECISION**

<u>HEARING</u>: September 21, 2021, with the record held open until October 12, 2021 for the sole purpose of receiving post-hearing briefs.

<u>APPEARANCES</u>: Jacob Kubert, Esq. appeared on behalf of Petitioner Brian D. Sopatyk. Penny L. Koepke, Esq. appeared on behalf of Respondent Xanadu Lake Resort Condominium, Inc.

<u>ADMINISTRATIVE LAW JUDGE</u>: Velva Moses-Thompson

<u>FINDINGS OF FACT</u>

1. The Arizona Department of Real Estate (the 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 Xanadu Lake Resort Condominium, Inc. is a condominium unit owners' association whose members own the condominiums in Xanadu Lake Resort (Xanadu) in Lake Havasu City, Arizona.

3. Petitioner Brian D. Sopatyk owns several units in Xanadu and is a member of Respondent.

4. On or about June 29, 2021, Petitioner filed a triple-issue petition with the Department alleging that Respondent had violated its Covenants, Conditions, and Restrictions (CC&Rs) Article 2 § 3(a)(2), Article 3, § 3(d)(1), and Article 6 § 2(a).

<u>Issue 1: Alleged violation of CC&R Article 2 § 3(a)(2)</u>

5. Article 2 § 3(a)(2) provides that external items such as screen doors may

not be constructed, erected, or maintained in Xanadu.[1] Petitioner alleges that Respondent violated Article 2 § 3(a)(2) when it directed and authorized homeowners to purchase and install security screen doors at Xanadu. Petitioner contends that Respondent could not take said action without amending CC&R Article 2 § 3(a)(2) through a majority vote of the homeowners.

Issue 2: Alleged violation of CC&R Article 3 § 3(d)(1)

6. Under CC&R Article 3 § 3(d)(1), animals are not allowed in any unit in the general or common areas or facilities of Xanadu without the expression permission of the Board.[2] Petitioner alleges that Respondent violated CC&R Article 3 § 3(d)(1) when it barred pets from Xanadu without guidelines.

Issue 3: Alleged violation of CC&R Article 6 § 2(a)

7. Under CC&R Article 6 § 2(a), Respondent must "establish and maintain in a separate, segregated account, an adequate reserve fund for the periodic maintenance, repair and replacement of the improvements to the common area and those limited common areas which the Homeowners Association may be required to maintain. Those funds shall be maintained out of the regular assessments for common expenses."[3] Petitioner alleges that Respondent violated CC&R Article 6 § 2(a) when it levied an assessment on commercial units at a rate of $50 per month to pay for the marquee at Xanadu until the total cost of repairs was met. Furthermore, Petitioner alleges that Respondent violated CC&R Article 6 § 2(a) when it continued to charge such a monthly assessment after the total cost of repairs was met. Instead, Petitioner argues, Respondent was required to pay for the cost to repair the marquee out of the reserve fund that holds the regular assessments for common expenses. Petitioner further contended that even if the $50 assessment was a special assessment under CC&R Article 6 § 7[4], Respondent was required to follow the requirements of CC&R CC&R Article 6 § 5. Article 6 § 5 provides:

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[1] *See* Exhibit 1.
[2] *See* Exhibit 1.
[3] *See* Exhibit 1.
[4] *See* Exhibit 1.

> In addition to the annual assessments authorized above, the Association may levy, in any assessment year, a special assessment applicable to that year only for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement upon the Common Area, including fixtures and personal property related thereto, provided that any such assessment shall have the assent of Two-thirds (2/3) of the votes of members who are voting in person or by proxy at a meeting duly called for this purpose.

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

9. The matter was referred to the Office of Administrative Hearings for an evidentiary hearing.

10. A hearing was held on September 21, 2021.

11. At hearing, Respondent contended that Petitioner was barred under Arizona Revised Statutes (A.R.S.) § 12-548 from filing a petition with the Department regarding Issues 2 and 3.

12. Respondent did not dispute that it prohibits pets at Xanadu. Respondent contended that it is not required under Article 3 § 3(d)(1) to allow pets at Xanadu.

13. Respondent contended that it is not charging an assessment to use the marquee, but rather, a rental fee in the amount of $50 to a unit owner who advertises on the marquee. Respondent's position is that it is not barred from charging such a rental fee by the CC&Rs.

14. Respondent did not dispute that it has allowed unit owners to install screen doors at Xanadu. Respondent further argued that under CC&R Article 7 [5], the Architectural Committee has the authority to authorize unit owners to install screen doors.

14. CC&R Article XI § 1 provides:[6]

> The Association, or any Owner, shall have the right to enforce, by any proceeding at Law or in equity, all restrictions,

[5] *See* Exhibit 1.
[6] *See* Exhibit 1.

> conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration. Failure by the Association or by any Owner to enforce any covenant or restriction herein contained shall in on event be deemed a waiver of the right to do so thereafter.

CONCLUSIONS OF LAW

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 CC&Rs by a preponderance of the evidence.[7] Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.[8]

3. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."[9] 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."[10]

4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give effect to the intent of the parties.[11] "Restrictive covenants must be construed as a whole and interpreted in view of their underlying purposes, giving effect to all provisions contained therein."[12]

5. The Administrative Law Judge concludes that screen doors are not permitted in Xanadu under CC&R Article 2 § 3(a)(2). \CC&R Article 7 does not override CC&R

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[7] *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).

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

[9] MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

[10] BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

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

[12] *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).

Article 2 § 3(a)(2). If Respondent were permitted to authorize the installation of screen doors through the approval of the Architectural Committee, the bar in CC&R Article 2 § 3(a)(2) would have no meaning.

6. Respondent contends that Petitioner is barred under A.R.S. § 12-548 from filing a petition with the Department for alleged CC&R violations related to Respondent's "no-pet" policy and the Association's "rental fee" or "assessment" charged to unit owners. A.R.S. § 12-548 is inapplicable to the petition filed in this matter because the statute applies to actions for debt evidenced by a contract in writing. The petition does not relate to a debt and furthermore, the Department does not have any statute of limitations provisions.

7. The Administrative Law Judge concludes that Respondent is not required, but may allow pets with the Board's approval. The evidence presented at hearing shows that the Respondent has consistently prohibited pets from Xanadu. Petitioner did not establish by a preponderance of the evidence that Respondent has arbitrarily or unreasonably applied CC&R Article 3 § 3(d)(1).

8. The Administrative Law Judge concludes that the marquee is a part of the common area of Xanadu and therefore, the Association was not authorized under CC&R Article 6 § 2(a), to charge a separate assessment or rental fee for the use of the marquee. Furthermore, there was no evidence presented at hearing that the $50 assessment was imposed that complied with CC&R Article 6 § 5.

ORDER

IT IS ORDERED that Petitioner be deemed the prevailing party in this matter regarding petition Issues 1 and 3.

IT IS FURTHER ORDERED that Respondent be deemed the prevailing party in this matter regarding petition Issue 2.

IT IS FURTHER ORDERED that Respondent pay Petitioner his filing fee of $1,000.00, to be paid directly to Petitioner within thirty (30) days of this Order.

IT IS FURTHER ORDERED Respondent is directed to comply with the requirements of CC&R Article 2 § 3(a)(2) and Article 6 § 2(a) going forward.

No Civil Penalty is found to be appropriate in this matter.

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, November 1, 2021.

/s/ Velva Moses-Thompson
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate