

1 Conditions, and Restrictions (CC&Rs) Article VI, Section 9, and Article IV, Section 1.

2 The November 20, 2020 petition provided, in relevant part, as follows:

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

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

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

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

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

17 8. A hearing was held on February 9, 2021. Petitioner Lee Edwards testified
18 on his own behalf and submitted exhibits 1 through 14. Respondent presented the
19 testimony of Board President, Caleb Koch, and Board member Mary Edinburgh.
20 Respondent submitted exhibits 1 through 10.

21 9. In or around January of 2020, two Board members met with an attorney
22 regarding the method historically used by the Board to calculate assessments. See
23 Respondent's Exhibit 3. On or about January 24, 2020, the attorney notified the
24 homeowners that to ensure compliance with the CC&Rs, the Association should charge
25 an assessment based on each homeowners 1/26 interest in the common areas of the
26 Association. The January 24, 2020 letter provided, in relevant part, as follows:¹

27 Pursuant to Article II, Section 5 each unit has a 1/26 interest in
28 the common areas of the Association. This essentially means
29 that the annual budget is divided 26 ways and each unit is
30 responsible for paying an equal portion of the budget.

¹ See id.

1 It is my understanding that in the past the Association has
2 partially based each unit's annual assessment on the square
3 footage of the unit. Going forward it is my recommendation
4 that the Association comply with the sections cited above and
5 charge each unit equally for the annual assessments.

6 10. The Board subsequently advised the homeowners that the prior method of
7 calculating assessments based on the square foot of each unit violated the CC&Rs.
8 See Respondent's Exhibit 5. The Board sought the input of the homeowners regarding
9 whether they desired an assessment based on 1/26 of the Association costs (1/26 rate),
10 a variable blended rate, or an assessment based on the square footage of each unit
11 (square footage rate). Most of the homeowners chose the 1/26 rate. The Board notified
12 the members that if any method other than the 1/26 rate was chosen, the CC&Rs would
13 needed to be amended. See id.

14 11. On September 26, 2020, the Board notified the homeowners that it would
15 begin charging an assessment based on the 1/26 rate going forward because the
16 majority of the homeowners chose the rate. The Board notified the homeowners that an
17 amendment would not be necessary. See Respondent's Exhibit 7.

18 12. At hearing, Mr. Edwards argued that the square footage rate was a
19 uniform rate that complied with the CC&Rs. Furthermore, Mr. Edwards contended that
20 the Association waived its right to enforce a 1/26 rate because the Association has
21 charged an assessment based on the square footage rate for the past 40 years.

22 13. Respondent contended that the CC&Rs require that each homeowner pay
23 an assessment based on the 1/26 rate. Respondent contended that it is not possible to
24 waive the CC&R requirement.

25 14. Article II, Sections 5 and 7, Article VI, Sections 4 and 9 of the CC&Rs
26 provide in relevant part as follows:

27 Article II, Section 5 provides, as follows:

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

1 Article II, Section 7 provides, as follows:

2
3 The proportionate shares of the separate owners of the
4 separate condominium in the profits and common expenses in
5 the common areas, shall be the same as their respective
6 interest in the common areas as set forth in Article II, Section
7 5.

8 Article VI, Section 4 provides, as follows:

9 Declarant and the owner of each such unit, for themselves,
10 their heirs, successors and assigns, further covenant that
11 each unit shall be subject to an assessment in an amount to
12 be determined by the Association in the following manner:

13 (a) such units share of the actual cost to the Association of all
14 repair, construction, replacement and maintenance of the
15 general and restricted common areas, and other facilities and
16 activities including but not limited to, mowing grass, caring for
17 the grounds, sprinkler system, and other charges required by
18 this Declaration of Covenants, Conditions and Restrictions;

19 (b) such units share of the actual cost to the Association of
20 such recreational facilities as may from time to time be
21 provided by the Association;

22 (c) such townhouse units share of such sum as the Board of
23 Directors of the Association shall determine to be fair and
24 prudent for the establishment and maintenance of a reserve
25 for repair, maintenance, and other charges as hereinafter
26 provided, fire and extended coverage insurance of the
27 common areas, and a liability insurance policy in the fact
28 amount of not less than \$500,000.00, which in addition to
29 public liability shall cover repair and construction work to all of
30 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.

(d) such units share of such additional sum as the Board of
Directors of the Association shall determine to be necessary
to *meet the primary purposes of the Association. Each unit's
share shall be the same as its undivided interest in the*

1 *common elements of the total amount determined under the*
2 *subparagraphs (a), (b), (c), and (d) above.*

3 Article VI, Section 9 provides, as follows:

4 Both regular fees, assessments and special assessments
5 must be fixed at a uniform rate for all units.

6 **CONCLUSIONS OF LAW**

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

11 2. Petitioners bear the burden of proof to establish that Respondent violated
12 the CC&Rs by a preponderance of the evidence.² Respondent bears the burden to
13 establish affirmative defenses by the same evidentiary standard.³

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

21 4. In Arizona, if a restrictive covenant is unambiguous, it is enforced to give
22 effect to the intent of the parties.⁶ “Restrictive covenants must be construed as a whole
23 and interpreted in view of their underlying purposes, giving effect to all provisions
24 contained therein.”⁷ CC&R Article VI, Section 9 requires that assessments be charged

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26 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).

27 ³ See A.A.C. R2-19-119(B)(2).

28 ⁴ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

29 ⁵ BLACK’S LAW DICTIONARY at page 1220 (8th ed. 1999).

30 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).

1 at a uniform rate for all units. The preponderance of the evidence shows that
2 Respondent's assessment based on a uniform rate of 1/26 of the costs of the
3 Association complies with Article VI, section 9. Petitioners have failed to meet their
4 burden to establish that Respondent violated the CC&Rs and Bylaws.

5 5. Consequently, the petition should be dismissed and Respondent is
6 deemed to be the prevailing party in this matter.

7 **ORDER**

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

9 **NOTICE**

10 **Pursuant to ARIZ. REV. STAT. section 32-2199.02(B), this Order is binding on the**
11 **parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. section 32-**
12 **2199.04. Pursuant to ARIZ. REV. STAT. section 41-1092.09, a request for rehearing**
13 **in this matter must be filed with the Commissioner of the Department of Real**
14 **Estate within 30 days of the service of this Order upon the parties.**

15 Done this day, February 19, 2021.

16 /s/ Velva Moses-Thompson
17 Administrative Law Judge

18 Transmitted electronically to:

19 Judy Lowe, Commissioner
20 Arizona Department of Real Estate

21 Transmitted US Mail to:

22 Teresa H. Foster, ESQ.
23 Ellis & Baker, P.C.
24 6245 N 24th Parkway, Ste 100
25 Phoenix, AZ 85016

26 Beth Mulcahy, Esq.
27 Mulcahy Law Firm, PC
28 3001 E. Camelback Rd., Ste 130
29 Phoenix, AZ 85016