



1 the filed Petition and forwarded to the Office of Administrative Hearings by the  
2 Department of Fire, Building and Life Safety (“Department”).

3 4. At a May 6, 2011 homeowners’ association meeting, the Board unanimously  
4 adopted the CFLA. Effective August 1, 2011, the Rental Rules adopted by the Board  
5 require any owner who leases a home or renews or revises an existing lease agreement  
6 to sign and have the tenants sign the CFLA rental agreement form. See Exhibit C at 1.

7 5. On June 20, 2012, Mr. Jones filed a Petition with the Department alleging the  
8 following three complaints:

9 (i) The respondent violated Article 11.7 of the CC&Rs by unilaterally  
10 amending the documents without 75% or more of the total eligible votes in  
11 the association;

12 (ii) The respondent ruled to impose a compulsory contract on a class of  
13 owners with language contrary to 33-1803(B) forcing the class of owners  
14 to submit under threat of violation that: 1) a single violation of any  
15 provisions of the community documents shall be deemed irreparable  
16 despite that 33-1803(B) assumes all violations reparable[;] 2) the class of  
17 owners will be denied due process proscribed by 33-1803(B) whereby  
18 upon execution of the compulsory contract, a single violation of any  
19 provision shall be deemed irreparable even before the violation and  
20 opportunity for a subsequent hearing occurs[;] 3) the class of owners are  
21 subject to an unreasonable penalty beyond the explicit limitation of  
22 “reasonable monetary penalties” per 33-1803(B) for a single violation of  
23 any provision[;] 4) the respondent will have enforcement authority per ARS  
24 33 [C]hapter 3 which is beyond the reasonable limits of 33-1803(B), and  
25 beyond the scope of DFBLs oversight despite that the legislature granted  
26 DFBLs oversight of “enforcement and application of community  
27 declarations, rules and bylaws” (SB 1148); and

28 (iii) The board violated Article 6.5 of the CC&Rs by imposing rules that  
29 discriminate between owners.

30 6. On July 24, 2012, Westwind filed an Answer to Petition, denying all of the  
complaint items in the Petition.

7. On August 14, 2012, the Department issued a Notice of Hearing to the parties  
notifying them that Mr. Jones has alleged that Westwind has violated the “Declaration of  
Covenants, Conditions and Restrictions.”

**Complaint # 1**

1 8. Mr. Jones alleges in his Petition that Westwind violated Article 11.7 of the  
2 CC&Rs by unilaterally amending the documents without 75% or more of the total  
3 eligible votes in the association. Mr. Jones alleges that Westwind violated the CC&Rs  
4 when the Board amended the Rental Rules to include the provisions that “[a]ll leases  
5 executed as of August 2011 shall be for a minimum term of 12 months,” and “[m]onth-  
6 to-month or short term leases with no initial one (1) year lease term will be reviewed on  
7 a case-by-case basis.” See Exhibit C.

8 9. Article 8.13 of the CC&Rs states the following in pertinent part: “Leasing.  
9 *Nothing in the Declaration will be deemed to prevent the leasing of a Lot and Detached*  
10 *Dwelling Unit to a Single Family from time to time by the Owner of the Lot . . .*” See  
11 Exhibit A at 28. (Emphasis added.)

12 10. Article 11.7 of the CC&Rs states the following in pertinent part: “. . . [A]ny  
13 amendment will be deemed adopted if approved at a duly called regular or special  
14 meeting by the affirmative vote (in person or by proxy) of seventy-five [percent] (75%) or  
15 more of the total number of eligible votes in the Association. . . .” See Exhibit A at 37.

16 11. Article 6.5 of the CC&Rs grants the Board authority to adopt rules, stating the  
17 following in pertinent part:

18 Association Rules. By a majority vote of the Board, the Association, from  
19 time to time and subject to the provisions of this Declaration, may adopt,  
20 amend, and repeal rules and regulations for the Project. The Association  
21 Rules may restrict and govern use of any area by any Owner or the  
22 Owner’s Permittees or the Owner’s pets and additionally may establish a  
23 system of fines and charges for violations of the Project Documents;  
24 however, the Association Rules may not discriminate among Owners. . . .  
25 *The Association Rules will not be interpreted in a manner inconsistent with*  
26 *this Declaration or the Articles or Bylaws*, and, upon adoption, the  
27 Association Rules will have the same force and effect as if they were set  
28 forth in full and were a part of this Declaration.

29 See Exhibit A at 23. (Emphasis added.)

30 12. Mr. Jones asserted that Westwind’s Board by amending the Rental Rules, has  
effectively precluded him from marketing his home to a class of tenants, specifically  
those within the military, who would wish to lease the home for less than a twelve month  
period, without prior approval from the Board. Mr. Jones further contended that if the

1 Board is permitted to amend rules and regulations, it undermines the provision of the  
2 CC&Rs requiring a 75% affirmative vote of the homeowners.

3 13. Westwind argued that there is nothing in the provisions of the Rental Rules that  
4 would preclude Mr. Jones from renting his home and that the Board is charged with  
5 clarifying the governing documents when vagueness exists and that the term "from time  
6 to time" is vague and needed to be interpreted.

7 **Complaint #2**

8 14. Mr. Jones contended that the adoption of the CFLA violates A.R.S. § 33-1803(B)  
9 which states in pertinent part, "[a]fter notice and an opportunity to be heard, the board of  
10 directors may impose reasonable monetary penalties on members for violations of the  
11 declaration, bylaws, and rules of the association."

12 15. The CFLA states in paragraph 6 of the Crime Free Neighborhood Agreement the  
13 following:

14 VIOLATION OF THE ABOVE COMMUNITY DOCUMENTS OR THE  
15 PROVISIONS SHALL BE A MATERIAL AND IRREPARABLE VIOLATION  
16 OF THE LEASE AND GOOD CAUSE FOR IMMEDIATE TERMINATION  
17 OF TENANCY. The Owner and the tenant agree that \* Association is a  
18 third-party beneficiary of the lease and this Addendum and may enforce all  
19 the terms of these contracts and may avail itself of all the remedies  
20 afforded a landlord under Arizona Law including the forcible detainer laws.  
21 A single violation of any provisions of the community documents or this  
22 Addendum shall be deemed a serious violation, and a material and  
23 irreparable non-compliance. It is understood that a single violation shall  
24 be good cause for immediate termination of the lease under A.R.S. 33-  
25 1377, as provided in A.R.S. 33-1368. Unless otherwise prohibited by law,  
26 proof of violation shall not require criminal conviction, but shall be by a  
27 preponderance of the evidence.

28 See Exhibit C at 3. (Emphasis in original.)

29 16. Mr. Jones is concerned that the Board through the adoption of the CFLA will treat  
30 any CC&R violation, such as landscaping and trashcan violations, in the same manner  
as it will treat criminal activity. Consequently, Mr. Jones asserted that he believes that if  
either he or his tenant has a landscaping violation or trashcan violation, the Board will  
be able to evict the tenant after a single violation.

1 17. Westwind contended that the CFLA makes no mention of any violations other  
2 than criminal activity and therefore, there is no basis for Mr. Jones' belief that  
3 landscaping and trashcan violations would be enforced utilizing the CFLA.

4 18. Steven Wadding, President of the Board, testified that the CFLA was  
5 unanimously adopted at the May 6, 2011 homeowners' association meeting after input  
6 from homeowners in Westwind, including homeowners who are leasing their homes to  
7 tenants. Mr. Wadding explained that the CFLA was adopted in response to increasing  
8 criminal activity in rental units within Westwind and the owners wanted a more crime  
9 free neighborhood in order to preserve resale values and to not further degrade the  
10 neighborhood.

11 19. Mr. Wadding also testified that the CFLA establishes Westwind as a third party  
12 beneficiary between an owner and a tenant to allow Westwind the ability to correct  
13 violations in the event a property is owned by an off-site owner who is non-responsive,  
14 or the property is vacant or in foreclosure. Mr. Wadding testified that the adoption of the  
15 CFLA was best for the safety of the residents and property values in the community, but  
16 that the remedies available pursuant to the CFLA, specifically forcible detainer action,  
17 would only be used as a last resort. Westwind has never filed a forcible detainer action.

18 **Complaint #3**

19 20. Mr. Jones argued that by adopting the CFLA, Westwind is discriminating against  
20 him and other owners who lease their homes because it treats guests, family members,  
21 or invitees of owners differently than tenants.

22 21. Westwind argued that the CFLA applies to all owners who lease their property.  
23 Westwind further argued that owners who lease their homes are not a protected class  
24 under federal or state statute. Westwind analogized the situation to one in which  
25 owners of pets are required to abide by pet rules implemented by the Board. However,  
26 the rules as applied to pet owners obviously do not apply to non-pet owners.

27 **CONCLUSIONS OF LAW**

28 1. In this proceeding, Mr. Jones bears the burden of proving by a preponderance of  
29 the evidence that Westwind violated its governing documents. See A.A.C. R2-19-119.  
30

1 2. A preponderance of the evidence is “[e]vidence which is of greater weight or more  
2 convincing than the evidence which is offered in opposition to it; that is, evidence which as  
3 a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW  
4 DICTIONARY 1182 (6th ed. 1990).

5 3. The Administrative Law Judge concludes that Westwind violated Article 11.7 of  
6 the CC&Rs when it adopted the Rental Rules restricting the leasing of a Lot, effectively  
7 amending the CC&Rs without obtaining the affirmative vote of 75% of its members.  
8 Pursuant to Article 6.5 of the CC&Rs, the Board has the authority to adopt rules.  
9 However, those rules “will not be interpreted in a manner inconsistent” with the CC&Rs.  
10 The Rental Rules, including the CFLA, as adopted, are inconsistent with Article 8.13 of the  
11 CC&Rs that state that “nothing in the Declaration will be deemed to prevent the leasing of  
12 a Lot . . .” The Rental Rules and CFLA impose restrictions that could potentially prevent  
13 the leasing of a Lot in that Westwind has the authority to disapprove of a shorter lease  
14 period or immediately terminate a lease, which may result in preventing the leasing of a  
15 Lot. The Rental Rules and CFLA are inconsistent with the CC&Rs and therefore, are in  
16 violation of Article 6.5, as well.

17 4. The Administrative Law Judge concludes that by the above findings, the issue  
18 regarding discrimination is moot because Westwind did not have the authority to adopt  
19 rules that effectively amended the CC&Rs without obtaining an affirmative vote of 75%  
20 of the members of Westwind, and are inconsistent with the CC&Rs.

21 5. The provisions of the Rental Rules and CFLA specifically addressed herein that  
22 were determined to conflict with the CC&Rs were not properly adopted, have no legal  
23 effect, and are unenforceable.

24 6. The Administrative Law Judge concludes that Mr. Jones sustained his burden of  
25 proving by a preponderance of the evidence that Westwind violated its governing  
26 documents, and is therefore, the prevailing party.<sup>1</sup> The Administrative Law Judge further  
27 concludes that for the two violations found herein, a civil penalty of \$200.00 for each  
28 violation is imposed against Westwind.

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29 <sup>1</sup> The Administrative Law Judge does not further address whether Westwind is in violation of A.R.S. § 33-  
30 1803(B) because that statute addresses monetary penalties and there was no evidence presented  
establishing any improper imposition of monetary penalties.

**RECOMMENDED ORDER**

In view of the foregoing, IT IS ORDERED:

- 1) In the future, Westwind shall not enforce against any member of Westwind those provisions of the Rental Rules and CFLA specifically addressed herein that were determined to conflict with the CC&Rs, were not properly adopted, and have no legal effect;
- 2) Westwind shall within thirty (30) days of the effective date of the Order entered in this matter reimburse Mr. Jones the filing fee of \$2,000.00 pursuant to A.R.S. § 41-2198.02(A); and
- 3) Westwind shall pay to the Department within thirty (30) days of the effective date of the Order entered in this matter a total civil penalty of \$400.00 pursuant to A.R.S. § 41-2198.02(A).

*In the event of certification of the Administrative Law Judge Decision by the Director of the Office of Administrative Hearings, the effective date of the Order will be 5 days from the date of that certification.*

Done this day, November 26, 2012.

/s/ Sondra J. Vanella  
Administrative Law Judge

Transmitted electronically to:

Gene Palma, Director  
Department of Fire Building and Life Safety