

1 **Final agency action regarding decision below:**

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3 **ALJCERT ALJ decision certified as final**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 GREG FISH,

8 Petitioner,

9 vs

10 FLYNN LANE BILTMORE ASSOC, INC.

11 Respondent.

No. 14F-H1414007-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

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14 **HEARING:** November 4, 2014, at 8:00. The record was held open until
15 November 20, 2014.

16 **APPEARANCES:** Gregory James Fish (hereinafter "Mr. Fish" or "Petitioner")
17 appeared on his own behalf. Flynn Lane Biltmore Assoc. Inc. (hereinafter "Biltmore")
18 was represented by its attorney, Craig Armstrong, Esq., Brown-Olcott, PLLC.

19 **ADMINISTRATIVE LAW JUDGE:** M. Douglas

20
21 Evidence and testimony were presented and the following Findings of Fact,
22 Conclusions of Law and Recommended Order are made:

23 **FINDINGS OF FACT**

24 **Background and Procedure**

- 25 1. The Department of Fire, Building and Life Safety (the "Department") is authorized by
26 statute to receive Petitions for Hearings from members of homeowners' associations
27 and from homeowners' associations in Arizona.
- 28 2. Biltmore is a condominium association located in Phoenix, Arizona.
- 29 3. Petitioner owns a residence in and is a member of Biltmore.
- 30 4. Petitioner filed a petition with the Department alleging that Biltmore had violated the
provisions of CC&Rs 7 and 8. Petitioner specifically alleged as follows:

1 Assessments are being billed incorrectly. The CC&Rs state they
2 are to be prorated based on each Unit's proportionate share of the
3 Common Expenses. Instead, assessments are being split evenly
4 amongst all units. This is also true of an additional assessment
5 billed in 2013 to all units for so-called unforeseen expenses.

5 5. Respondent's Answer to the Petition provided, in part, as follows:

6 The CC&R's for Flynn Lane Biltmore Association, Inc states the
7 monthly assessment should be pro rated based on each unit's
8 proportionate share of the Common Expense.

9 In the year 1968 when the property was developed, the developer
10 recorded the CC&R's as stated above, and did not take into
11 consideration that the difference in cost between the 2 and 3
12 bedroom units at that time would be 43 cents.

13 The Association at that time did not feel the difference was great
14 enough to split so they moved forward charging both the 2 and 3
15 bedrooms equal amounts for the monthly assessment.

16 This policy has not changed in 46 years.

17 As of today, should the Association's members by way of a vote to
18 split the monthly assessment between the 2 and 3 bedrooms, the
19 difference in cost would be \$17.00.

20 At this time, aside from Mr. Fish, none of the original owners or
21 current owners has approached the Association looking to make a
22 change.

21 **TESTIMONY**

22 **Testimony of Michael Latz**

23 6. Michael Latz (hereinafter "Mr. Latz") testified that he had been the previous
24 community manager for Biltmore. Mr. Latz stated that he and the Board of Directors
25 (hereinafter "Board") for Biltmore understood that Biltmore was not following the CC&Rs
26 for assessments. Mr. Latz testified that despite this knowledge, Biltmore continued to
27 split assessments equally among all units. Mr. Latz stated that he was concerned that
28 some unit owners would be required to pay more than their assessment should have
29 been.

30 7. Mr. Latz's testimony is found to be credible.

1 **Testimony of Gregory James Fish**

2 8. Mr. Fish testified that he had owned a unit in Biltmore since 2002. Mr. Fish stated
3 that according to the CC&Rs for Biltmore, unit assessments were supposed to be based
4 on the unit owners' undivided percentage ownership of the common elements. Mr. Fish
5 testified that he informed Biltmore that the CC&Rs were not being followed. Mr. Fish
6 stated that despite his repeated protestations, Biltmore continued to improperly split
7 assessments equally among all units.

8 9. Mr. Fish testified that there are four different sized units in Biltmore. Mr. Fish stated
9 that each unit is supposed to be assessed in accordance with its square footage. Mr.
10 Fish testified that Biltmore was aware of the CC&Rs, but continued to impose
11 assessments by splitting the assessments equally among all units. Mr. Fish stated that
12 he was very frustrated by Biltmore's intransigent behavior.

13 10. Mr. Fish's testimony is found to be credible.

14 **Testimony of Karen Jackson**

15 11. Karen Jackson (hereinafter "Ms. Jackson") testified that she had been Mr. Fish's
16 property manager for the last two years. Ms. Jackson stated that she had prepared an
17 analysis of the amount of money that Mr. Jackson had been overcharged in
18 assessments imposed by Biltmore.¹ Ms. Jackson testified that Biltmore's use of the
19 wrong assessment method resulted in Mr. Fish being overcharged \$1,860.68 over the
20 last six years of assessments imposed by Biltmore.

21 12. Ms. Jackson's testimony is found to be credible.

22 **Testimony of Maureen Watrous**

23 13. Maureen Watrous (hereinafter "Ms. Watrous") testified that she is the property
24 manager for Biltmore. Ms. Watrous stated that she became the property manager for
25 Biltmore in March 2014. Ms. Watrous testified that she was aware of the petition at
26 issue.

27 14. Ms. Watrous testified that she believed that Mr. Fish first raised his concern about
28 wrongful assessments after Biltmore's annual meeting in November 2013. Ms. Watrous
29 stated that previous assessments had been equalized with each unit owner paying the

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¹ See Exhibit I (Rate at Which Assessments Were Actually Billed).

1 same amount.

2 15. Ms. Watrous testified that the new Board for Biltmore did not come into office until
3 November 13, 2013. Ms. Watrous stated that the Board had not had time to change the
4 assessment method for the 2014 budget for Biltmore.

5 16. Ms. Watrous testified that Mr. Fish stopped paying his assessments to Biltmore in
6 February 2013. Ms. Watrous stated she was familiar with the percentage calculations
7 contained in Biltmore's CC&Rs. Ms. Watrous testified that according to her review of
8 the calculations of the assessments imposed by Biltmore, Mr. Fish had been
9 overcharged \$1,198.08 over the last six years.

10 17. Ms. Watrous testified there was also a special assessment imposed on the unit
11 owners. Ms. Watrous stated that Mr. Fish was overcharged \$213.33 in the special
12 assessment. Ms. Watrous testified that the total amount that Mr. Fish was overcharged
13 by Biltmore for regular and special assessments over the last two years was the total
14 sum of \$1,411.41.

15 18. Ms. Watrous testified that the current Board of Biltmore has taken action to create a
16 budget based upon the percentage method of assessment contained in Biltmore's
17 CC&Rs. Ms. Watrous stated that on November 1, 2014, the Board voted to include the
18 monthly assessment calculated by percentages to be effective January 1, 2015.² Ms.
19 Watrous testified that Mr. Fish was present for the November 1, 2014 meeting. Ms.
20 Watrous stated that Mr. Fish was loud and disruptive at the meeting.

21 19. Ms. Watrous testified that Biltmore is not a wealthy community. Ms. Watrous stated
22 that Biltmore is an older community and is facing numerous expenses to repair items in
23 the community that have been "pushed off." Ms. Watrous testified that Biltmore does
24 not have the money to perform all of the repairs that are necessary in the community.

25 **Testimony of Thomas E. Tower**

26 20. Thomas E. Tower (hereinafter "Mr. Tower") testified that he had been an owner in
27 Biltmore since 1976. Mr. Tower stated that he is the current president of the Board for
28 Biltmore. Mr. Tower testified that he and five new Board members were voted into
29 office in November 2013.

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² See Exhibit 5 (Minutes of Special Meeting of the Board).

1 21. Mr. Tower testified that Mr. Latz informed the new Board that the assessments were
2 not being performed in accordance with applicable CC&Rs on November 27, 2013. Mr.
3 Tower stated that the annual budget had to be prepared by December 1, 2013. Mr.
4 Tower testified that the Board chose to postpone the new budget until January or
5 February 2014.

6 22. Mr. Tower testified that the majority of unit owners in Biltmore preferred the use of
7 equalized assessments as opposed to the percentage method of assessment. Mr.
8 Tower stated that he believed the equalized assessments started in the eighties when
9 the RTC came into possession of numerous Biltmore units.³ Mr. Tower testified that the
10 RTC mandated the use of equalized assessments.

11 23. Mr. Tower testified that he was informed that it was nearly impossible to change the
12 CC&Rs for Biltmore. Mr. Tower stated that Biltmore was now attempting to comply with
13 Biltmore's CC&Rs by using the percentage method of assessment. Mr. Tower testified
14 that the unit owners in Biltmore will have to adjust to the change. Mr. Tower stated that
15 percentage assessments will be issued in January 2015.

16 24. Mr. Tower acknowledged that he had known of the requirement in the CC&Rs for
17 percentage assessments since the 1970s. Mr. Tower testified that he believed that the
18 previous Boards had followed the expressed direction of the community.

19
20 **PROVISIONS OF CC&Rs REFERENCED AT HEARING**

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22 1. Biltmore CC&R 8(B) provides, in relevant part, as follows:

23 Except as set forth in Subparagraph 8G(1) below, each Unit
24 Owner's proportionate share of the total amount determined under
25 Subparagraph 8A above shall be equal to the said Owner's
26 undivided percentage ownership of the Common Elements,
27 together with any additional amount owed by the Unit Owner⁴

28 **CONCLUSIONS OF LAW**

29
30 ³ Resolution Trust Corporation ("RTC").

⁴ Exhibit 1 (CC&Rs for Biltmore).

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2 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to
3 file a petition with the Department for a hearing concerning violations of planned
4 community documents or violations of statutes that regulate planned communities.
5 That statute provides that such petitions will be heard before the Office of
6 Administrative Hearings.

7 2. The burden of proof at an administrative hearing falls to the party asserting a
8 claim, right, or entitlement and the standard of proof on all issue in this matter is by a
9 preponderance of the evidence. See A.A.C. R2-19-119.

10 3. Proof by “preponderance of the evidence” means that it is sufficient to persuade
11 the finder of fact that the proposition is “more likely true than not.” *In re Arnold and*
12 *Baker Farms*, 177 B.R. 648, 654 (9th Cir. BAP (Ariz.) 1994).

13 4. Biltmore’s CC&Rs provide that each unit owner’s proportionate share of the total
14 amount of assessments shall be equal to the said owner’s undivided percentage
15 ownership of the Common Elements. Mr. Latz credibly testified that he and the Board
16 for Biltmore understood that Biltmore was not following its own CC&Rs for
17 assessments. Mr. Latz credibly testified that despite this knowledge, Biltmore
18 continued to split assessments equally among all units. Ms. Jackson credibly testified
19 that Biltmore’s use of the wrong assessment method resulted in Mr. Fish being
20 overcharged \$1,860.68 over the last six years of assessments imposed by Biltmore.
21 This Tribunal concludes that Biltmore violated the charged provision of Biltmore’s
22 CC&R No. 8(B).

23
24 **RECOMMENDED ORDER**

25 In view of the foregoing, it is ORDERED that Petitioner be deemed the prevailing
26 party in this matter.

27 It is further ORDERED that Biltmore shall fully comply with the applicable
28 provisions of its CC&Rs in the future.

29 It is further ORDERED that Biltmore shall pay Petitioner his filing fee of \$550.00,
30 to be paid directly to Mr. Fish within thirty (30) days of this Order.

1 It is further ORDERED that Biltmore pay a civil penalty in the amount of \$200.00
2 to the Department within thirty (30) days of the date of this Order.

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

6 Done this day, November 24, 2014.

7 /s/ M. Douglas
8 Administrative Law Judge

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10 Transmitted electronically to:

11 Gene Palma, Director
12 Department of Fire Building and Life Safety
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