



1 the whole membership and the “prior approval of the holders  
2 of all mortgages and the beneficiaries under all trust deeds  
3 then encumbering one or more of the Apartments.”

4 5. Respondent’s attorney filed an answer to the Petition, denying any violation  
5 of paragraph 13 of the CC&Rs or applicable statute. Respondent’s answer provided, in  
6 relevant part, as follows:

7 It is my understanding that [Respondent] originally  
8 maintained a fitness center in the basement recreation  
9 room, and the fitness center was previously removed from  
10 the basement and converted to leasable storage spaces,  
11 without member approval. [Respondent] has leased other  
12 portions of the Common Elements to commercial tenants.  
13 Unfortunately, [Respondent] has found it difficult to lease  
14 space and collect past due lease payments from commercial  
15 tenants.

16 The latest tenant occupying the space in question relocated  
17 to a slightly smaller suite in the building that had been  
18 vacant, and [Respondent] solicited feedback from the  
19 Owners about using the recently vacated suite for a fitness  
20 center in two open meetings. In April 2015, [Respondent]  
21 sent out a survey to the Owners. Sixty-one percent (61%)  
22 of the Owners returned the surveys. Of those who returned  
23 the survey, the Owners favored using the space as a fitness  
24 center by a 3-1 margin. Consequently, [Respondent]  
25 changed the use of the space to a fitness center. . . .  
26 . . . .

27 Although [Respondent] did not need permission from the  
28 Owners, [Respondent] still respected the Owners’ wishes. A  
29 majority of the Owners already voted to use the space for a  
30 fitness center. Requiring a formal vote of the Owners is  
form over substance.

Until recently, Executive Towers was the only high-rise  
condominium in Phoenix without a fitness center. Therefore,  
the Board believes that the fitness center improves the value  
off the property at Executive Towers. The fitness center has  
been well received by the Owners, residents, and realtors  
touring the building.

1 In closing, [Respondent] had the authority to convert the  
2 suite into a fitness center. [Respondent] did not need a  
3 formal vote of the Owners and approval of the mortgage  
4 holders and beneficiaries and it did not violate paragraph 13  
5 of the [CC&Rs]. We believe the space is best used as a  
6 fitness center rather than left unoccupied without generating  
7 revenue or value for the community.

6 6. A hearing was held on January 6, 2016. Petitioner Mr. Griggs submitted  
7 eight exhibits and presented the testimony of three witnesses: (1) Linda Pollack, who  
8 has lived in the Executive Towers for three and a half years and has owned a unit for  
9 three years; (2) Himself; and (3) Helen Jerzy, who has lived in the Executive Towers for  
10 38 years and is currently a member of Respondent's Board of Directors. Respondent  
11 submitted ten exhibits and presented the testimony of three witnesses: (1) William B.  
12 Early, who has lived at the Executive Towers since 2004 and has prepared a  
13 compendium of Respondent's board's decisions and minutes since 1996; (2) Wayne  
14 Peter Parente, Respondent's President; and (3) Jay Russett, Respondent's Executive  
15 Director in charge of property management.

16 **RESPONDENT'S BYLAWS AND CC&RS**

- 17 7. Respondent's CC&Rs were adopted on December 14, 1971.  
18 8. Paragraph 13 of the CC&Rs provides, in relevant part, as follows:

19 There shall be no structural alterations or additions to the  
20 Building without the prior approval of a Majority of the  
21 Owners given at a regular or special meeting of the  
22 members of the Association, and the prior approval of the  
23 holders of all mortgages and the beneficiaries under all trust  
24 deeds then encumbering one or more off the Apartments. . .

- 25 9. Paragraph 1.7 of the CC&Rs provides, in relevant part, as follows:

26 "Common Elements" means the "general common  
27 elements", as that term is defined in Section 33-551, Arizona  
28 Revised Statutes,<sup>1</sup> together with store spaces on the first  
29 level, building office on the first level, basement laundry,  
30 parking garage, common parking areas, storage areas,

<sup>1</sup> A.R.S. § 33-551 has been repealed and replaced by A.R.S. § 33-1202, which defines "common elements" as "all portions of a condominium other than the units."

1 basement recreation and massage rooms, swimming pool  
2 and swimming pool furniture and equipment, hospitality  
3 room on the first level, outside walks and driveways,  
4 landscaping, and all other portions of [the property], except  
5 the Apartments.

6 10. Section 1.10 of the CC&Rs provides as follows:

7 Majority” or “Majority of Owners” means the owners of more  
8 than 50 percent of the undivided ownership of the Common  
9 Elements. Any specified percentage of the Owners means  
10 that percentage of undivided ownership in the Common  
11 Elements.

12 Members’ votes are counted according to the size of their condominium units, with the  
13 votes of owners of larger units counting proportionately more than the votes of owners  
14 of smaller units.

15 11. Paragraph 4 of the CC&Rs defines Respondent Association in relevant part  
16 as follows:

17 The Association has been, or will be, formed so as to  
18 constitute the “council of co-owners”, as that term is defined  
19 in section 33-551, Arizona Revised statutes, and to serve as  
20 the governing body of all of the Owners for the maintenance,  
21 repair, preplacement, administration and operation of the  
22 Property . . . .<sup>2</sup>

23 12. Paragraph 4.2 of the CC&Rs provides as follows:

24 Board’s Determination Binding. In the event of any dispute  
25 or disagreement between any Owners relating to the  
26 Property, or any question of interpretation or application of  
27 the provisions of the [CC&Rs] or Bylaws, the determination  
28 thereof by the Board shall be final and binding on each all of  
29 such Owners.

30 13. Paragraph 5 of the CC&Rs provides, in relevant part, as follows:

Each Owner shall have the right to use the Common  
Elements . . . . Such rights to use and possess the Common

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<sup>2</sup> A.R.S. § 41-1202 does not define the term, “council of co-owners,” but provides that “‘Association’ or ‘unit owners’ association’ means the unit owners’ association organized under § 33-1241” and “‘[b]oard of directors’ means the body, regardless of its name, designated in the declaration and given general management powers to act on behalf of the association.” A.R.S. § 41-1202(4) and (5).

1 Elements shall be subject to and governed by the provisions  
2 of [the CC&Rs] and the Bylaws. The Association shall have  
3 the authority to lease or to grant concessions with respect to  
4 parts of the Common Elements, subject to the provisions of  
5 the [CC&Rs]. . . .

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11 14. Paragraph 12 of the CC&Rs provides, in relevant part, as follows:

12 Maintenance, Repairs and Replacements. Each Owner  
13 shall furnish and be responsible for, at his own expense, all  
14 of the maintenance, repairs and replacements within his own  
15 Apartment. Maintenance, repairs and replacements of the  
16 Common Elements shall be furnished by the Association as  
17 part of the common expenses, subject to the Bylaws and  
18 rules and regulations of the Association. . . .

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27 15. Paragraph 17 of the CC&Rs provides, in relevant part, as follows:

28 The common elements shall be used only for access,  
29 ingress and egress to and from the respective Apartments  
30 by the Owners residing therein and their guests, household  
help and other authorized visitors and for such other  
purposes as are incidental to the residential use of the  
Apartments; provided, however, that the garage, laundry,  
building office, hospitality room and other special areas shall  
be used for the purposes approved by the Board. The use,  
maintenance and operation of the Common Elements will  
not be obstructed, damaged or unreasonably interfered with  
by any Owner.

16. Article 4, § 6 of Respondent's Bylaws provides as follows:

Except as otherwise specifically provided in the [CC&Rs],  
the Board shall not approve any capital expenditure in  
excess of \$5,000 unless required for emergency, repair,  
protection or operation of the Common Elements, nor enter  
into any contracts for more than two years without the prior  
approval of two-thirds of the total ownership of the Common  
Elements.

**HEARING EVIDENCE**

17. The original plans for the Executive Towers included commercial space for a  
restaurant and coffee shop on the first floor. A barber shop and Botox clinic currently  
occupy these commercial spaces.

1 18. During the 1980's, there was an exercise room or gym in the basement of  
2 the Executive Towers. At some point in the late 1980's, Respondent's board converted  
3 the gym in the basement to storage space that was available for residents to lease.

4 19. Mr. Early testified that he has served on Respondent's board for more than  
5 three years, although he is currently not a Board member. Because board members'  
6 terms of office are only for one year, Mr. Early compiled a compendium of the board  
7 decisions that were available at the time, dating from approximately 1996, which the  
8 board's current members could consult about prior policies.

9 20. Mr. Early testified that the board did not refer the decision to convert the  
10 basement gym into storage space to the membership for a majority vote.

11 21. Mr. Early testified that the board has a history of repurposing common  
12 elements to better serve the needs of the membership without referring the decisions to  
13 the membership for a majority vote, including the following: (1) To convert the top floor  
14 of the parking garage to a tennis court; (2) To convert a shallow "kiddie pool" into a  
15 social pool that is approximately 4' deep, with benches along the sides; (3) To construct  
16 a separate mailroom, rather than have the mailroom be part of the sales office; and (4)  
17 To convert an area of stair landings for trash pickup after residents could no longer use  
18 the chutes to incinerators.

19 22. At some point, additional spaces on the ground floor were converted to  
20 commercial spaces that were available to lease. Mr. Parente testified that two tenants  
21 formerly occupied the spaces, but failed to pay rent for two years. Respondent finally  
22 evicted the remaining tenant. After the tenant vacated the premises, another tenant  
23 wished to move into its smaller space, leaving space suite 7 vacant.

24 23. Mr. Parente testified Respondent advertised the empty suite 7 on Craigslist  
25 and on a sign outside the building for at least six months, but that Respondent was  
26 unable to lease the space to a new tenant. Mr. Parente testified that although 3 or 4  
27 prospective tenants made inquiries, the Executive Towers is no longer a popular  
28 commercial area and most commercial tenants wish to operate their businesses closer  
29 to downtown, on Portland Place.

30 24. Mr. Parente testified that he was concerned about relying on leased income

1 to supplement assessments from residents because the lease amount per square foot  
2 for the commercial spaces was going down.

3 25. Mr. Parente testified that the amenities of all the comparable high-rise  
4 condominiums and hotels in central Phoenix included gyms or fitness centers. The  
5 price per square foot for units in the Executive Towers was significantly lower than in  
6 comparable properties. Real estate agents, prospective tenants, and prospective  
7 purchasers frequently did not inquire further when they heard that the Executive  
8 Towers did not have a fitness center.

9 26. Mr. Parente testified that he obtained quotes to convert suite 7 into a  
10 fitness center and presented his idea to the board at the May 28, 2015 meeting. The  
11 May 28, 2015 minutes reflect that board members unanimously voted to submit the  
12 issue to membership through a survey, in relevant part was follows:

13 *A motion was duly made and seconded that pending a*  
14 *majority vote of Members returning a survey who support*  
15 *converting Suite 7 to a Fitness Center, to reallocate the use*  
16 *of the north section of Suite 7 into a Fitness Center and*  
17 *enter a two (2) year lease with Fitness4Home (Allstate*  
18 *Capital) for cardio and strength training equipment with lease*  
19 *payments approximately \$702.63/month and a FMV*  
20 *purchase option at the end of the lease capped at*  
21 *approximately \$2,270.04 plus \$329.00 administrative fee.*  
22 *To be included on the ballot a detail of the potential*  
23 *additional monthly cost and the potential loss of a portion of*  
24 *the monthly retail rental income.*<sup>3</sup>

25 27. Mr. Parente testified that Respondent was not required to obtain input from  
26 residents to repurpose suite 7 to a fitness center. Respondent sent out the survey  
27 because at the May 28, 2015 meeting, some residents stated that no one wanted a  
28 fitness center and that only two people had ever gone to the gym that used to be in the  
29 basement of the Executive Towers.

30 28. Ms. Jerzy testified that she has lived at the Executive Towers since 1978  
and has been a member of the board since 2001. Ms. Jerzy testified that when there  
was a gym in the basement, only one tenant and his son used the gym to practice

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<sup>3</sup> Petitioner's Exhibit 4 at 7.

1 karate. Ms. Jerzy testified that although the change from the gym to storage in the  
2 basement did not go to the full membership for a vote, any change in the common  
3 elements should be approved by a vote of a majority of Respondent's members.

4 29. Mr. Griggs testified that he did not see any advertisements for vacant  
5 commercial space in the Executive Towers. Even if Respondent had advertised the  
6 space without success in leasing it, Mr. Griggs testified that membership should have  
7 approved any change in the use of the space.

8 30. Ms. Pollack testified that she regularly attends Respondent's board  
9 meetings. At the May 28, 2015 meeting, several members came forward to tell the  
10 board that it was overstepping its bounds and that assessments were rising due to its  
11 irresponsibility and failure to respond to members' legitimate concerns. Ms. Pollack  
12 testified that the board manipulates the outcome of its votes and meetings. Ms. Pollack  
13 testified that members of the board who do not agree with the board's president are  
14 disrespected.

15 31. Ms. Pollack testified that a fitness center should not be a priority and that  
16 Respondent should not have constructed the fitness center until it could afford  
17 additional improvements. Ms. Pollack acknowledged that she was not aware that  
18 Respondent had advertised and had been unable to lease suite 7 to a commercial  
19 tenant.

20 32. On or about June 4, 2015, the Board distributed a survey to the 160  
21 apartments in the Executive Towers about whether they favored converting a portion of  
22 Suite 7 into a fitness center and explaining the anticipated cost and possible loss of  
23 rental income. Respondent's letter stated, in relevant part, as follows:

24 The included survey was developed for the purpose of  
25 requesting a yes/no vote for adding a fitness center. The  
26 fitness center is a small expense to the Association,  
27 therefore, the Board is soliciting feedback from the owners.

28 The Association has been receiving feedback from the  
29 current owners, potential owners and realtors that a fitness  
30 center is considered a necessity in today's real estate  
market.

- We are the only high rise in Phoenix without a fitness center and fitness centers have become a standard in multi-family complexes and hotels.
- The fitness center is a marketable amenity for owners wishing to sell or rent their units.
- A fitness center located within Executive Towers can reduce outside membership expenses for residents.

The Board has reviewed several proposals from vendors, and selected a proposal that provides commercial quality fitness equipment for the Association. All equipment is covered with a two (2) year or greater equipment warranty. The space under consideration would occupy approximately 600 sq. ft. of vacant retail space (Suite 7) in the west wing of the lobby. This space is one of the most impressive in the building with large north facing windows along Clarendon Ave., and will be equipped with a unisex ADA compliant bathroom. The Board has approved the renovation of this space. Once completed it will be used either as our fitness center or we will continue leasing this space for retail use. Please refer to the enclosed attachments for a listing of the equipment and the fitness center floorplan.

The remaining 270 sq. ft. not converted to a fitness center will remain available for commercial use. The Association has already been contacted by personal trainers and massage therapists expressing interest in renting this space. Having such professionals in the building would add another welcomed and impressive amenity to the Association.

The approximate cost of a two (2) year equipment lease is \$16,900, with an end-of-lease purchase price of approximately \$2,600.00. Based on the square footage reduction of the rental space, we would reduce the expected rental revenue in the budget by approximately \$800.00 a month.

- On average, the combined monthly costs result in approximately \$10 per unit for the first two (2) years.
- After two (2) years, when the lease is paid off the monthly cost will be approximately \$5 per unit.
- There is sufficient surplus in this year's Operating Budget to absorb the cost without an increase in our monthly assessments.

1 Finally, the Association has not been successful in leasing  
2 and/or collecting delinquent rental revenue on our larger  
3 retail spaces, with the two (2) previous tenants of Suite 6  
4 (aka: Caza Market) have been evicted for non-payment of  
5 rent, resulting in the loss of rental revenue for the past  
6 thirteen (13) months. Therefore, retail revenue for the  
7 vacant retail space (Suite 7) is not a guaranteed source of  
8 revenue, but a fitness center will provide a guaranteed  
9 benefit to the residents of Executive Towers.<sup>4</sup>

10 33. The Board next met on June 25, 2015, and reviewed the following general  
11 manager update:

12 **Suite 7 Refurbishment** – The refurbishment began the  
13 week of June 8<sup>th</sup>. To date, the temporary walls and the  
14 flooring was removed. The electrical has been exposed for  
15 upgrades and relocations. There will be some minor  
16 asbestos remediation done the week of June 22nd to allow  
17 for the installation of the new ADA-sized door for the  
18 restroom. Electrical work will also be done the week of June  
19 22nd. Remaining work is on hold pending the approval or  
20 disapproval of the proposed Fitness Center.<sup>5</sup>

21 34. The owners of 97 of the apartments, or 61.8315% of the total number of  
22 possible votes based on the size of the units, returned the survey.<sup>6</sup> The owners of 75  
23 of the responding apartments, or 47.8365% of possible votes based on the size of the  
24 units, favored converting a portion of Suite 7 into a fitness center. The owners of 21 of  
25 the responding apartments, or 13.3375% of possible votes based on the size of the  
26 units, opposed converting a portion of suite 7 into a fitness center.<sup>7</sup>

27 35. After receiving the results of the survey, Respondent completed refurbishing  
28 suite 7 into a fitness center. Mr. Russett testified that Respondent spent about  
29 \$4,000.00 completing the project, which included removing temporary walls that were  
30 not load-bearing, removing a floating floor and placing a rubber floor over the concrete  
floor, which had been jack-hammered and poorly patched sometime in the past,

<sup>4</sup> Respondent's Exhibit 4 at 1-2.

<sup>5</sup> Respondent's Exhibit 8 at 3.

<sup>6</sup> See Respondent's Exhibit 5.

<sup>7</sup> See Respondent's Exhibit 6.

1 installing a television set, installing additional electrical on the exterior wall, and  
2 remodeling the bathroom to be ADA-compliant. No permits were required to repurpose  
3 suite 7 to a fitness center.

4 36. Mr. Griggs testified that the total cost of the fitness center is approximately  
5 \$9,000 per year for two years and that the final payoff for the equipment will be  
6 \$27,000. Mr. Griggs testified that the Board should not have considered repurposing  
7 suite 7 to a fitness center without consulting membership because paragraph 13 of the  
8 CC&Rs requires the membership's approval for a structural alteration and article 4 § 6  
9 of the bylaws require membership approval for a capital expenditure of more than  
10 \$5,000.

11 37. Mr. Griggs testified that paragraph 13 of the CC&Rs and article 4 § 6 of the  
12 bylaws required Respondent to obtain the approval of more than 50% of possible votes  
13 of members before it repurposed suite 7 to a fitness center. Mr. Griggs testified that  
14 even if the survey could be considered a vote, 47.8365% was not a majority.  
15 Respondent's members should have been given a choice of how to spend the money.

16 38. Mr. Russett testified that the alterations to suite 7 were not capital  
17 improvements because Respondent merely converted an existing amenity to another  
18 use, rather than constructing a new amenity, such as construction of a second  
19 swimming pool or installation of solar panels.

20 39. Mr. Parente testified that because the operating budget had a surplus, the  
21 \$4,000 came from the existing budget and did not result in increased assessments.

22 40. Mr. Russett testified that Respondent increased assessments on its  
23 members by 6% during the last year, but that 5% of the increase went to increase the  
24 reserve account and that only 1% went to operating expenses.

25 41. Ms. Jerzy acknowledged that none of the renovations were structural  
26 because they did not affect the structure of the building. Mr. Griggs argued the word  
27 "structural" in paragraph 13 of the CC&Rs may be mental or monetary, not just  
28 physical. Mr. Griggs testified that repairing the subfloor was a structural modification.

29 42. Mr. Parente testified that presently, the fitness center uses 30 towels per  
30 day and that well over 100 people use the fitness center every week.

1 43. Mr. Parente explained that Respondent felt that it was necessary to  
2 repurpose suite 7 to a fitness center during 2015, rather than waiting until all the  
3 residents and owners could be approached for their approval because the space was  
4 not being used efficiently and Respondent owed a fiduciary duty to protect property  
5 values in the Executive Towers.

6 44. Mr. Russett testified that the rent that Respondent would have collected on  
7 the unit if Respondent had been able to find a commercial tenant who actually paid the  
8 agreed-upon rent would have been about \$800/month or \$9,000/year, which Mr.  
9 Russett characterized as “miniscule.” Mr. Russett testified that the benefit to the  
10 building as a whole outweighed the small amount of potential lost revenue.

11 45. Ms. Pollack testified that the suite 7 could have been rented for \$1,200 to  
12 \$1,400 per month and that the construction of the fitness center cost Respondent  
13 \$50,000 to \$60,000 in lost revenue. Ms. Pollack testified that her monthly assessment  
14 was raised \$150/month and that she now pays Respondent a fee of \$920/month, which  
15 she acknowledged includes electricity for her unit.

16 46. Mr. Russett testified that a comparable market analysis showed that the  
17 average price per square foot of the units that had been sold in the Executive Towers  
18 had increased \$16 since the fitness center was opened,<sup>8</sup> in part because the amenity  
19 made units more attractive to purchasers.

20 47. Ms. Jerzy disagreed that Respondent’s role is to increase property values in  
21 the Executive Towers. Ms. Jerzy opined that if Respondent increased monthly  
22 assessments, it has not done its job to represent members, even if property values  
23 increased.

24 **CONCLUSIONS OF LAW**

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

1           2. Mr. Griggs as the petitioner bears the burden of proof to establish that  
2 Respondent violated its CC&Rs or bylaws by a preponderance of the evidence.<sup>9</sup>  
3 Respondent bears the burden to establish affirmative defenses by the same evidentiary  
4 standard.<sup>10</sup>

5           3. “A preponderance of the evidence is such proof as convinces the trier of fact  
6 that the contention is more probably true than not.”<sup>11</sup> A preponderance of the evidence  
7 is “[t]he greater weight of the evidence, not necessarily established by the greater  
8 number of witnesses testifying to a fact but by evidence that has the most convincing  
9 force; superior evidentiary weight that, though not sufficient to free the mind wholly from  
10 all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of  
11 the issue rather than the other.”<sup>12</sup>

12           4. The best and most reliable index of the meaning of a CC&R or a bylaw is its  
13 language and, when the language is clear and unequivocal, it is determinative of the  
14 meaning of the CC&R or bylaw.<sup>13</sup> Each word, phrase, clause, and sentence must be  
15 given meaning so that no part of the CC&R or bylaw will be void, inert, redundant, or  
16 trivial.<sup>14</sup>

17           5. Paragraph 13 of the CC&Rs requires that a majority of members must  
18 approve “structural alterations or additions” to the Executive Towers building. A  
19 “structural alteration” is “[a] significant change to a building or other structure,  
20 essentially creating a different building or structure.”<sup>15</sup> Repurposing suite 7 from a  
21 commercial leased space into a fitness center did not require a permit, did not require  
22 removal of load bearing walls, and did not require the replacement of the subfloor.  
23 Petitioner did not bear his burden to establish that paragraph 13 of the CC&Rs required  
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25 <sup>8</sup> See Respondent’s Exhibit 9 and 10.

26 <sup>9</sup> See A.R.S. § 41-1092.07(G)(2); 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 <sup>10</sup> See A.A.C. R2-19-119(B)(2).

28 <sup>11</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

29 <sup>12</sup> BLACK’S LAW DICTIONARY at page 1220 (8<sup>th</sup> ed. 1999).

30 <sup>13</sup> See *Jansen v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991) (quoted in *Bentivegna*,  
206 Ariz. at 587 ¶ 20, 81 P.3d at 1046).

<sup>14</sup> See *Walker v. City of Scottsdale*, 163 Ariz. 206, 210, 786 P.2d 1057, 1061 (App. 1990) (citing *City of Phoenix v. Yates*, 69 Ariz. 68, 72, 208 P.2d 1147, 1149 (1949); *United States v. Mehrmanesh*, 689 F.2d 822 (9<sup>th</sup> Cir. 1982)).

1 Respondent to obtain the approval of a majority of its members before it repurposed the  
2 former commercial space in suite 7 into a fitness center.

3 6. Article 4, § 6 of Respondent's bylaws prohibited the board from approving  
4 any capital expenditure over \$5,000 without the approval of two-thirds of the total  
5 ownership of the Executive Towers. The terms of the survey stated and Mr. Parente  
6 and Mr. Russett credibly testified that the cost of refurbishing the commercial space  
7 into a fitness center was \$4,000. Because neither Ms. Pollack, Mr. Griggs, nor Ms.  
8 Jerzy appeared to have reliable information about the cost of refurbishment, Petitioner  
9 did not present any credible evidence to impeach Respondent's evidence. Therefore,  
10 Petitioner did not bear his burden to establish that Article 4, § 6 of the bylaws required  
11 Respondent to obtain the approval of the majority of its members before it repurposed  
12 the commercial space into a fitness center.

13 7. A "capital expenditure" is "[a]n outlay of funds to acquire or improve a fixed  
14 asset."<sup>16</sup> Because Respondent leased the fitness equipment, it was not a fixed asset.  
15 Petitioner did not present evidence to controvert that the cost of leasing the fitness  
16 equipment is approximately \$800/month or that the cost of the end-of-lease purchase is  
17 \$2,600, as stated in the survey. Although if the board had elected to purchase the  
18 fitness equipment outright, the cost would have exceeded the \$5,000 capital  
19 expenditure limit, both Arizona statute and the CC&Rs afford broad discretion to the  
20 board to manage and maintain common elements.<sup>17</sup> Because aggregate lease  
21 payments over time is not a capital expenditure, Petitioner did not bear his burden to  
22 establish that Respondent made a capital expenditure over \$5,000 to equip the fitness  
23 center.

### 24 **RECOMMENDED ORDER**

25 In view of the foregoing, it is ORDERED that no action is required of Respondent  
26 in this matter and that the petition is dismissed.

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27 <sup>15</sup> BLACK'S LAW DICTIONARY, *supra*, at 85.

28 <sup>16</sup> *Id.* at 222.

29 <sup>17</sup> See A.R.S. § 33-1242(A)(7) ("Subject to the provisions of the [CC&Rs], the association may . . .  
30 [c]ause additional improvements to be made as a part of the common elements"); see *also* CC&Rs ¶¶  
4.2, 5, 12, and 17.

