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4.

On or about December 28, 2020, Petitioner filed a petition with the Department that alleged that Respondent had violated its Covenants, Conditions, and Restrictions (CC&Rs) § 7.13 because it had not completed a reserve study since 2016. Under CC&R § 7.13, Respondent is required to complete a reserve study every three years. The last reserve study completed by Respondent was in 2016. Petitioner also alleged that Respondent had violated A.R.S. § 33-1258 by failing to provide requested documents within 10 business days. Respondent filed a written answer to the petition, denying that it had violated any CC&Rs or A.R.S. § 33-1258. The Department referred the petition to the Office of Administrative Hearings, an independent state agency, for an evidentiary hearing.

5.

A hearing was held on March 25, 2021.

#### HEARING EVIDENCE

6.

Ms. Merkle testified that Respondent failed to provide the documents that she requested and failed to conduct a reserve study in compliance with CC&R 7.13. Ms. Merkle provided no other testimony.

7.

Respondent presented the testimony of Community Manager Becky Stowers and Respondent's attorney, Kelly Oetinger. Ms. Stowers and Ms. Oetinger explained that Respondent provided the documents requested by Ms. Merkle which were in its possession at the time her requests. It is undisputed that Respondent has not completed a reserve study since 2016. However, Ms. Stowers testified that Respondent has completed many repairs since 2016. Ms. Stowers that Respondent has made repairs and replacements in many of the categories listed on the 2016 reserve study with the exception of plant replacement, granite replenishment, and Respondent has not yet full replaced the pool equipment. Ms. Stowers stated that the fences, walls, gates and lighting has not become due. Ms. Stowers also testified that it would not be cost effective to complete a reserve study at this time.

1 9. Sections 7.13 of the CC&Rs provided in relevant part as follows:

2 **Reserves.** ..... After the termination of the Period of  
3 Declarant Control, the Board of Directors shall obtain a  
4 reserve study at least once every three years, which study  
5 shall at a minimum include (a) identification of the major  
6 components of the Common Elements which the Association  
7 is obligated to repair, replace, restore, or maintain which, as  
8 of the date of the study, have a remaining useful life of less  
9 than thirty (30) years; (b) identification of the probable  
10 remaining useful life of the identified major components as of  
11 the date of the study; (c) an estimate of the cost of repair,  
12 replacement, restoration, or maintenance of the identified  
13 major components during and at the end of their useful life;  
14 (d) an estimate of the total annual contribution necessary to  
15 defray the cost to repair, replace, restore, or maintain the  
16 identified major components during and at the end of their  
17 useful life after subtracting total reserve funds as of the date  
18 of the study. The Board of Directors shall modify the budget  
19 in accordance with the findings of the reserve study.

20 . . . . .

21 **CONCLUSIONS OF LAW**

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

26 2. Petitioner bears the burden of proof to establish that Respondent violated the  
27 CC&Rs by a preponderance of the evidence.<sup>1</sup> Respondent bears the burden to establish  
28 affirmative defenses by the same evidentiary standard.<sup>2</sup>

29 3. "A preponderance of the evidence is such proof as convinces the trier of fact  
30 that the contention is more probably true than not."<sup>3</sup> 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

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<sup>1</sup> 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).

<sup>2</sup> See A.A.C. R2-19-119(B)(2).

<sup>3</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable  
2 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather  
3 than the other.”<sup>4</sup>

4 4. It is undisputed that Respondent has not completed a reserve study since  
5 2016.

6 5. Petitioner failed to establish that Respondent failed to provide copies of  
7 documents or access to records that Respondent had within its possession within 10  
8 business days of Petitioner’s requests.

9 6. Petitioner has not established the merits of the petition that she filed with the  
10 Department against Respondent regarding an alleged violation of A.R.S. § 33-1258.

11 7. The preponderance of the evidence shows that Respondent did not complete  
12 a reserve study as required under CCR § 7.13.

13 **ORDER**

14 **IT IS ORDERED** that Petitioner be deemed the prevailing party in this matter  
15 regarding the violation of CC&R 7.13 charged in her petition.

16 **IT IS FURTHER ORDERED** that Respondent shall fully comply with CC&R 7.13  
17 in the future.

18 **IT IS FURTHER ORDERED** that Respondent pay Petitioner her filing fee of  
19 \$500.00, which constitutes one-half (1/2) of her filing fee of One Thousand dollars  
20 (\$1,000.00), to be paid directly to Petitioner within thirty (30) days of this Order.

21 **IT IS FURTHER ORDERED** that in all other respects, the petition is denied.

22 **NOTICE**

23 **Pursuant to A.R.S. § 32-2199.02(B), this Order is binding on the parties**  
24 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S.**  
25 **§ 41-1092.09, a request for rehearing in this matter must be filed with the**  
26 **Commissioner of the Department of Real Estate within 30 days of the service of**  
27 **this Order upon the parties.**

28 Done this day, April 14, 2021.

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30 <sup>4</sup> BLACK’S LAW DICTIONARY at page 1220 (8<sup>th</sup> ed. 1999).

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/s/ Velva Moses-Thompson  
Administrative Law Judge

Transmitted electronically to:  
Judy Lowe, Commissioner  
Arizona Department of Real Estate