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No. 20F-H2020054-REL

**ADMINISTRATIVE LAW JUDGE
DECISION**

APPEARANCES: Petitioner Jean Williams appeared on her own behalf. Independent Surprise Farms II Community Association was represented by Nick Nogami.

FINDINGS OF FACT

2. On or about March 31, 2020, Jean Williams (Petitioner) filed a Homeowners Association (HOA) Dispute Process Petition (Petition) with the Arizona Department of Real Estate (Department) alleging that Respondent had violated the provisions of A.R.S. § 33-1803 and Article VII, Section 7.2 and 7.4(a)-(c) of the CC&Rs. Petitioner's statement of the issue provided, in pertinent part, as follows:

All errors in original.

1

1 4. At hearing, Petitioner testified on her own behalf. Respondent did not
2 present any witnesses and relied on its legal argument.

3 5. Respondent stipulated that effective April 2019, the Annual Assessment
4 increased from \$660.00 a year to \$720.00 a year, a nine percent increase from the
5 previous Annual Assessment, and that this increase occurred without any vote of the
6 members.

7 6. Respondent also stipulated that effective April 2020, the Annual
8 Assessment increased from \$720.00 a year to \$864.00 a year, a twenty percent increase
9 from the previous Annual Assessment, and that this increase occurred without any vote of
10 the members.

11 7. Petitioner argued that the Annual Assessment could not be increased
12 twenty percent in one year without a vote of the members as outlined in Article VII, Section
13 7.4 of the CC&Rs.

14 **CONCLUSIONS OF LAW**

15 1. The Department has jurisdiction to hear disputes between a property owner
16 and a homeowners association. A.R.S. § 32-2199 *et seq.*

17 2. In this proceeding, Petitioner bears the burden of proving by a
18 preponderance of the evidence that Respondent violated Article VII, Section 7.2 and 7.4
19 of the CC&Rs and A.R.S. § 33-1803(A). A.A.C. R2-19-119.

20 3. A preponderance of the evidence is “[t]he greater weight of the evidence, not
21 necessarily established by the greater number of witnesses testifying to a fact but by
22 evidence that has the most convincing force.” BLACK’S LAW DICTIONARY 1220 (8th ed. 2004).

23 4. A.R.S. § 33-1803(A) provides, in pertinent part, as follows:

24 Unless limitations in the community documents would result in a lower limit
25 for the assessment, the association shall not impose a regular assessment
26 that is more than twenty percent greater than the immediately preceding
27 fiscal year’s assessment without the approval of the majority of the
28 members of the association.

29 5. Respondent’s CC&Rs were recorded in 2003 and contained Article VII,
30 Section 7.4 that provided as follows:

Maximum Annual Assessment. The Annual Assessment to be established by the Board may not exceed a certain amount, hereinafter referred to as the "Maximum Annual Assessment, which Maximum Annual Assessment shall be determined and shall vary in accordance with the following provisions:

- (a) Until January 1 of the year following the Recordation of the first Tract Declaration, the Maximum Annual Assessment against each Owner shall be Four Hundred Eighty dollars (\$480) per Membership.
- (b) Commencing with the year immediately following Recordation of the first Tract Declaration, and continuing each succeeding year thereafter, the Maximum Annual Assessment shall be increased effective January 1 of each such year without a vote of the Membership by . . . ten percent (10 %) . . . , but in no event greater than the maximum increase allowed under A.R.S. § 33-1803(A) if such statute is then effective. . . .¹
- (c) From and after January 1 of the year immediately following the recordation of the first Tract Declaration, the Maximum Annual Assessment shall be increased above the Maximum Annual Assessment otherwise determined under Subsection (b) above by a vote of two-thirds (2/3) of each class of Members who are voting in person or by proxy at a meeting duly called for such purpose.

6. Using the annual ten percent increase in the Maximum Annual Assessment set forth in Article VII, Section 7.4 of the CC&Rs, the Maximum Annual Assessment in each year from 2003 through 2020 was as follows:

2003.....	\$480.00
2004.....	\$528.00
2005.....	\$580.80
2006.....	\$638.88
2007.....	\$702.76
2008.....	\$773.03
2009.....	\$850.33
2010.....	\$935.36
2011.....	\$1028.89
2012.....	\$1131.77
2013.....	\$1244.94
2014.....	\$1369.43
2015.....	\$1369.43
2016.....	\$1657.00
2017.....	\$1822.70
2018.....	\$2004.97

¹ The CC&Rs include an alternative means of determining the annual increase in the Maximum Annual Assessment relating to the Consumer Price Index, which was not employed during the relevant time period.

2019.....\$2205.46
2020.....\$2426.00

7. Article VII, Section 7.2 of the CC&Rs provided as follows:

Annual Assessments. In order to provide for the uses and purposes specified in Article IX hereof, including the establishment of replacement and maintenance reserves, the Board in each year, commencing with the year in which the first Tract Declaration is recorded, shall assess against each Lot and Parcel which is Assessable Property an Annual Assessment The amount of the Annual Assessment, subject to the provisions of Section 7.4 hereof, shall be in the sole discretion of the Board but shall be determined with the objective of fulfilling the Association's obligations under this Declaration and providing for the uses and purposes specified in Article IX.

8. "Annual Assessment" is defined in the CC&Rs to mean "the charge levied and assessed each year against each Lot and Parcel pursuant to Article VII, Section 7.2 hereof."

9. The provisions of Article VII, Section 7.4 of the CC&Rs provided that the Maximum Annual Assessment automatically increased ten percent every year. Accordingly, at the time of the April 2020 increase in the Annual Assessment, the Maximum Annual Assessment was \$2426.00 per year.

10. The provisions of Article VII, Section 7.2 of the CC&Rs provided that the Board had the sole discretion to increase the Annual Assessment, so long as it was within the limitation of the Maximum Annual Assessment determined above.

11. A.R.S. § 33-1803(A) limited the increase in the Annual Assessment in any given year to twenty percent without a vote of the members.

12. In this matter, Respondent increased the Annual Assessment by twenty percent effective April 2020. This Annual Assessment was less than the Maximum Annual Assessment of \$2426.00 for 2020 and was within the limitation set forth in A.R.S. § 33-1803(A).

13. Accordingly, Petitioner failed to establish that Respondent improperly increased the Annual Assessment from \$720.00 per year to \$864.00 per year.

1 14. Petitioner's assertion that Respondent could not increase the Annual
2 Assessment by twenty percent was predicated on her erroneous reading of Article VII,
3 Section 7.4 of the CC&Rs. Petitioner repeatedly asserted that an increase in the Annual
4 Assessment was limited to ten percent in any given year unless approved by a vote of the
5 members even though Article VII, Section 7.4 was entitled Maximum Annual Assessment
6 and consistently referenced the same. By definition, the existence of a Maximum Annual
7 Assessment necessitates an Annual Assessment that may be less than the maximum.

8 15. Therefore, this Tribunal concludes that Respondent did not violate the
9 referenced provisions of the CC&Rs or the provisions of A.R.S. § 33-1803(A).

10 **ORDER**

11 **IT IS ORDERED** that Petitioner's petition is dismissed.

12 **NOTICE**

13 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the**
14 **parties unless a rehearing is granted pursuant to A.R.S. § 32-**
15 **2199.04. Pursuant to A.R.S. § 41-1092.09, a request for rehearing in**
16 **this matter must be filed with the Commissioner of the Department of**
17 **Real Estate within 30 days of the service of this Order upon the parties.**

18 Done this day, July 30, 2020.

19 /s/ Tammy L. Eigenheer
20 Administrative Law Judge

21
22 Transmitted electronically to:

23 Judy Lowe, Commissioner
24 Arizona Department of Real Estate