IN THE OFFICE OF ADMINISTRATIVE HEARINGS

William M Brown, Petitioner, v. Terravita Country Club, Inc., Respondent.	**No. 18F-H1817004-REL** **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: January 31, 2018, at 8:30 a.m.

APPEARANCES: William H. Brown ("Petitioner") failed to appear; Terravita County Club, Inc. ("Respondent") was represented by Michael H. Orcutt, Esq., Lipson Neilson, P.C.

ADMINISTRATIVE LAW JUDGE: Diane Mihalsky

FINDINGS OF FACT

1. The Arizona Department of Real Estate ("the Department") is authorized by statute to receive and to decide Petitions for Hearings from members of homeowners' associations and from homeowners' associations in Arizona.

2. Respondent is a homeowners' association whose members own properties in the Terravita Country Club development.

3. Petitioner currently owns or formerly owned a home in and is or was a member of Respondent.

4. On or about August 30, 2017, Petitioner filed a single-issue petition with the Department that alleged that Respondent had violated A.R.S. § 33-1803 by failing to provide proper notice to Petitioner of several alleged violations of Respondent's Covenants, Conditions, and Restrictions.

5. Respondent filed a written answer to the petition, denying that it had violated A.R.S. § 33-1803 and affirmatively alleging that it had provided proper notice of Petitioner. The Department referred the petition to the Office of Administrative Hearings ("OAH"), an independent state agency, for an evidentiary hearing.

6. On October 2, 2017, the Department issued a Notice of Hearing, setting a hearing before OAH on November 24, 2017. The Department sent the Notice of Hearing to Petitioner at the address on his petition, 6751 E. Amber Sun Dr., which was his home in Terravita Country Club.

7. On October 13, 2017, Respondent's attorney filed a motion to continue the hearing to resolve a conflict in his calendar. On October 16, 2017, the Administrative Law Judge assigned to the case ("ALJ") issued an order continuing the hearing to December 15, 2017. The order was sent to Petitioner at his address of record.

8. On November 27, 2017, Petitioner filed a motion to continue the December 15, 2017 hearing because he had medical procedures scheduled and because he planned to spend the holidays in Texas with his family and friends. On December 1, 2017, the ALJ issued an order continuing the hearing to January 31, 2018. The order was sent to Petitioner at his address of record.

9. On December 11, 2017, Petitioner filed a second motion to continue because certain related cases between the parties were pending in Maricopa County Superior Court and settlement negotiations allegedly were ongoing.

10. Petitioner's December 11, 2017 motion also stated that he and his partner had entered into a contract on November 14, 2017 to sell their home at 6751 E. Amber Sun Dr., Scottsdale, Arizona and that they planned to return to Texas on or before December 31, 2017.

11. On December 14, 2017, the ALJ denied Respondent's second motion to continue, reminding the parties that a hearing would be held on January 31, 2018. The December 14, 2017 order was sent to Petitioner at his address of record.

12. A hearing was held on January 31, 2018. Respondent appeared through its attorney and was prepared to present the testimony of its party representative and witness.

13. Petitioner did not request to appear telephonically at the continued hearing and did not request that the hearing be continued a third time. Although the start of the duly noticed hearing was delayed seventeen minutes to allow Petitioner additional travel time, Petitioner did not appear, personally or through an attorney, and did not contact

OAH to request that the start of the hearing be further delayed. Consequently, Petitioner did not present any evidence to prosecute the petition that he had filed with the Department.

CONCLUSIONS OF LAW

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

2. The December 1, 2017 order continuing the hearing at Petitioner's request that OAH mailed to Petitioner at his address of record was reasonable he is deemed to have received notice of the January 31, 2018 continued hearing.[1]

3. Petitioner bears the burden of proof to establish that Respondent violated A.R.S. § 33-1803 by a preponderance of the evidence.[2] "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."[3]

4. Petitioner's failure to appear at the hearing that was continued at his request or to present any evidence to establish the merits of his petition precludes any finding that Respondent violated A.R.S. § 33-1803. Therefore, Petitioner's petition should be dismissed.

RECOMMENDED ORDER

In view of the foregoing, it is ORDERED that Petitioner's petition in this matter is denied.

Pursuant to A.R.S. § 32-2199.02(B), this Order is binding on the parties unless a rehearing is granted pursuant to A.R.S. § 32-2199.04 based on a petition setting forth the reasons for the request for rehearing, in which case the order issued at the conclusion of the rehearing would be binding on the parties.

Done this day, January 31, 2018.

/s/ Diane Mihalsky

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[1] *See* A.R.S. §§ 41-1092.04; 41-1092.05(D).
[2] *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).
[3] MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate