

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2 Gregory L. Czekaj,
3 Petitioner,

No. 19F-H1918040-REL

4 v.
5 Colonia Del Rey HOA, Inc.,
6 Respondent.

7 and

No. 19F-H1919054-REL

8 Colonia Del Rey HOA, Inc.,
9 Petitioner.

10 v.
11 Gregory L. Czekaj,
12 Respondent.

**ADMINISTRATIVE LAW JUDGE
DECISION**

13 **HEARING:** June 14, 2019.

14 **APPEARANCES:** Gregory L. Czekaj appeared on his own behalf. Colonia Del
15 Rey HOA, Inc. was represented by its President, Marybeth Andree.

16 **ADMINISTRATIVE LAW JUDGE:** Kay Abramsohn

17 **FINDINGS OF FACT**

18 1. The Arizona Department of Real Estate (“the Department”) is authorized by
19 statute to receive and to decide Petitions for Hearings from members of home owners’
20 associations in Arizona.

21 2. Established in 1984, Colonia Del Rey HOA, Inc. (hereinafter, “HOA” or
22 “Respondent” in both cases) is comprised of nine (9) homes on a private road in
23 Tucson, Arizona. The HOA has common areas and a Ramada, but has no pool and
24 has no HOA office. The HOA Board is comprised of elected volunteers.

25 3. Gregory L. Czekaj (hereinafter, “Petitioner” in both cases) purchased his
26 home in the HOA in March 2017.

27 4. On or about December 20, 2018, Petitioner filed three separate single-issue
28 petitions with the Department.¹

29
30 ¹ The complaints herein were numbered by the Tribunal for purposes of the hearing.

1 5. Complaint ONE contains the following issue to be determined: Petitioner
2 alleges that the HOA failed to provide records he had requested, in violation of A.R.S. §
3 33-1805.²

4 6. In Minute Entry dated May 16, 2019, the Tribunal reminded Petitioner that
5 Complaint ONE would be limited to record requests he had made prior to the filing of
6 the Complaint.

7 7. Complaint TWO contains the following issue to be determined: Petitioner
8 alleges that the HOA's May 6, 2017 five dollar fee increase was invalid due to the
9 allowance of a proxy vote, in violation of the HOA rules and A.R.S. § 33-1812(A).

10 8. Complaint THREE contains the following issue to be determined: Petitioner
11 alleges that the HOA failed to give a ten-day notice for a meeting to be held on
12 November 18, 2018 to vote on amendments to the HOA By-Laws, in violation of A.R.S.
13 § 33-1804(B).³

14 9. The Department consolidated the petitions and referred those three petitions
15 to the Office of Administrative Hearings, an independent state agency, for an evidentiary
16 hearing.

17 10. On or about March 29, 2019, HOA filed a single-issue petition.⁴ The HOA
18 alleged that Petitioner had violated Sections 6.1, Section 7.1, and 9.2 of the HOA
19 Bylaws by exceeding his rights and authorities as a member of the HOA, to wit,
20 misrepresenting himself to be an officer of the HOA in order to obtain information.

21 11. The parties subsequently requested that the Petitioner's complaints and the
22 HOA complaint be consolidated for one administrative hearing.

23 12. At hearing, Petitioner presented thirty-three exhibits, designated as Exhibits
24 1 through 33, regarding the three petitions, and he testified on his own behalf.

25 13. At hearing, HOA presented sixteen exhibits, designated as Exhibits A
26 through P, and Ms. Andree testified on behalf of the HOA.

27 ² The statute requires that a member be allowed a review of records within 10 business days; the statute
28 does not require that an HOA provide copies at no cost. Many document requests these days are fulfilled
29 with electronic documents, presumably previously scanned, so that a cost may not necessarily be
30 involved.

³ Each petition had been presented to the Department with labeled attachments. However, the
documents considered in this matter consist of the filed petitions themselves, the HOA responses, and the
documents admitted to the hearing record.

⁴ For purposes of the administrative hearing, this complaint is designated "Complaint Four."

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COMPLAINT ONE

14. On April 21, 2018, Petitioner requested “to review any and all [HOA] documents including all organizational, business, corporate and financial records that the CDR/HOA has.”⁵ See Exhibit 4.

15. On May 2, 2018, Ms. Andree responded, asking Petitioner to narrow his request indicating that the “request is burdensome.”⁶ *Id.*

16. On May 6, 2018, Petitioner clarified he wanted to “start” with “all the organizational and corporate documents, which includes policies and procedures.” See Exhibit 5. He also noted that this should include digital and paper documents.

17. On May 14, 2018, Ms. Andree emailed Petitioner documents. *Id.*

18. On May 22, 2018, Petitioner responded: “Thanks Marybeth. Are there not more documents? Greg.” *Id.* At hearing, Petitioner argued that he felt the HOA was “withholding” documents from him.

19. On May 25, 2018, Ms. Andree listed the documents she had provided on May 14, 2018, as follows: CDR Articles [of Incorporation]; CDR Bylaws; CDR CC&Rs; and, CDR Rules and Regs. *Id.*

20. On May 25, 2018, Petitioner responded “thank you.” *Id.* At this point, Ms. Andree presumed that the request was fulfilled. However, at hearing, Petitioner argued that they had not provided the new Articles of Incorporation, which he indicated he had to obtain from the state at a cost of \$54.00.⁷

21. On November 13, 2018, Petitioner requested “financial books and records since the date I purchased my property ... under ARS 33-1805(A) from the time I closed escrow to the present”.⁸ See Exhibit 1.

22. On November 14, 2018, Petitioner contacted his attorney. See Exhibit 7.

⁵ Emphasis added here.

⁶ Additionally, Ms. Andree requested that Petitioner not use her work email to contact her but to use a different address; she reminded him again in November 2018.

⁷ At hearing, Petitioner stated that they had not provided the “revocation” of the old articles [a revocation for failure to file an annual report]. See Exhibit 11.

⁸ Petitioner further stated that the HOA had “denied all my requests.” However, this was incorrect, as the HOA had responded in May and had provided clarified requested documents. See Exhibit 5.

1 23. On November 14, 2018, Petitioner's attorney contacted the HOA's attorney,
2 requesting her to ensure that Petitioner *received* the documents within 10 days. See
3 Exhibit 8. He listed out various types of documents: as follows: *copies* of "all
4 association financials, balance sheets, bank statements, tax returns, audited and
5 otherwise, corporate records, minutes of meetings, books and records that have not
6 already been provided." *Id.*

7 24. On November 19, 2018, the HOA advised Petitioner that he could review
8 the records at the Ramada on November 23, 2018. *Id.* In response, first, Petitioner
9 wanted to know about more time for the review and, the next day, he indicated to the
10 HOA that he wanted to "have copies of reviewed documents" and he requested to meet
11 at one of several particular places so that he could make and pay for the copies. See
12 Exhibits 1 and 9.

13 25. The HOA and Petitioner met on November 23, 2018 for over two hours.

14 26. At that time, Petitioner refused to sign off on a review statement indicating
15 that he had already received certain documents and that, at that date, he was reviewing
16 certain documents.⁹ See Exhibit F. At hearing, Ms. Andree indicated that he had
17 wanted to see a "bank activity report" which was not a type of record that the HOA kept
18 (*i.e.*, created).

19 27. On November 23, 2018, while at the records review, Petitioner hand wrote a
20 request for "all financial and other records of the [HOA] from 1984 to the present,"
21 noting that he also wanted copies at 15 cents per page, a cost that he would reimburse.
22 See Exhibit 10. However, at hearing, Ms. Andree indicated that Petitioner did not give
23 her that handwritten request at the records review (indicating instead that he had
24 informed her that he would email his request to the Board¹⁰); she further noted that,
25 during the records review, Petitioner had not requested any particular copies.¹¹

26
27 ⁹ The review form contains a section in which a member may specify that he would like to purchase a
28 copy of a particular document; the HOA is permitted to charge 15 cents per page and must be reimbursed
29 when the copies are delivered. A.R.S. § 33-1805(A) specifies that, on a request to purchase copies, an
30 HOA has ten days to make the copies and that the HOA may charge a fee for making the copies of up to
15 cents per page.

¹⁰ See Exhibit F.

¹¹ See HOA response to Petitioner's complaints, Administrative Record.

1 28. On November 26, 2018, Petitioner's attorney, Gary Wolf, contacted the
2 HOA's attorney, Carolyn Goldschmidt, indicating that the records review was "not
3 complete."¹² See Exhibit G. Mr. Wolf mentioned the 2017 federal and state HOA
4 returns, indicating that Ms. Andree had indicated those were kept by the CPA and he
5 requested that those be forwarded to Petitioner. Mr. Wolf mentioned that "bills" of the
6 HOA should have been included, such as for the landscapers. He mentioned that Ms.
7 Andree had indicated something about some records having already been shredded,
8 and he requested that Ms. Goldschmidt explain "record-keeping" requirements to the
9 HOA. Mr. Wolf mentioned that Ms. Andree had told Petitioner that he would need to
10 make a special request for "copies" for her to take to the Board.¹³ He advised that they
11 would be entitled to attorney's fees "if Petitioner does not receive all requested records,
12 *including an opportunity to photocopy those records, ... a request for production of*
13 *records is basic and primary and has always been protected by the courts.*" Emphasis
14 added here.

15 29. In response, on November 30, 2018, Ms. Goldschmidt noted Petitioner had
16 asked for a tax "statement" and the HOA had not realized he wanted a copy of a tax
17 "return" when they had provided the County tax statement to him. See Exhibit G. She
18 indicated that, pursuant to A.R.S. § 33-1812(A)(7), the ballots on May 6, 2017 votes had
19 been shredded after the requisite one year period had elapsed. Ms. Goldschmidt
20 provided attachments to her response with "the remaining records that [Petitioner] has
21 requested to review, including copies of the tax returns and the expense invoices."¹⁴

22 30. At hearing, Petitioner argued that, at the records review, he did not receive a
23 copy of the "tax return" (which he later received). Petitioner further indicated that he
24 had only received an invoice for the HOA insurance policy.¹⁵ See Exhibit 12.

25
26 ¹² The hearing record does not document whether either of these attorneys were present at the records
27 review session.

28 ¹³ Petitioner's attorney felt that such action (a refusal to go to a copy shop to make copies) was "not within
29 the spirit, nor letter, of the law under A.R.S. 33-1805." However, the law mandates access and review,
30 and allows an HOA ten days for the HOA to make copies when copies are requested.

¹⁴ Neither party provided to the hearing record a copy of either attachment, or a list of the documents so
attached, to her letter to Petitioner's attorney.

¹⁵ After that records review meeting, Petitioner did contact the HOA insurance agent, Mr. Tick, in his
efforts to obtain a copy of the insurance policy.

Petitioner's overall argument as to records was that the HOA "withheld" information, to which he is legally entitled, from him.

31. At hearing, Ms. Andree indicated that they presumed the April 2018 records request had been satisfied with the May 2018 disclosure when Petitioner had responded "Thank you." Ms. Andree indicated that the state tax return was not completed at the time of the records review and was not actually done until April of 2019. As to the insurance policy, she indicated that Petitioner had asked for "financial books and records" in November 2018, they had not believed an insurance policy was a part of such requested records. Overall, Ms. Andree noted that the HOA believed they responded appropriately to the records requests when the requests were specified, and that Petitioner since had also been provided copies electronically at no cost.

COMPLAINT TWO

32. The agenda for the Annual Meeting (held on May 6, 2017) indicated that a vote would be taken on a proposal to increase the members' Assessments by "up to \$5 per month." See Exhibit 18. If the proposal passed, the assessment would increase from \$75.00 per month to \$80.00 per month. See Exhibit 19. However, the agenda also erroneously stated that six (6) of nine (9) votes were needed to approve an increase.

33. Petitioner argued that the original vote had been 5 YES and 1 NO, and that a proxy vote had been used to bring the YES votes to 6 for the fee increases to be made.¹⁶ Petitioner argued that A.R.S. § 33-1812(A) and the HOA's own policy on Absentee Ballots, Resolution 20140315-01, prohibit proxy voting. See Exhibit 17.

34. The amended minutes for the meeting provide further explanation for the events of the Annual Meeting than do the original minutes.¹⁷ See Exhibit 21. When a vote was taken on the increase in the assessments, the count was noted as 5 YES votes and 1 NO vote. At that point, one member, a former president of the HOA, had asked another member if she wanted to cast Mr. Freeman's proxy vote on file, and she

¹⁶ Petitioner had a concern that the original tabulation of the votes was not available at this time for his review; it appears that this concern was related to his concern that the minutes from the meeting were incorrect. The prior tabulation document had been destroyed under the HOA one-year record retention policy.

¹⁷ It is noted that Ms. Andree was the Secretary of the HOA and she wrote the minutes; it appears they were amended based on Petitioner's July 2017 inquiry into the vote.

1 agreed to do so.¹⁸ Thus, the result of the vote taken on that day became 6 YES votes
2 and 1 NO vote, and the HOA determined that the proposal had passed and the
3 Assessments were revised.¹⁹

4 35. At a Board meeting on July 15, 2017, Petitioner questioned the counting of
5 those Assessments' votes; Petitioner's belief was that the final vote was really 5 YES
6 and 1 NO.²⁰

7 36. The amended Annual Meeting minutes indicate the following:

8 Note: Due to questions regarding the vote cast for Ed
9 Freeman by Proxy Sarah Hitch, the board reviewed and
10 determined the change in Arizona State Law prohibiting the
11 use of Proxy votes. Further review of the HOA controlling
12 documents indicated passage of the Assessment actually
13 required two-thirds (2/3) of the votes cast, not two-thirds
14 (2/3) of the members vote as the ballot incorrectly stated.
15 *The final result of the votes cast was 5 YES votes and 1 NO*
16 *vote, there were more than 2/3 of the 6 votes, or 4 YES*
17 *votes, so the decision to pass the proposal to increase the*
18 *assessment stands. Phil provided email clarification²¹ to all*
19 *members [Emphasis added here.]*

20 37. At hearing, Petitioner also relied on the Article IV of the CC&Rs, Section 8,
21 Special Assessments for Capitol Improvements, and Section 9, Notice and Quorum for
22 Any Action Authorized under Section 5 and 8 for his argument that the \$5.00 fee
23 increase had required a certain quorum.

24 38. Article IV of the CC&Rs, Section 5(b) and (f), together, provide that 2/3 of
25 the votes who are voting (*i.e.*, of the votes cast) is required to pass annual assessments
26 *in excess of* the maximum amount of an increase (*i.e.*, ten percent over the prior years'
27 annual assessment).²²

28 ¹⁸ On further reflection by the former president, it turned out that (a) proxy votes were not properly allowed,
29 and (b) Mr. Freeman was a tenant, who was not eligible to vote. See Exhibit 26, Mr. Oliver's letter of
30 explanation and apology to Petitioner as to the confusion surrounding the vote at the meeting.

¹⁹ A copy of the proposal for the increases is found in Exhibit 19.

²⁰ See Exhibit 25, Phil Oliver's letter regarding the irregularity that had occurred.

²¹ The email clarification is found at Exhibit 25.

²² See Exhibit 16.

39. Article IV of the CC&Rs, Section 8, provide that 2/3 of the votes who are voting (*i.e.*, of the votes cast) is required to pass special assessments for capitol improvements.

40. Article IV of the CC&Rs, Section 9, provides a “quorum” is met with the presence of members entitled to cast fifty percent (50%) of the votes.²³

41. At hearing, the HOA position was that, based on the Article IV of the CC&Rs, Sections 5(f), 8, and 9, there was a quorum of more than 50% of the members present and that, with the six members present voting (and not including any “proxy”), a vote of 5 YES and 1 NO was a 2/3 vote in favor of the increases in the assessments.

COMPLAINT THREE

42. Petitioner argued, based on a November 5, 2018 receipt he alleged was for the copies made of the ballot (a 15 page document), that nine full copies of the meeting notice/ballot to vote to amend the HOA Bylaws were not made and, therefore, 9 ballots could not have been “mailed” or “hand-delivered” to the nine members on that date.²⁴ See Exhibit 28. Petitioner further argued that the notices were not picked up by the postal service until November 6, 2018 and that he had “received” his notice on Friday, November 9, 2018, which was only nine (9) before the meeting on November 18, 2018. Petitioner argued that the [new] Bylaws were not valid due to these issues.

43. A.R.S. § 33-1804(B), in pertinent part, provides that “not fewer than ten ... days in advance” of a meeting, the HOA secretary shall “cause notice to be hand-delivered **or** sent prepaid by [U.S.] mail to the mailing address designated in writing by a member.” Emphasis added here.

44. The hearing record demonstrates that the ballots were mailed on November 5, 2018 by the then HOA secretary, Susan Sotelo. See Exhibits 30 and 32. The hearing record further demonstrates that the meeting notice package was also emailed to the members on November 4, 2018. See Exhibit 32.

²³ While the provision also mentions “classes” of membership, there is no indication in the hearing record that more than one type of membership existed at the time.

²⁴ Petitioner noted that one person, Ed Freeman, who lives in Oregon, had not been “mailed” a meeting notice and ballot, but had only received it by email.

1 45. The hearing record demonstrates that the mailing to Ed Freeman in Oregon
2 was returned by the postal service.²⁵ See Exhibit K.

3 46. At hearing, the HOA position was that the statute does not require that the
4 meeting notice be “received” within a time frame, only that the HOA cause notice to be
5 made within a time frame. Ms. Andree also noted that A.R.S. § 33-1812(A), in pertinent
6 part, provides that absentee ballots are acceptable and that the HOA may allow
7 absentee voting to be cast by email. Finally, Ms. Andree noted that A.R.S. § 33-
8 1804(B) provides that a failure of a member to receive the “actual notice” does not affect
9 the validity of actions taken at the meeting.

10 **DOCKET 19F-H1919054-REL**

11 **COMPLAINT FOUR**

12 47. In February 2019, Petitioner contacted the HOA’s insurance agent’s office to
13 attempt to have a meeting with the agent and to obtain a copy of the HOA insurance
14 policy, a Directors and Officers Liability policy. Mr. Tick subsequently notified an HOA
15 officer, telling her to tell Petitioner to go through the Board to obtain a copy.

16 48. At hearing, Mr. Tick explained that State Farm, the insurance company owns
17 the contract with the HOA. Mr. Tick indicated that, at the time he was contacted by
18 Petitioner, he was unaware whether Petitioner was legally authorized to have a copy.
19 Finally, Mr. Tick indicated that he became aware that Petitioner wanted it so he could go
20 against the HOA regarding the \$5.00 fee increase.

21 49. In February 2019, Petitioner went to the Internal Revenue Service office,
22 asking about the HOA information and the HOA taxpayer identification number (“TIN”).²⁶

23 50. At hearing, Petitioner argued that his requests for information were being
24 shot down and that he had “every legal right” to get certain information.²⁷ Petitioner

25 ²⁵ See also Exhibit 29.

26 ²⁶ Regarding “information (i.e., records), his position was that there should be “no redaction” of an
27 insurance policy number or a TIN; this was not an issue within his petitions. Ultimately, Petitioner’s
28 purpose for requesting the TIN was so that he could take the TIN and go back to the “Department of
29 Revenue” to see if the HOA had ever filed a tax return. Audio Hearing Recording at 3:11:30 – 3:12:04.

30 ²⁷ This was an oft-repeated argument at the hearing in combination with a statement that the HOA had not
given him the information. Additionally, during this portion of the hearing, Petitioner continued to present
his multiple and various grievances against the HOA Board, its actions, inactions, or past actions.
However, with the exception of the requests for records and responses thereto, Petitioner’s grievances
about alleged Board mismanagement, a demand for an investigation thereof, and a need for a “full
accounting,” are simply not the subject of this hearing.

1 stated that he had “not impersonated anyone” and indicated that he told the IRS he was
2 a homeowner and he gave his driver’s license to the IRS employee and, therefore, the
3 IRS knew who he was when they gave him the TIN.²⁸ Petitioner argued that the HOA
4 petition and the police report were retaliation for his requests for information that he is
5 “legally entitled to receive.”

6 51. Petitioner argued that he has authority to call vendors or the IRS based on
7 Article XII, Section 1 and Article XIV, Section 1 of the CC&Rs, which indicate,
8 respectively, that the “affairs” of the HOA “shall be conducted by the [HOA],” and that
9 the HOA, “or any Owner shall have the right to enforce, by any proceeding at law or in
10 equity, all restrictions, conditions, covenants, reservations, liens and charges now or
11 hereafter imposed by the provisions of [the CC&Rs].”

12 52. Petitioner argued that he cannot be in violation of any asserted Bylaws
13 because the HOA did not comply with the meeting notice timeline for amendment of the
14 Bylaws and, therefore, the Bylaws are invalid. Alternatively, he argued that nowhere in
15 the Bylaws is he prevented from calling vendors or going to the IRS because he was
16 legally entitled to the information he sought.²⁹

17 53. At hearing, Ms. Andree responded that there was no retaliation involved in
18 regard to the police report. She indicated that the IRS had suggested that the HOA file
19 a police report due to the possibility that the inquiry as to a TIN could be an identity theft
20 situation and the HOA should be concerned about its fiduciary responsibility.³⁰ She
21 indicated that the IRS informed them of the forms to file regarding the possibility of such
22 and that the HOA simply followed up on that IRS recommendation.³¹

23 54. Section 3.1 of the Amended and Restated Bylaws of [HOA] (“Bylaws”) provides that the owner of a lot in the HOA is a “member” of the HOA. See Exhibit Q.
24 The Bylaws specify that the “privileges” of membership are as follows: “to vote, to hold
25 office, and to enjoy the benefit from the Common Area, subject to the restrictions in [the
26

27 ²⁸ Petitioner theorized that, using the address on his driver’s license, the IRS clerk had found the address
28 in its data base, and that hi address was previously the address or a former/prior officer of the HOA.

29 ²⁹ See Exhibit L.

30 ³⁰ Ms. Andree specified that the IRS had informed the HOA that they found no fraudulent tax activity taking
31 place with regard to the HOA and the HOA information. See Exhibits O and P. She indicated that she
32 would provide a copy of any final IRS report to Petitioner.

³¹ See Exhibits M and N.

Bylaws].” There is no indication that any other benefits, rights, or privileges attach to a member based on the Bylaws.

55. Section 6.1 of the Bylaws provides that business of the HOA is managed by a Board of Directors, which Board is elected by members at the Annual Meeting.³² *Id.* Members have voting rights but no administrative rights, authority, or responsibility are attributed to members in the Bylaws. Prior to an Annual Meeting, members may express an interest in serving on the Board, and a list of such members willing to serve is provided to the Board and presented for votes at the Annual Meeting.³³

56. Section 7.1 of the Bylaws provides that the Board exercises all powers, duties, and authority “vested in or delegated to” the Board that are not reserved to a member through Bylaws, Articles of Incorporation, CC&Rs, or state statutes.”

CONCLUSIONS OF LAW

57. This matter lies within the Department’s jurisdiction. Pursuant to A.R.S. §§ 32-2102 and 32-2199 et al., regarding a dispute between an owner and a planned community association, the owner or association may petition the department for a hearing concerning violations of condominium documents or violations of the statutes that regulate condominiums as long as the petitioner has filed a petition with the department and paid a filing fee as outlined in A.R.S. § 32-2199.05.

58. Pursuant to A.R.S. §§ 32-2199(2), 32-2199.01(D), 32-2199.02, and 41-1092, OAH has the authority to hear and decide the contested case at bar. OAH has the authority to interpret the contract between the parties. *See Tierra Ranchos Homeowners Ass’n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007)

59. In these proceedings, a petitioner bears the burden of proving by a preponderance of the evidence that a respondent has violated the planned community document(s) provisions or statutes alleged to have been violated.³⁴

60. “A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not.”³⁵ A preponderance of the evidence is “[t]he greater weight of the evidence, not necessarily established by the greater number of

³² Officers of the Board are also elected at the Annual Meeting. *Id.*, Section 9.2.

³³ *Id.*, Section 6.2

³⁴ See ARIZ. ADMIN. CODE R2-19-119.

³⁵ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 witnesses testifying to a fact but by evidence that has the most convincing force; superior
2 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
3 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather
4 than the other.”³⁶

5 **DOCKET 19F-H1918040-REL, COMPLAINT ONE**

6 61. A.R.S. § 33-1805(A) states that, with the exceptions stated in subsection
7 (B), “all financial and other records of the association shall be made reasonably
8 available for examination...” and that a home owners association has “ten business
9 days” to fulfill a written request. In the absence of evidence otherwise, the
10 Administrative Law Judge presumes that the HOA operates on a 5-day business week.

11 62. The hearing record demonstrates that the HOA reasonably asked Petitioner
12 to narrow his April 21, 2018 request “to review any and all [HOA] documents including
13 all organizational, business, corporate and financial records that the CDR/HOA has.”
14 Although the hearing record failed to detail in what location, by whom, or by what
15 method the HOA records were kept, the Administrative Law Judge concludes that the
16 request, as stated, was burdensome and needed to be clarified given that the HOA has
17 been in existence since 1984, has no office, and various persons have been officers
18 over the past years. Petitioner’s clarification on May 6, 2018 for “starting” with particular
19 documents was timely responded to by the HOA on May 14, 2018 with an
20 email/attachment of documents. Once Petitioner said “Thank You” on May 25, 2018,
21 and until Petitioner requested to review more documents, the HOA appropriately
22 determined that the May 6, 2018 records review request was satisfied.

23 63. Regarding the November 13, 2018 request, the parties met timely on
24 November 23 2018 and Petitioner was given the opportunity to review the records.

25 64. Although the hearing record indicated that Petitioner hand wrote a
26 November 23, 2018 note asking for certain documents and “copies,” the hearing record
27 does not demonstrate when he emailed such a request to the HOA.³⁷

28
29 ³⁶ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

30 ³⁷ Ms. Andree’s testimony was undisputed that, at the records review, Petitioner had not given her that
noted but had told her he would email such request to the HOA.

1 65. However, following Mr. Wolf's November 26, 2018 letter, on November 30,
2 2018, Ms. Goldschmidt, on behalf of the HOA, emailed to Petitioner "the remaining
3 records that [Petitioner] has requested to review, including copies of the tax returns and
4 the expense invoices."

5 66. The Administrative Law Judge concludes that the hearing record
6 demonstrates that the HOA timely provided the requested records in compliance with
7 A.R.S. § 33-1805 and the HOA is the prevailing party on this Petition/Complaint.

8 **DOCKET 19F-H1918040-REL, COMPLAINT TWO**

9 67. The hearing record demonstrates that, at the May 6, 2017 Annual Meeting,
10 the "proxy" vote initially allowed was subsequently determined to not be permitted and,
11 as a result, no "proxy" vote was counted in the final tabulation of votes on the proposed
12 fee increase. The hearing record further demonstrates that the final vote of 5 YES and
13 1 NO was a vote that met the HOA's requisite voting criteria for approval of a fee
14 increase because the votes in favor of a fee increase were 2/3 of the votes cast. The
15 Administrative Law Judge concludes that the no "proxy" vote was utilized in the
16 tabulation of the final vote as to a \$5.00 fee increase; therefore, the vote approving the
17 \$5.00 fee increase was not invalid. The HOA is the prevailing party on this
18 Petition/Complaint.

19 **DOCKET 19F-H1918040-REL, COMPLAINT THREE**

20 68. The hearing record demonstrates that, in compliance with A.R.S. § 33-
21 1804(B), the HOA caused the notice packages for a November 19, 2018 meeting to be
22 mailed more than ten days prior to the meeting. The hearing record demonstrated that
23 Susan Sotelo, the HOA secretary at that time, mailed the packages on November 5,
24 2018. Therefore, the Administrative Law Judge concludes that Petitioner's argument
25 fails that the notice packages had to be "received" more than ten days prior to the
26 meeting; such a position is a misreading of the statutory requirement. Furthermore,
27 A.R.S. § 33-1804(B) provides that a failure of a member to receive the "actual notice"
28 does not affect the validity of the action taken at the meeting. The HOA is the prevailing
29 party on this Petition/Complaint.

30 **DOCKET 19F-H1919054-REL, COMPLAINT FOUR**

1 69. The hearing record demonstrated that Petitioner did contact the IRS and did
2 obtain some information. However, the HOA's argument, that Petitioner misrepresented
3 himself to the IRS as being an officer of the HOA, was not evidenced to be true.
4 Petitioner's testimony was undisputed that he only presented his driver's license and
5 indicated that he lived at that address in HOA.

6 70. The hearing record demonstrated that Petitioner did contact Mr. Tick, the
7 HOA insurance agent. The hearing record did not demonstrate that Petitioner indicated
8 he was an officer of the HOA. The Administrative Law Judge concludes that, even if his
9 phone call was perceived by the insurance office staff as being a phone call from an
10 officer of the HOA, the information he sought, a copy of the HOA insurance policy was
11 not provided to him by the insurance office or agent.

12 71. The Administrative Law Judge is compelled to note that Petitioner zealously
13 pursues "information" and that he is propelled in these matters by certain motives, to
14 wit, to have the \$5.00 fee increase be declared invalid and to have the Amended
15 Bylaws be declared invalid for the reason that he disagrees with those actions.
16 Nevertheless, Petitioner is mistaken if he believes that he, as a member, may undertake
17 to dictate or manage actions of the Board. The HOA Bylaws do not vest any of the
18 Board's authority in the members.

19 72. The CC&R provision found in Article XIV, Section 1 does state that an
20 "owner", *i.e.*, a member, has a right to enforce "all restrictions, conditions, covenants,
21 reservations, liens and charges" set forth in the CC&Rs. However, that provision does
22 not bestow on a member any of the Board's authority or responsibility or any of a Board
23 Officer's authority or responsibility to perform actions necessary to enforce. Petitioner,
24 a member of the HOA, is not on the HOA Board and is not an elected officer of the
25 Board. The CC&R provision cited by Petitioner only serves to allow or permit a member
26 to raise the issue with the Board (*i.e.*, to petition the Board) so that the Board ensures
27 that "restrictions, conditions, covenants, reservations, liens and charges" are properly
28 and appropriately enforced. And it must be noted that, in these four petitions, no such
29 "restrictions, conditions, covenants, reservations, liens and charges" were stated to be
30 at issue.

1 73. The HOA Bylaws are specific as to the "privileges" of being a member of the
2 HOA being the right to vote, or hold office or to enjoy the common areas within the HOA
3 community itself. Member privileges do not include any administrative or management
4 rights, any administrative or management authority or any administrative or
5 management responsibility. Only the HOA Board, through its elected officers may
6 exercise administrative and management right, authority and responsibility.

7 74. Petitioner's response to this HOA Petition is a misapplied semantic
8 statement. The Administrative Law Judge concludes that Petitioner's argument that he
9 has a legal right "to get information" should only be seen and interpreted as an
10 argument that he is allowed to review the HOA records; that is the subject of Petitioner's
11 Complaint One.

12 75. The Administrative Law Judge concludes that HOA's argument fails that
13 Petitioner had misrepresented himself as an officer of the HOA. However, the
14 Administrative Law Judge further concludes that Petitioner is mistaken that he, as an
15 "owner" has the same authority as an officer of the HOA Board; the statutory right to
16 review the HOA records is simply that, a right to review records. The hearing evidence
17 is split on this complaint; therefore, the HOA has not prevailed.

18 **ORDER**

19 IT IS ORDERED that the HOA be deemed the prevailing party with regard to
20 Complaint One, Complaint Two, and Complaint Three because Petitioner has not
21 proven the alleged violations in those matter. Petitioner bears his filing fees.

22 IT IS FURTHER ORDERED that the HOA has not prevailed, and neither has
23 Petitioner, with regard to Complaint Four. The HOA bears its filing fee.

24 **NOTICE**

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

Done this day, July 8, 2019.

/s/ Kay Abramsohn
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate

Transmitted through US Mail to:

Gregory L Czekaj
3749 N Avenida Arbodela
Tucson, AZ 85716

Colonia Del Rey Homeowners Association
c/o Marybeth Andree
3719 N Avenida Arbodela
Tucson, AZ 85719