

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2  
3 Joan A. Tober,  
4 Petitioner,  
5 vs.  
6 Civano 1 Neighborhood 1 Homeowners  
7 Association,  
8 Respondent.

**No. 19F-H1918042-REL**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

9 **HEARING:** June 5, 2019, followed by post-hearing briefing; hearing record  
10 closed as of July 8, 2019.

11 **APPEARANCES:** Joan A. Tober appeared telephonically on her own behalf.  
12 Diana J. Elston, Esq., represented Civano 1 Neighborhood Homeowners Association  
13 (HOA).

14 **ADMINISTRATIVE LAW JUDGE:** Kay Abramsohn

15 **FINDINGS OF FACT**

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

19 2. On or about December 26, 2018, Petitioner filed a single-issue petition  
20 (“Petition”) with the Department. The Petition alleges that, despite three informal  
21 requests, HOA failed to provide to her “all information” that was discussed at a Board  
22 Meeting regarding the North Ridge wall. The Petition further states that, at that  
23 meeting, a letter (“Letter”) from the HOA attorneys was “disclosed and discussed” and  
24 comments were made about prior “costs” regarding the wall.

25 3. Petitioner’s November 29, 2018 request to HOA asked for the following:

26 I am requesting any and all documentation to include the [Letter] that was  
27 disclosed and discussed at the November 20, 2018 Board meeting  
28 regarding the structural integrity and the Association members’  
29 responsibility for same and all background information.

30 4. HOA responded the next day, November 29, 2018, indicating that the Board  
President had misspoken about giving a copy of the Letter to residents because the

1 Letter contained legal analysis and legal advice to the Board and, thus, was privileged  
2 attorney-client communication.

3 5. HOA's January 29, 2019 response to the Petition indicated that the Board  
4 President had, during the meeting, referenced receiving the privileged "legal opinion"  
5 Letter from the HOA attorneys.

6 6. At hearing, Petitioner presented evidence regarding her request and her  
7 various summaries and synopses of the matter. Petitioner essentially argued that the  
8 HOA had intentionally waived confidentiality when the Board President mentioned the  
9 Letter at the meeting and the other Board members did not object, *i.e.*, showing  
10 unanimous consent to waive confidentiality. Petitioner acknowledged that the Board  
11 provided various other documents since the meeting and her request, but argued that  
12 the HOA has not provided a copy of the Letter.

13 7. Petitioner she argues that, since the wall issue has been an issue since 2013,  
14 there are likely more documents she should be given under her request for "any and all  
15 documents" regarding the problems with the wall. Petitioner referenced needing various  
16 "background" documents regarding 2013 and 2014 items; for some, but not all, she  
17 provides further explanation of what a "background" document would be.

18 8. Petitioner acknowledged that HOA has 10 days to respond with "access" to  
19 requested documents. She argued that HOA gave her documents she already had  
20 obtained from the city and there are other documents she is waiting for.<sup>1</sup>

21 9. Petitioner worked for the company that developed the land/homes in the  
22 association area. Petitioner purchased her home in 2001. She has been a Board  
23 member in the past; she is currently a member on the Finance Committee. Since 2008,  
24 Petitioner has taped every meeting and she often creates a transcript of the meetings.<sup>2</sup>

25 10. The attorney letter had been discussed by the Board in executive session  
26 prior to the meeting. HOA argued that, by its mere mention at the meeting, the Board  
27 had not waived confidentiality or attorney-client privilege as to the Letter. HOA argued

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28 <sup>1</sup> For example, Petitioner was concerned about a landscaping contract that, apparently, had expired and  
29 no new contract had been demonstrated to exist. Petitioner did not demonstrate a connection between  
30 the wall issues and the landscaping maintenance; however, the Board President testified that the \$5.00  
per person fee/budget increase was intended to cover landscaping and the North Ridge wall area.

<sup>2</sup> Petitioner provided several recordings and "transcripts" to the hearing record; at hearing, she also  
referenced portions of transcripts and particular recording moments, some of which were not transcribed.

1 that A.R.S. § 33-1805 deals with business records and that HOA has the right to assert  
2 privilege as to attorney-client communication. Additionally, HOA essentially argued that  
3 the request for “any and all” documents was too broad to know what Petitioner wanted  
4 to see; however, HOA also indicated that simply by reviewing her presented proposed  
5 exhibits, it can be determined that Petitioner has received copies of requested  
6 documents.

### 7 CONCLUSIONS OF LAW

8 11. This matter lies within the Department’s jurisdiction. Pursuant to A.R.S. §§  
9 32-2102 and 32-2199 et al., regarding a dispute between an owner and a planned  
10 community association, the owner or association may petition the department for a  
11 hearing concerning violations of condominium documents or violations of the statutes  
12 that regulate condominiums as long as the petitioner has filed a petition with the  
13 department and paid a filing fee as outlined in A.R.S. § 32-2199.05.

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

18 13. In these proceedings, a petitioner bears the burden of proving by a  
19 preponderance of the evidence that a respondent has violated the planned community  
20 document(s) provisions or statutes alleged to have been violated.<sup>3</sup>

21 14. “A preponderance of the evidence is such proof as convinces the trier of fact  
22 that the contention is more probably true than not.”<sup>4</sup> A preponderance of the evidence is  
23 “[t]he greater weight of the evidence, not necessarily established by the greater number of  
24 witnesses testifying to a fact but by evidence that has the most convincing force; superior  
25 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable  
26 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather  
27 than the other.”<sup>5</sup>

28  
29 <sup>3</sup> See ARIZ. ADMIN. CODE R2-19-119.

30 <sup>4</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

<sup>5</sup> BLACK’S LAW DICTIONARY 1220 (8<sup>th</sup> ed. 1999).

1 15. A.R.S. § 33-1805(A) states that, with the exceptions stated in subsection  
2 (B), “all financial and other records of the association shall be made reasonably  
3 available for examination...” and that a home owners association has “ten business  
4 days” to fulfill a written request.

5 16. A.R.S. § 33-1805(B) states that “privileged communication between an  
6 attorney for the association and the association” may be withheld. Therefore, HOA is  
7 not statutorily required to provide access or a copy of the Letter to Petitioner or to any  
8 resident.

9 17. The Administrative Law Judge concludes that the hearing record  
10 demonstrates that the HOA provided requested records in compliance with A.R.S. § 33-  
11 1805 and HOA is the prevailing party on this Petition/Complaint.

12 **ORDER**

13 IT IS ORDERED that the HOA be deemed the prevailing party with regard to the  
14 Petition and Petitioner bears her filing fee.

15 **NOTICE**

16 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties**  
17 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S.**  
18 **§ 41-1092.09, a request for rehearing in this matter must be filed with the**  
19 **Commissioner of the Department of Real Estate within 30 days of the service of**  
20 **this Order upon the parties.**

21 Done this day, July 29, 2019.

22 /s/ Kay Abramsohn  
23 Administrative Law Judge  
24

25  
26 Transmitted electronically to:

27 Judy Lowe, Commissioner  
28 Arizona Department of Real Estate

29 Transmitted through US Mail to:  
30

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By Felicia Del Sol