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**Final agency action regarding decision below:**

**ALJFIN ALJ Decision final by statute**

**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

Debra K. Morin,  
Petitioner,

v.  
Solera Chandler Homeowners' Association,  
Inc.,

Respondent.

**No. 20F-H2020051-REL**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

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**TELEPHONIC HEARING:** May 20, 2020 and July 15, 2020.<sup>1</sup>

**APPEARANCES:** Debra K. Morin (Petitioner) represented herself. Lydia Linsmeier, Esq. represented Solera Chandler Homeowners' Association (Solera).

**ADMINISTRATIVE LAW JUDGE:** Kay Abramsohn

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**FINDINGS OF FACT**

1. Pursuant to Arizona Revised Statutes (A.R.S.) 33-1801 et seq., the Arizona Department of Real Estate (Department) is authorized by statute to receive and to decide Petitions for Hearings from members of planned community associations in Arizona.

2. Petitioner has lived in Solera for four years. On or about March 12, 2020, Petitioner filed a two-issue petition (Petition) with the Department alleging Solera had violated the following:

(a) the Articles of Incorporation<sup>2</sup> (A)(5) and (A)(6);

(b) the By-Laws<sup>3</sup> (A)(3.11.13), (3.11.18.), (3.12);

(c) the By-Laws (A)(4.8.1);

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<sup>1</sup> The hearing was required to be reconvened because, at a certain point during the first hearing session, the more recently submitted exhibits Petitioner was referencing at the hearing diverged from the initial submission/disclosure of exhibits which were the only exhibits that counsel for Solera had access to at the time of the first hearing session.

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<sup>2</sup> See full document, Solera Exhibit A. The full documents are referenced herein, because for the administrative hearing, on each of the points she argued, Petitioner had prepared a series of numbered exhibits isolating out the various portions of the various HOA documents in connection with a written statement and other exhibits (including photographs, videos, other various documents, meeting excerpts, etc. Initially, Petitioner had submitted documents for proposed exhibits and subsequently, she resubmitted documents as proposed exhibits with new numbering and a chart of "indexed" exhibits (each document was correlated to her newly created statement of evidence in support of her two identified issues in the Petition).

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<sup>3</sup> See full document, Solera Exhibit B.

- (d) the CC&Rs<sup>4</sup> (A)(1) in 1.4;
- (e) the CC&Rs (A)(2) in 2.1;
- (f) the CC&Rs (A)(7) in 7.1;
- (g) the R&Rs<sup>5</sup> (A)(1) in 1.1, in 1.2, and in 1.4; and
- (h) the Solera Code of Ethics for Board Members #1, #6, #7, #8, and #9.

3. Petitioner’s Issue #1 is as follows: Solera, the Solera Board of Directors (Board), and Premier Management Company (Premier) “do not allow direct communication from homeowners. Petitioner indicated that she wanted this “policy” rescinded and that she had raised this issue at a March 4, 2020 Board Meeting.

4. Petitioner’s Issue #2 is as follows: Solera, the Board, and Premier “are not providing oversight to the General Manager in maintaining all Areas of Association Responsibility ... in good condition and repair at all times.” Petitioner indicated that “all” the landscaping in the Areas of Association Responsibility (AREAS) is “still having uncontrolled weeds” and that the Community Center and the AREAS were “not maintained in good condition and repair at all times.”

5. Petitioner argued that Solera, the Board and Premier are required to be held to the law and the governing documents to maintain the AREAS “in good condition at all times just as homeowners are expected to do so.” Petitioner requested relief, in the event that her Petition was affirmed, that (1) the Board publically admit at a Board meeting their failures to follow the governing documents and specify the steps the Board is taking to “improve direct communication with homeowners;” (2) establish “direct communication rules” for reporting management deficiencies; and, (3) compliance monitoring by the “Real Estate Board.”<sup>6</sup>

6. Solera filed a Response to the Petition and, further, on April 2, 2020, filed a Motion to Dismiss the Petition, asking the Department to dismiss the Petition because the issues were outside the Department’s jurisdiction pursuant to Arizona Revised Statutes

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<sup>4</sup> CC&Rs references the Solera Declaration of Covenants, Conditions, and Restrictions for Springfield Lakes. See full document, Solera Exhibit C.

<sup>5</sup> R&Rs references the Solera Rules and Regulations. See full document, Solera Exhibit D.

<sup>6</sup> This reference was not further explained at hearing.

1 (A.R.S.) § 32-2199.01(A) and that the relief Petitioner requested could not be granted as a  
2 matter of law.<sup>7</sup>

3 7. The matter was referred to the Arizona Office of Administrative Hearings  
4 (Tribunal) for conduct of an administrative hearing regarding the Petition.

5 8. On May 12, 2020, Solera renewed its Motion to Dismiss.<sup>8</sup>

6 9. The Tribunal issued its Minute Entry on May 18, 2020, noting that Petitioner  
7 had not responded to the Motion to Dismiss.<sup>9</sup>

8 10. At the May 20, 2020 hearing, the parties presented their arguments  
9 regarding the Motion to Dismiss. The statutory parameters of the Tribunal's jurisdiction do  
10 not include interpretation of or application of a non-governing document such as the  
11 Board's Code of Ethics; this circumstance called for removal from consideration herein of  
12 the underlying allegations regarding ethics and mismanagement of Solera based on the  
13 Solera Code of Ethics. As a result, Petitioner withdrew her Issue #1.

14 11. Regarding Solera's Motion to Dismiss, the Tribunal ruled that, with  
15 Petitioner's withdrawal of Issue #1 and removal of the underlying allegations of ethics and  
16 oversight/mismanagement based on non-governing documents, a bare-bones issue  
17 remained in the Petition, essentially, Petitioner's allegation of a failure of Solera to  
18 maintain the AREAS in good condition and repair at all times. Based on the foregoing,  
19 Solera's Motion to Dismiss was effectively denied.

20 12. At hearing, Petitioner focused on documenting each AREAS location at  
21 which she had observed weeds or maintenance issues. Petitioner presented over eighty  
22 (80) photographs, some of which were taken before and some of which were taken after  
23 the Petition was filed.<sup>10</sup> As to items she had observed in AREAS, Petitioner complained of

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24 <sup>7</sup> Solera further argued that A.R.S. §§ 32-2119 through 32-2119.05 were unconstitutional as a violation of  
25 separation of powers and that neither the Department nor the Arizona Office of Administrative Hearings,  
26 both executive branch authorities, had jurisdiction to act on any such petitions. Solera's legal argument in  
27 this regard is not addressed herein due to the limited jurisdiction of the Tribunal in considering referred  
28 petitions.

29 <sup>8</sup> Petitioner had not withdrawn her Petition, or either issue in the Petition, after receiving Solera's Motion to  
30 Dismiss.

<sup>9</sup> The Minute Entry also addressed problems with Petitioners' recent disclosures of seemingly piecemeal  
exhibits.

<sup>10</sup> Some of the photographs were comparison photographs, ostensibly showing the same location after  
passage of time.

1 the Community Center exterior,<sup>11</sup> street conditions, street asphalt and sealing repairs,  
2 storm drains,<sup>12</sup> sidewalks,<sup>13</sup> water pooling and/or intrusion issues,<sup>14</sup> walls, curbing,  
3 exposed landscaping lights wiring, exposed landscaping drip irrigation lines, tree removal  
4 and stumps,<sup>15</sup> and weeds in granite rock locations.<sup>16</sup>

5 13. At hearing, Petitioner's position was the same as to all "maintenance" issues  
6 she raised, which was that the same standard must be applied to Solera (from CC&Rs  
7 Article 7, Section 7.1) that is applied to the homeowners (from CC&Rs Article 7, Section  
8 7.2) on their responsibility to "maintain in good condition and repair at all times" their  
9 respective AREAS and homes/lots.<sup>17</sup> Petitioner argued that the homeowners have no  
10 discretion with regard to any delay in taking care of issues and Solera should not be able  
11 to take months to address an issue.<sup>18</sup> At hearing, Petitioner argued that the General  
12 Manager is not monitoring and maintaining the AREAS and, thus, Solera is responsible to  
13 do so and, further, that Solera, the Board, and Premier are all culpable for these  
14 problems.<sup>19</sup>

15 14. The hearing evidence regarding Petitioner's complaint to Solera about  
16 weeds is representative of the overall situation she believes exists as to Solera, the Board  
17 and Premier.<sup>20</sup>

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18 <sup>11</sup> See Exhibits A27-33 (photographs and email dated February 21, 2020).

19 <sup>12</sup> See Exhibits A 58-59. At hearing, during cross exam, Ms. Frazier indicated that, to her knowledge, the  
20 storm drains were cleaned out in June 2020.

21 <sup>13</sup> See Exhibit A47 (Petitioner email dated February 21, 2020).

22 <sup>14</sup> See Exhibits A33-39.

23 <sup>15</sup> See Exhibit A184-187 (Petitioner email dated February 21, 2020 and photographs).

24 <sup>16</sup> See Exhibit A127 (Petitioner email dated February 21, 2020). As a part of her evidence, Petitioner cited to  
25 several sources which are not justiciable in this Tribunal: Premier company standards and City of Chandler  
26 Ordinances. See Exhibits A22-23 and A131-138. Additionally, Petitioner cited to Solera Design Guidelines,  
27 which were not mentioned in the Petition and which would appear to be a product of the Solera Architectural  
28 Review Committee. See Exhibits A24 and A40-46

29 <sup>17</sup> Petitioner's written statement (Statement) filed on May 19, 2020 as to Issue #2, referenced R&Rs, Article  
30 6, Section 6.4, stating that "[e]ach owner of a Lot is responsible for the maintenance of his/her property in a  
weed free condition 365 days a year, even though an owner may be a seasonal resident." See Statement at  
11.

<sup>18</sup> It is evident that Petitioner is dissatisfied with Solera not having addressed her specific concerns in what  
she believes would have been a more timely manner.

<sup>19</sup> Several times during the hearing Petitioner queried whether Ms. Frazier had not observed a particular  
problem as Ms. Frazier had driven into the development and/or had not walked around the AREAS to  
inspect and observe the problems Petitioner was raising.

<sup>20</sup> Each of Petitioner's notices to Solera on February 21, 2020 take the same approach.

1 (a) On February 21, 2020, Petitioner complained to Solera (copying Premier)  
2 alleging a violation of the CC&Rs Article 7, Maintenance and 7.1, AREAS, as to  
3 weeds. Petitioner complained:

4 This is NOT being done and our HOA looks disgusting with the  
5 continued presence of unchecked weeds inside and outside  
6 our community! No excuses, you cannot hold homeowners to a  
7 higher standard than you are willing to do for our HOA. You are  
8 on notice to rectify this violation immediately! Please reply with  
9 the date this will be completed.<sup>21</sup>

10 (b) Within three hours, Denise Frazier, the on-site general manager (an employee  
11 of Premier), responded:<sup>22</sup>

12 On behalf of the [Board], I can provide you with the following  
13 information: the landscape crew hula hoes and sprays daily,  
14 based on routine maintenance cycle and location of site work.  
15 The spray technician was on site 1/28 and 1/29 and sprayed  
16 all areas. He was also onsite on 2/6 and 2/7 and sprayed all  
17 areas. Considering that we have 1,143,550 square feet of  
18 granite and 270,933 square feet of turf, the maintenance of  
19 weeds is a continuous and ongoing concern that is constantly  
20 being addressed.

21 (c) Petitioner replied:<sup>23</sup>

22 YOUR response is just more excuses! You (the Board of  
23 Directors, General Manager, and Premier Management  
24 Company) are responsible for administering the landscape  
25 contract for our HOA as specified in our CC&Rs. With that  
26 comes the fiduciary responsibility to oversee and to directly  
27 supervise the contractor for compliance with each line item of  
28 the signed contract. Not to make excuses for their  
29 nonperformance! This contractor has been doing our  
30 landscaping for over 4 years that I have lived here so there are

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26 <sup>21</sup> See Exhibit A127. Petitioner used an HOA form for reporting violations to file her complaint with Solera.  
27 Assuming *arguendo* that the same “standards” apply to Solera regarding an owner’s ability to “enforce” a  
28 CC&R maintenance and repair provision, Petitioner would then arguably be bound by providing the process  
29 set forth in R&R Article 7 and could not demand immediate action; however, clearly, there is no  
30 authorization found in any of the Solera documents for an owner to impose fines or liens against Solera.

<sup>22</sup> *Id.*

<sup>23</sup> See Exhibit A129.

1 no viable excuses. Our entire HOA landscaping should  
2 always look properly maintained at all times in each zone!

3 It appears that since it is not your personal money being  
4 spent, it is ok to have substandard work performance. It is  
5 evident that no one of YOU inspected the landscape  
6 contractor's work on 1/28 and 1/29 "sprayed all areas"  
7 because this was not a blanket spraying, it was spot spraying  
8 of existing weeds (over two weeks old) and not sufficient to  
9 maintain abatement of new weeds. It would have been more  
10 effective to blanket spray all of the granite areas so we would  
11 not continue have new weeds.

12 On 2/6 and 2/7 "sprayed all areas" again, this was not a  
13 blanket spraying of the areas, it was a spot spraying of  
14 individual weeds which was not sufficient to control the new  
15 weeds that were emerging with the winter rains. Again,  
16 blanket spraying would have solved this issue.

17 As far as hula hoeing, someone needs to train these guys on  
18 proper use. I observed a couple landscape workers  
19 attempting this weed removal technique. I went back and  
20 looked at the job they had done. The weeds were still on the  
21 ground, you could see the granite turned up in each spot they  
22 touched, and the overall landscape appearance was  
23 disgusting!

24 Considering the numbers, the General Manager quoted for  
25 granite and turf, this landscape contract seems inadequate for  
26 our needs unless substandard performance is the norm for  
27 our HOA. The budgeted amount for 2020 for landscape  
28 services is \$392,506 which we should not have to wait for any  
29 particular zone to be maintained, the entire property should be  
30 well maintained for that amount of money. Someone is NOT  
monitoring and insuring compliance for each area.

I would highly recommend that YOU take steps to find another  
landscape contractor that can readily provide a level of  
service that each of you would require from a private  
landscape contractor doing maintenance on your personal  
property that you would pay with your own money.

15. At hearing, Petitioner argued that Solera must follow their own guidelines  
and that she, as a homeowner, has the authority to enforce the HOA documents against

1 Solera through the statutory petition process based on CC&Rs Article 9, Section 9.1,  
2 Enforcement.<sup>24</sup> Amongst her arguments, Petitioner argued that the Board is either  
3 accepting or paying for substandard work and that the Board is making excuses and  
4 taking license in violating the CC&Rs.

5 16. CC&R Article 9, Section 9.1, Enforcement, provides that Solera “or any  
6 owner” shall have the right to enforce “the Project Documents in any manner provided for  
7 in the Project Documents or by law or in equity ...”<sup>25</sup> However, only the Board has the  
8 power to levy reasonable monetary penalties against an owner for violations of the  
9 documents when the owner is given notice and an opportunity to be heard.<sup>26</sup>

10 17. CC&R Article 9, Section 9.5 provides that, with the exception of a judicial  
11 construction, Solera has “the exclusive right to construe and interpret the provisions of the  
12 [CC&Rs].”<sup>27</sup> Further, Solera’s construction or interpretation of the CC&Rs “is final,  
13 conclusive and binding as to all Persons and property benefited or bound by” the  
14 CC&Rs.<sup>28</sup>

15 18. Denise Frazier, Solera’s onsite general manager, testified regarding  
16 maintenance issues. Ms. Frazier oversees day-to-day operations at Solera and does not  
17 make decisions regarding maintenance issues, unless it’s an emergency and then she  
18 has authority to spend up to a particular amount. Maintenance projects are reviewed by a  
19 Building and Grounds Committee (B&G), and once determined by the Finance Committee  
20 that finances are in order for such, the matter goes to the Board for approval.

21 19. Solera has Reserves (involving funds set aside for particular items) and a  
22 schedule for large maintenance projects, such as items at/in the Community Center,  
23 sidewalks, and repairing or resealing the streets. While Solera’ Reserves is reviewed, or  
24 updated, “at least every 5 years,” Ms. Frazier indicated that the Board typically does it  
25 annually.

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26 <sup>24</sup> See Exhibit C at 44.

27 <sup>25</sup> The “Project Documents” are the CC&Rs, any supplemental to the CC&Rs, the By-Laws, the R&Rs and  
28 the Design Guidelines. See Exhibit C at 5.

29 <sup>26</sup> See R&Rs, Article 7. Policy of Corrective Actions and Schedule of Fines.

30 <sup>27</sup> *Id.* at 45.

<sup>28</sup> *Id.*

1           20. While B&G inspects the sidewalks annually, the Reserves' schedule for  
2 sidewalks is every 4 years.<sup>29</sup> Solera looks at issues at a ¼ inch standard but utilizes City  
3 of Chandler trip-hazard guidelines of ½ inch to determine where to make repairs. A  
4 sidewalk area that had been covered in cool-decking was in disrepair and Ms. Frazier  
5 indicated that it took "several months" to be repaired; Petitioner complained of this on  
6 February 21, 2020.<sup>30</sup> In the interim, Solera had placed orange warning cones over the  
7 particular sidewalk area and swept up the disintegrating cool-decking.

8           21. Regarding streets, the Reserves' schedule calls for repairs every 8 years  
9 and sealing cracks every 2 years.<sup>31</sup> After a November 2019 Board Meeting, some asphalt  
10 repairs were approved to be done; a ¼ inch crack standard was used by B&G.<sup>32</sup> Street  
11 resealing (up to the curbing) is scheduled to be done in 2021 in the Reserves; Ms. Frazier  
12 noted that a repair is just a repair and not a "restoration" of the street.

13           22. Regarding Petitioner's concerns as to some concrete curbing and several  
14 "boundary" walls, Ms. Frazier indicated that these were the City of Chandler's  
15 responsibility.<sup>33</sup> Ms. Frazier was unaware of any particular City ordinance for maintaining  
16 those items. Ms. Frazier noted that the damage observed on the City wall in A103 (on the  
17 right) was water wicking as a result of watering being done inside the wall; the same issue  
18 can be seen in the photographs in A102.<sup>34</sup>

19           23. Regarding the exposed landscaping lights wiring, Ms. Frazier indicated that,  
20 in 2018, Solera had done a lighting project and that, in 2020, as Solera was replacing  
21 trees and placing new granite, the landscapers had exposed the lines so that the lines  
22 would not be cut as the new items were put in place. Ms. Frazier further noted that, as to  
23 the exposed landscaping drip irrigation lines, if there were no plants at a particular  
24 location, the drip irrigation lines were not buried because the landscapers still needed to  
25 know the locations of the drip irrigation lines.

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26 <sup>29</sup> Frazier testimony.

27 <sup>30</sup> See Exhibits A47, A49, and A50.

28 <sup>31</sup> Petitioner demonstrated multiple areas of which she was concerned.

29 <sup>32</sup> See Exhibits A63, and A64-71.

30 <sup>33</sup> See Exhibits A97-99 and A102 and 103(on the left).

<sup>34</sup> Neither party addressed whether the owner of the lot situated on the other side of the City wall was responsible for such an issue.



1           1.       This matter lies within the Department’s jurisdiction. Pursuant to A.R.S. §§  
2 32-2102 and 32-2199 et al., regarding a dispute between an owner and a planned  
3 community association, the owner or association may petition the department for a  
4 hearing concerning violations of condominium documents or violations of the statutes that  
5 regulate condominiums as long as the petitioner has filed a petition with the department  
6 and paid a filing fee as outlined in A.R.S. § 32-2199.05.

7           2.       Pursuant to A.R.S. §§ 32-2199(2), 32-2199.01(D), 32-2199.02, and 41-  
8 1092, OAH has the authority to consider and decide the contested petitions, the authority  
9 to order any party to abide by the statute, community documents and contract provisions  
10 at issue, the authority to interpret the contract *between the parties*, and the authority to  
11 levy a civil penalty on the basis of each proven violation. *See also Tierra Ranchos*  
12 *Homeowners Ass’n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

13           3.       In these proceedings, a petitioner bears the burden of proving by a  
14 preponderance of the evidence that a respondent has violated the planned community  
15 document(s’) provisions or statutes alleged to have been violated.<sup>40</sup>

16           4.       “A preponderance of the evidence is such proof as convinces the trier of fact  
17 that the contention is more probably true than not.”<sup>41</sup> A preponderance of the evidence is  
18 “[t]he greater weight of the evidence, not necessarily established by the greater number of  
19 witnesses testifying to a fact but by evidence that has the most convincing force; superior  
20 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable  
21 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than  
22 the other.”<sup>42</sup>

23           5.       Overall, the hearing record demonstrated that Petitioner’s Petition was  
24 brought based on her belief that the Board and General Manager were non-responsive to  
25 her and to her complaints and were not providing appropriate oversight in order to  
26 maintain the development’s AREAS. Each of Petitioner’s February 21, 2020 complaints  
27 to the Board demonstrate her dissatisfaction. In this case, after the arguments on the

28 <sup>40</sup> See ARIZ. ADMIN. CODE R2-19-119.

29 <sup>41</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

30 <sup>42</sup> BLACK’S LAW DICTIONARY 1220 (8<sup>th</sup> ed. 1999).

1 Motion to Dismiss, Petitioner withdrew Issue #1; the issue had no connection to Solera's  
2 governing documents. Issue #2 was also stated to be an allegation that the Board and  
3 General Manager were not providing appropriate oversight regarding maintenance. In an  
4 effort to allow Petitioner to proceed on her filed Petition, the Tribunal extracted from Issue  
5 #2, the bones of an alleged violation of Solera's failure to "maintain in good condition and  
6 repair at all times" the AREAS.

7 6. In this case, the Administrative Law Judge concludes that Petitioner has not  
8 demonstrated that Solera is in violation of its governing documents through any failure to  
9 "maintain in good condition and repair at all times" the AREAS. While the CC&Rs allow an  
10 owner to bring to the Board a complaint, the CC&Rs specify that the Board is the sole  
11 judge regarding appropriate maintenance, repair and replacement of all AREAS. The  
12 developer was ultimately responsible for the process by which Solera and its entire  
13 property area was developed and responsible to put in place the methods by which the  
14 Board administers, maintains, preserves and the use and enjoyment of the entire  
15 development, not just the AREAS.<sup>43</sup> The hearing record demonstrated that the Board has  
16 in place various processes and methods by which it undertakes its responsibilities to  
17 maintain the development. Solera maintains and repairs the AREAS through and  
18 pursuant to its various governing documents, including CC&Rs, R&Rs, and its Design  
19 Guidelines. The Administrative Law Judge concludes that Solera is in compliance with its  
20 governing documents including CC&R Article 7, Section 7.1. Therefore, the Petition  
21 should be dismissed.

22 **ORDER**

23 IT IS ORDERED Petitioner's Petition is dismissed and Solera is deemed the  
24 prevailing party.

25 IT IS FURTHER ORDERED Petitioner shall bear her filing fee.

26 **NOTICE**

27 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the parties**  
28 **unless a rehearing is granted pursuant to A.R.S. § 32-2199.04. Pursuant to A.R.S.**

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<sup>43</sup> See Exhibit C (CC&R Article 2, Section 2.1) at 6-7.

1 **§ 41-1092.09, a request for rehearing in this matter must be filed with the**  
2 **Commissioner of the Department of Real Estate within 30 days of the service of**  
3 **this Order upon the parties.**

4 Done this day, August 19, 2020.

5 /s/ Kay Abramsohn  
6 Administrative Law Judge

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9 Transmitted by either mail, e-mail, or facsimile August 19, 2020 to:

10 Judy Lowe, Commissioner  
11 Arizona Department of Real Estate  
12 100 N. 15th Avenue, Suite 201  
13 Phoenix, Arizona 85007

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30 By Felicia Del Sol