

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Gregory L Czekaj,
4 Petitioner,
5 v.
6 Colonia Del Rey HOA,
7 Respondent.

No. 19F-H1918040-REL-RHG

**ADMINISTRATIVE LAW JUDGE
REHEARING DECISION**

8 **REHEARING:** December 6, 2019 and March 5, 2020.

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

11 **ADMINISTRATIVE LAW JUDGE:** Kay Abramsohn

12 **FINDINGS OF FACT**

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

16 2. Gregory L. Czekaj (“Petitioner”) purchased his home in Colonia Del Rey
17 HOA, Inc. (“HOA”) in March 2017. On or about December 20, 2018, Petitioner filed three
18 separate single-issue petitions against the HOA with the Department.¹

19 3. Established in 1984, HOA is comprised of nine (9) homes on a private
20 road in Tucson, Arizona. The HOA has common areas and a Ramada, but has no pool
21 and has no HOA office. The HOA Board is comprised of elected volunteers.

22 4. Complaint ONE contained the following issue to be determined: Petitioner
23 alleged that the HOA failed to provide records he had requested, at three different times,
24 in violation of A.R.S. § 33-1805.²

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

28 ¹ The complaints were numbered by the Tribunal for purposes of the initial hearing; the same numbers
29 are used herein for purposes of the rehearing Decision.

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

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

4 7. Complaint THREE contained the following issue to be determined:
5 Petitioner alleged that the HOA failed to give a ten-day notice for a meeting to be held on
6 November 18, 2018 to vote on amendments to the HOA By-Laws, in violation of A.R.S. §
7 33-1804(B).³

8 8. The Department consolidated the petitions and referred those three
9 petitions to the Office of Administrative Hearings, an independent state agency, for an
10 evidentiary hearing.⁴

11 9. At the initial hearing session on June 14, 2019, Petitioner presented
12 documentary evidence regarding the three Petitions and his testimony regarding the
13 matters. Petitioner was given the opportunity to question the HOA representative and to
14 cross-examine the witness called by the HOA, Mr. Tick (the HOA's insurance agent).⁵

15 10. At the initial hearing, Petitioner presented thirty-three exhibits,
16 designated as Exhibits 1 through 33, regarding the three Petitions. At that hearing, HOA
17 presented sixteen exhibits, designated as Exhibits A through P.⁶

18 11. Following the June 14, 2019 hearing, the Administrative Law Judge
19 issued a Decision dated July 8, 2019 in which she concluded that Petitioner's alleged
20 violations in Petitioner's three Petitions had not been proven and that the HOA was the
21 prevailing party on Petitioner's three Petitions.⁷

22 ³ Each petition had been presented to the Department with labeled attachments. However, the
23 documents considered in this matter consist of the filed petitions themselves, the documents admitted to
24 the Initial hearing record as designated exhibits, and the documents admitted to the Rehearing hearing
25 record.

26 ⁴ On or about March 29, 2019, HOA had filed a single-issue petition, alleging that Petitioner had violated
27 Sections 6.1, Section 7.1, and 9.2 of the HOA Bylaws by exceeding his rights and authorities as a
28 member of the HOA, to wit, misrepresenting himself at the Internal Revenue Services (IRS) to be an
29 officer of the HOA in order to obtain information. The HOA's Petition was subsequently consolidated with
30 Petitioner's three petitions and the consolidated hearing addressed all four petitions.

⁵ HOA called Mr. Tick in regard to the HOA Petition.

⁶ As the HOA had filed a Petition, many of the HOA exhibits dealt with its Petition. The HOA proposed
exhibit labeled Q was not admitted as it was duplicative of another exhibit.

⁷ The Decision also determined that the HOA had not demonstrated its allegations, that the hearing
evidence was split on the HOA Petition, and that neither party had prevailed on the HOA Petition.

1 12. On or about August 12, 2019, after the issuance of the Administrative
2 Law Judge Decision, Petitioner filed a Homeowner’s Association (HOA) Dispute
3 Rehearing Request citing as particular grounds for the request that “irregularity in the
4 proceedings by the ALJ as well as misconduct by the ALJ [had] deprived [Petitioner] of a
5 fair hearing.” Within the rehearing request, Petitioner alleged that a retroactive swearing-
6 in of Petitioner and the HOA representative was “a serious irregularity” and was “a serious
7 breach of misconduct” by the ALJ that had deprived Petitioner of a fair hearing. Petitioner
8 argued that a retroactive swearing-in cannot substitute for the initial error “because the
9 parties are not penalized for disingenuous prior testimony.”

10 13. On or about August 27, 2019, the Commissioner of the Arizona
11 Department of Real Estate issued an Order Granting Rehearing and Notice of Hearing
12 (Order). In that Order, the Commissioner indicated “the Department hereby grants the
13 Petitioner’s request for rehearing for the reason outlined in the ... Rehearing Request.”

14 14. On December 10, 2019, and on March 5, 2020, the Tribunal conducted
15 the requested rehearing. The Tribunal had previously advised the parties that the exhibits
16 from the first hearing would be admitted to the rehearing and that any “new” proposed
17 exhibits were required to be disclosed and to be marked with Petitioner’s letters and HOA
18 numbers.⁸ For the rehearing, Petitioner submitted proposed exhibits marked with letters
19 A through GG.

20 15. At the rehearing, the exhibits from the first hearing were admitted to the
21 rehearing record; they are referred to herein as “Initial Exhibits.” During the rehearing,
22 Petitioner relied on exhibits both from the initial hearing and from his new exhibits
23 (referred to herein as “New Exhibits”). As to Complaint One, Petitioner presented Initial
24 Exhibits 1, 2, 5, A, E, G, and New Exhibits A, S, AA, BB, and GG. As to Complaint Two,
25 Petitioner presented Initial Exhibits 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, and New
26 Exhibits E, I, J, K, Y, CC, and FF.⁹ As to Complaint Three, Petitioner presented Initial
27 Exhibits 28, 29, 30, 31, 32, 33, and K, and New Exhibits L, M, N, and O.

28 ⁸ ORDER dated October 17, 2019.

29 ⁹ As presented by Petitioner, New Exhibit FF contains the three Petitions but does not contain all of the
30 attachments that were contained in the administrative record.

1 16. Because Petitioner’s request for a rehearing centered on his allegation
2 of a procedural error (a retroactive swearing in of himself and Ms. Andree), the Findings of
3 Fact in this Rehearing Decision are the result of evidence and arguments from the Initial
4 Hearing and from the Rehearing. Overall, some but not all factual evidence from the Initial
5 Hearing was repeated in the rehearing sessions by reference to some Initial Exhibits, and
6 some factual evidence was either corrected or clarified with the evidence presented at the
7 rehearing sessions.

8 17. At the rehearing sessions, Petitioner presented documentary evidence
9 regarding the three Petitions and his testimony regarding the matters. Petitioner was
10 given the opportunity to question the HOA representative and to cross-examine the
11 witness called by the HOA, Mr. Phil Oliver, the HOA’s former president.

12 18. At the second rehearing session, Petitioner requested to have, as a
13 witness, the clerk from the UPS store, “Damian.” Petitioner had not requested a
14 subpoena for the clerk.¹⁰ The clerk gave his name on the rehearing record as Damian
15 Schaffer. The HOA was able to cross-examine Mr. Schaffer.

16 19. At the second rehearing session, Petitioner requested to have, as a
17 witness, Susan Sotelo, the HOA former Secretary. While Petitioner had previously
18 requested a subpoena for Susan Sotelo for the December 10, 2019 hearing, Petitioner
19 had not requested a new subpoena for the March 5, 2020 hearing session nor had he
20 notified Susan Sotelo that he would be calling her. She gave her name on the rehearing
21 record as Dr. Susan B. Sotelo.¹¹ The HOA was able to cross-examine Dr. Sotelo.

22
23 ¹⁰ At the rehearing, Petitioner indicated that he only knew the clerk as “Damian.” See New Exhibit O.
24 Petitioner provided a phone number for the UPS store. When the call was initially placed and the
25 Administrative Law Judge requested to speak with Damian, the call was placed on hold and then
26 disconnected. When the call was again placed, the Administrative Law Judge requested to speak with
27 Damian; Damian had answered the phone but was clearly reluctant to participate in a hearing he knew
28 nothing about, stating that he did not know Petitioner. The Administrative Law Judge answered Damian’s
29 questions to the extent possible, indicating generally that it was about mailing procedures at the store.
30 Damian reluctantly provided testimony, reluctantly provided his last name, and adamantly requested that
Petitioner provide him documents of the matter, which Petitioner indicated he would do in the coming
day/days at the UPS store.

¹¹ Petitioner provided a phone number. When the call was placed, Dr. Sotelo noted that she had not been
subpoenaed and she was somewhat reluctant to participate. However, Dr. Sotelo did agree to answer
questions.

1 27. On May 25, 2018, Petitioner responded “thank you.” *Id.* At this point, Ms.
2 Andree presumed that the request was fulfilled.

3 28. At the initial hearing, Petitioner argued that the HOA had not, in fact,
4 provided the new Articles of Incorporation, which he indicated he had to obtain from the
5 state at a cost of \$54.00.¹⁸

6 29. At the rehearing, the HOA clarified that it did not have a copy of those
7 new Article of Incorporation within its papers at the time of his Petitioner’s request. The
8 HOA noted that the May requests were met by May 22, 2018, referring to Initial Exhibit
9 1.¹⁹

10 30. In 2002, the HOA had formed a nonprofit corporation and filed its [new]
11 Articles of Incorporation. See New Exhibit S.

12 31. On November 13, 2018, Petitioner requested “financial books and
13 records since the date I purchased my property ... under ARS 33-1805(A) from the time I
14 closed escrow to the present”.²⁰ See Initial Exhibit 1, page 3.

15 32. On November 14, 2018, Petitioner contacted his attorney. See Initial
16 Exhibit 7.

17 33. On November 14, 2018, Petitioner’s attorney contacted the HOA’s
18 attorney, requesting her to ensure that Petitioner *received* the documents “within 10
19 days.”²¹ See Initial Exhibit 8. He listed out various types of documents: as follows: *copies*
20 of “all association financials, balance sheets, bank statements, tax returns, audited and
21 otherwise, corporate records, minutes of meetings, books and records that have not
22 already been provided.” *Id.*

24 ¹⁸ At hearing, Petitioner stated that the HOA had not provided to him the “revocation” of the old articles.
25 He referenced a March 10, 1998 revocation of the HOA Articles of Incorporation by the Corporation
26 Commission for the HOA’s failure to file an annual report. See Initial Exhibit 11, page 2.

27 ¹⁹ Petitioner did not execute the HOA form regarding the documents provided in May 2018 by the HOA.
28 See Initial Exhibit 5.

29 ²⁰ November 13, 2018 was a Tuesday; 10 business days later would have been November 27, 2018. In
30 this request, 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 Initial
Exhibit 5.

²¹ It must be noted that the statute allows ten business days, not just ten days.

1 34. On November 19, 2018, the HOA advised Petitioner that he could review
2 the records at the Ramada on November 23, 2018. *Id.* In response, first, Petitioner
3 wanted to know about more time for the review and, the next day, he indicated to the HOA
4 that he wanted to “have copies of reviewed documents” and he requested to meet at one
5 of several particular places so that he could make and pay for the copies. See Initial
6 Exhibits 1 and 9.

7 35. The HOA and Petitioner met on November 23, 2018 for over two hours.

8 36. At that time, Petitioner refused to sign off on a review statement
9 indicating that he had already received certain documents and that, at that date, he was
10 reviewing certain documents.²² See Initial Exhibit F.

11 37. At the initial hearing, Ms. Andree indicated that Petitioner had wanted to
12 see a “bank activity report” which was not a type of record that the HOA kept (*i.e.*,
13 created).

14 38. On November 23, 2018, while at the records review, Petitioner hand
15 wrote a request for “all financial and other records of the [HOA] from 1984 to the present,”
16 noting that he also wanted copies at 15 cents per page, a cost that he would reimburse.
17 See Initial Exhibit 10. However, at hearing, Ms. Andree indicated that Petitioner did not
18 give her that handwritten request while at the records review (indicating instead that he
19 had informed her that he would email his request to the Board²³); she further noted that,
20 during the records review, Petitioner had not requested any particular copies.²⁴

21 39. On November 26, 2018, Petitioner’s attorney, Gary Wolf, contacted the
22 HOA’s attorney, Carolyn Goldschmidt, indicating that the records review was “not
23 complete.”²⁵ See Initial Exhibit G. Mr. Wolf mentioned the 2017 federal and state HOA
24 returns, indicating that Ms. Andree had indicated those were kept by the CPA and he

25 ²² The review form contains a section in which a member may specify that he would like to purchase a
26 copy of a particular document; the HOA is permitted to charge 15 cents per page and must be reimbursed
27 when the copies are delivered. A.R.S. § 33-1805(A) specifies that, on a request to purchase copies, an
HOA has ten business days to make the copies and that the HOA may charge a fee for making the
copies of up to 15 cents per page.

28 ²³ See Initial Exhibit F.

29 ²⁴ See HOA response to Petitioner’s complaints, Administrative Record.

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

1 requested that those be forwarded to Petitioner. Mr. Wolf mentioned that “bills” of the
2 HOA should have been included, such as for the landscapers. Mr. Wolf mentioned that
3 Ms. Andree had indicated something about some records having already been shredded,
4 and he requested that Ms. Goldschmidt explain “record-keeping” requirements to the
5 HOA. Mr. Wolf mentioned that Ms. Andree had told Petitioner that he would need to make
6 a special request for “copies” for her to take to the Board.²⁶ Mr. Wolf advised that they
7 would be entitled to attorney’s fees “if Petitioner does not receive all requested records,
8 *including an opportunity to photocopy those records, ... a request for production of*
9 *records is basic and primary and has always been protected by the courts.”* Emphasis
10 added here.

11 40. In response, on November 30, 2018, Ms. Goldschmidt noted Petitioner
12 had asked for a tax “statement” and the HOA had not realized he wanted a copy of a tax
13 “return” when they had provided the County tax statement to him. See Initial Exhibit G.
14 Ms. Goldschmidt indicated that, pursuant to A.R.S. § 33-1812(A)(7), the ballots on May 6,
15 2017 votes had been shredded after the requisite one year retention period had elapsed.
16 Ms. Goldschmidt provided attachments to her response with “the remaining records that
17 [Petitioner] has requested to review, including copies of the tax returns and the expense
18 invoices.”²⁷

19 41. At the initial hearing, Petitioner argued that, at the records review, he did
20 not receive a copy of the “tax return” (which he later received).²⁸ Petitioner further
21 indicated that he had only received an invoice for the HOA insurance policy.²⁹ See Exhibit
22 12. Petitioner’s overall argument as to records requests was that the HOA “withheld”
23 information from him, arguing it was information to which he is legally entitled.
24

25 ²⁶ Petitioner’s attorney felt that such action (a refusal to go to a copy shop to make copies) was “not within
26 the spirit, nor letter, of the law under A.R.S. 33-1805.” However, the law mandates access and review,
27 and allows an HOA ten business days for the HOA to make copies when copies are requested.

28 ²⁷ 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.

29 ²⁸ As noted above, he had asked for a tax “statement.”

30 ²⁹ 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.

1 42. At the initial hearing, Ms. Andree indicated that the HOA presumed the
2 April 2018 and May 2018 records requests had been satisfied with the May 2018
3 disclosure when Petitioner had responded “Thank you.”

4 43. At the initial hearing, Ms. Andree indicated that the state tax return was
5 not completed at the time of the records review and was not actually done until April of
6 2019. Regarding an insurance policy, she indicated that Petitioner had asked for
7 “financial books and records” in November 2018, and the HOA had not believed an
8 insurance policy was a part of such requested records. Overall, Ms. Andree noted that the
9 HOA believed they responded appropriately to the records requests when the requests
10 were specified, and that Petitioner since had also been provided copies electronically at
11 no cost.

12 44. At the rehearing, Petitioner argued that the HOA May 2, 2018 email
13 request to narrow his request was, in fact, a “refusal” because he has the right under the
14 [1984] CC&Rs (Article 12, Section 2) to inspect the books and records.³⁰ See New Exhibit
15 BB.³¹

16 45. At the rehearing, Petitioner argued that his request was not burdensome
17 because the HOA was required under the [1984] By-Laws (Article 10) to have its records
18 available at all times for inspection “at the principal office” of the HOA.³² See New Exhibit
19 AA.³³ Petitioner compounded on this argument, further arguing that the HOA was in
20 violation of A.R.S. §§ 10-11601(E) and 10-11602(A) and (B) regarding nonprofit’s
21 corporate records being required to be maintained “at its principal offices, at its known

22 ³⁰ At this point in the hearing, it was not apparent to which legal document Petitioner was referring, as he
23 simply noted them by Article and Section, and the New Exhibit designation; the specific document as set
24 forth in the Findings of Fact herein was determined by the Administrative Law Judge during consideration
25 and in drafting the Rehearing Decision.

26 ³¹ Petitioner’s one page excerpt, labeled Exhibit BB, was compared to the HOA’s Initial Exhibit D to
27 determine that it was an excerpt from the 1984 CC&Rs. See *also* Initial Exhibit 16. This argument -
28 refusal - changes the “tone” of Petitioner’s issue in Petition One, it is closely enough related to the issue
29 set forth that the Tribunal will consider it.

30 ³² This argument by Petitioner is one of two things: either an appeal of the Hearing Decision’s Conclusion
of Law #62 that the April 21, 2018 request was “burdensome” or it is a new issue not within the purview of
his Petition. While the HOA gave an argument in response at the rehearing, the Tribunal will not consider
Petitioner’s argued issue - whether the HOA not having a business office is a violation - in this matter.

³³ Petitioner’s two page excerpt, labeled New Exhibit AA, was compared to the HOA’s Initial Exhibit C to
determine that it was an excerpt from the 1984 By-Laws. The 1984 By-Laws were subsequently
amended at the November 18, 2018 meeting, effective December 1, 2018. See Initial Exhibit B.

1 place of business or at the office of its statutory agent” and available to members to
2 inspect.³⁴ Petitioner argued that there should be a business office.

3 46. At the rehearing, the HOA noted that it did not have a business office with any
4 particular hours, because there was no need for the HOA to experience such an expense;
5 Ms. Andree further indicated that the HOA records are simply retained at Board members’
6 homes. Ms. Andree essentially noted that, at no time, would the HOA Articles of
7 Incorporation give Petitioner (or any other member) the right to 24-hour access to records
8 at a Board member’s home.³⁵

9 **COMPLAINT TWO**

10 47. The agenda for the May 6, 2017 Annual Meeting indicated that a vote
11 would be taken on a proposal to increase the members’ Assessments by “up to \$5 per
12 month.” See Initial Exhibit 18. If the proposal passed, the assessment would increase
13 from \$75.00 per month to \$80.00 per month. See Initial Exhibit 19. The agenda
14 erroneously stated that six (6) of nine (9) votes were needed to approve an increase.

15 48. There were six persons present at the meeting: Ms. Andree (and her
16 husband, Les), Phil Oliver, Petitioner, Maryanne Beerling, and Sara Hitch. Sara Hitch
17 was not an HOA member but was a tenant; she had no membership voting rights.

18 49. The amended minutes for the meeting provide further explanation for the
19 events of the Annual Meeting than do the original minutes.³⁶ See Initial Exhibit 21. When
20 a vote was taken on the increase in the assessments, the count was noted as 5 YES votes
21 and 1 NO vote. At that point, the former president of the HOA had asked Sara Hitch if she
22 wanted to cast Ed Freeman’s proxy vote on file, and she agreed to do so.³⁷ Thus, the

23
24 ³⁴ Because planned communities are required to be compliant with A.R.S. Title 33, Chapter 16 (*i.e.*,
25 A.R.S. § 33-1801 et seq.), Petitioner’s argument - applying A.R.S. §§ 10-11601 and 10-11602 to this
26 matter - will not be considered.

27 ³⁵ Ms. Andree’s reference to the Articles of Incorporation was likely due to the confusion about which legal
28 document Petitioner was relying on at that time in the hearing.

29 ³⁶ It is noted that Ms. Andree was the Secretary of the HOA and she wrote the minutes; the minutes were
30 later amended based on Petitioner’s July 2017 inquiry into the vote.

³⁷ On further reflection by the former president, it turned out that (a) it was not 2/3 of members required for
passage but 2/3 of the votes, and (b) proxy votes were not properly allowed. See Initial Exhibit 26, Mr.
Oliver’s letter of explanation and apology to Petitioner as to the confusion surrounding the vote at the
meeting.

1 result of the vote taken on that day became 6 YES votes and 1 NO vote, and the HOA
2 determined that the proposal had passed and the Assessments were revised.³⁸

3 50. Regarding the use of a proxy vote, Petitioner argued that A.R.S. § 33-
4 1812(A) and the HOA's own policy on Absentee Ballots, Resolution 20140315-01,
5 prohibited proxy voting, and thus, the fee increase was invalid. See Initial Exhibit 17.

6 51. At a Board meeting on July 15, 2017, Petitioner questioned the counting
7 of those Assessments' votes; Petitioner's belief was that the final vote was really only 5
8 YES with 1 NO.³⁹

9 52. The amended Annual Meeting minutes indicate the following:⁴⁰

10 Note: Due to questions regarding the vote cast for Ed
11 Freeman by Proxy Sarah Hitch, the board reviewed and
12 determined the change in Arizona State Law prohibiting the
13 use of Proxy votes. Further review of the HOA controlling
14 documents indicated passage of the Assessment actually
15 required two-thirds (2/3) of the votes cast, not two-thirds (2/3)
16 of the members vote as the ballot incorrectly stated. *The final
17 result of the votes cast was 5 YES votes and 1 NO vote*, there
18 were more than 2/3 of the 6 votes, or 4 YES votes, so the
19 decision to pass the proposal to increase the assessment
20 stands. Phil provided email clarification⁴¹ to all members
21 [Emphasis added here.]

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

26 54. Article IV of the CC&Rs, Section 5(b) and (f), together, provide that 2/3
27 of the votes who are voting (*i.e.*, of the votes cast) is required to pass annual assessments
28 *in excess of* the maximum amount of an increase (*i.e.*, ten percent over the prior years'
29 annual assessment).⁴²

30 _____
31 ³⁸ A copy of the proposal for the increases is found in Initial Exhibit 19.

³⁹ See Initial Exhibit 25, Phil Oliver's letter regarding the irregularity that had occurred.

⁴⁰ See Initial Exhibit 21.

⁴¹ The email clarification is found at Initial Exhibit 25.

⁴² See Initial Exhibit 16.

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

4 56. Article IV of the CC&Rs, Section 9, provides a “quorum” is met with the
5 presence of members entitled to cast fifty percent (50%) of the votes.⁴³

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

10 58. At rehearing, Petitioner argued that 6 YES votes had been needed for
11 the fee increase to pass. Petitioner argued that the only solution was for the HOA to admit
12 they were wrong, to go back and refund or credit the \$5.00 increase and then take another
13 vote on a fee increase.

14 59. Additionally, at rehearing, Petitioner argued, for the first time, pursuant to
15 various subsections in A.R.S. § 33-1812(A): (a) the ballots used were not appropriate
16 because the physical ballots, as counted, did not contain the names, addresses, and
17 signatures of the voters; (b) that mailed-in ballots could not be used, (c) the ballots
18 “expired” at the end of the meeting (and could not be reconsidered later), and/or (d) the
19 ballots were required to have been retained and made available.⁴⁴

20 **60.** At rehearing, HOA argued it had not noticed the error as to having
21 announced needing 6 votes until Petitioner raised the question of the use of a proxy (as
22 was later discussed at the June 2017 meeting). Further, HOA argued that the proxy vote
23 was not counted, and the outcome at the time of initial count was passage with the 5 YES
24 votes. Finally, HOA indicated that the names and addresses were on a detachable
25 portion of the ballots and that because it was a secret ballot, that portion was detached
26 prior to the casting and counting.

27 ⁴³ While the provision also mentions “classes” of membership, there is no indication in the hearing record
28 that more than one type of membership existed at the time.

29 ⁴⁴ Petitioner further commented that he had no idea if there were some other mistakes made. These
30 argued issues do not fall within the purview of his Petition. While the HOA gave an argument in response
at the rehearing, the Tribunal will not consider Petitioner’s arguments regarding the newly alleged
violations of various subsections of A.R.S. § 33-1812(A) in this matter.

COMPLAINT THREE

1
2 61. Petitioner argued, based on a November 5, 2018 receipt for the copies
3 made of the ballot (a 15 page document), that nine full copies of the meeting notice/ballot
4 to vote to amend the HOA Bylaws were not made and, therefore, 9 ballots could not have
5 been “mailed” or “hand-delivered” to the nine members on that date.⁴⁵

6 62. Petitioner further argued (a) that the notices were not picked up from the
7 UPS store by the postal service until November 6, 2018⁴⁶ and (b) that he had “received”
8 his notice on Friday, November 9, 2018, which was only nine (9) before the meeting on
9 November 18, 2018. Petitioner argued that the Amended Bylaws were not valid due to
10 these mailing and delivery issues.

11 63. Dr. Sotelo went to the UPS store on November 5, 2018, made eight
12 copies of the ballot, keeping the original for herself and “mailed” the notices at the UPS
13 store. The time of the transaction, on the receipt, for the copies and mailing is 3:29 p.m.
14 See Initial Exhibit 28.

15 64. Dr. Sotelo also emailed the information on November 4, 2018 to the
16 HOA members. See Initial Exhibit 32. She indicated in her email dated November 6,
17 2018 that she had sent hard copies “by post” and implored the members to inform her if
18 they had not received the hard copy by November 9, 2018.

19 65. The UPS store clerk testified that the UPS store was a U.S. postal
20 service contract office.

21 66. Petitioner did not present any evidence to the contrary.

22 67. The UPS store clerk further indicated, that most likely, given the time of
23 the mailing (*i.e.*, 3:29 p.m.) that the postal service would not have come to the UPS store
24 to pick up mail at that hour, would not have picked it up until the next day, and that the mail

25
26 ⁴⁵ See Initial Exhibit 28. Petitioner argued that one person, Ed Freeman, who lives in Oregon, had not
27 been “mailed” a meeting notice and ballot, but had only received it by email and had not received it until
28 November 23rd. The mailing information, as documented through Initial Exhibit K, is not legible as to a
29 November mailing date. The remaining postal stickers have dates that appear to be in 2019 and, thus, do
30 not appear to be related to a 2018 mailing.

⁴⁶ Petitioner’s underlying argument was that mailing something at the UPS store is not mailing something
through the U.S. postal service.

1 would then go to Phoenix for sorting before going back to Tucson for delivery. See New
2 Exhibit O.

3 68. Petitioner received his mailed copy on November 9, 2018. See Initial
4 Exhibit 30. Petitioner argued that he needed to have received his copy of the notice/ballot
5 no later than November 8, 2018 or 10 days before the meeting and, thus he received his
6 one day late.

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

11 70. The hearing record demonstrates that the ballots were emailed to the
12 HOA members on November 4, 2018. See Initial Exhibit 32.

13 71. The hearing record demonstrates that the ballots were also mailed at a
14 U.S. Postal service contract office location on November 5, 2018 by Dr. Sotelo. See Initial
15 Exhibits 28 and 32.

16 72. The hearing record demonstrates that the mailing to Ed Freeman in
17 Oregon was returned by the postal service. See Initial Exhibit K. Petitioner argued that
18 Mr. Freeman did not receive his notice/ballot until November 22 or November 27, which
19 was long after the 10-day prior mailing requirement.

20 73. The HOA position was that the statute does not require that a meeting
21 notice be “received” within a time frame, only that the HOA cause notice to be made within
22 a time frame. The HOA argued that the mailing on November 5, 2018 at the UPS store,
23 which is a U.S. postal service contract location, met the statutory requirement because it
24 was a mailing at a contract postal service carrier.

25 74. Ms. Andree argued that nine ballots were cast for the proposal to amend
26 the By-Laws, with Mr. Freeman’s ballot received on November 4, 2018 by his response
27 email. See Initial Exhibit 33. She argued that A.R.S. § 33-1812(A), in pertinent part,
28
29
30

1 provides that absentee ballots are acceptable and that the HOA may allow absentee
2 voting to be cast by email.⁴⁷

3 75. Ms. Andree argued that A.R.S. § 33-1804(B) provides that a failure of a
4 member to receive the “actual notice” does not affect the validity of actions taken at the
5 meeting.

6 CONCLUSIONS OF LAW

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

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

17 78. In these proceedings, a petitioner bears the burden of proving by a
18 preponderance of the evidence that a respondent, with the alleged actions, has violated
19 the planned community document(s) provisions or statutes alleged in the petition to have
20 been violated.⁴⁸ Similarly, in a rehearing, that petitioner bears the burden to prove the
21 allegations in the filed petition.

22 79. “A preponderance of the evidence is such proof as convinces the trier of
23 fact that the contention is more probably true than not.”⁴⁹ A preponderance of the evidence
24 is “[t]he greater weight of the evidence, not necessarily established by the greater number
25 of witnesses testifying to a fact but by evidence that has the most convincing force; superior
26 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
27

28 ⁴⁷ See also Initial Exhibit 17.

29 ⁴⁸ See ARIZ. ADMIN. CODE R2-19-119.

30 ⁴⁹ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”⁵⁰

COMPLAINT ONE

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

81. The hearing record demonstrates that the HOA reasonably asked Petitioner to narrow his April 21, 2018 request “to review any and all [HOA] documents including all organizational, business, corporate and financial records that the CDR/HOA has.”⁵¹ Based on the hearing record, the Administrative Law Judge concludes that Petitioner’s request, as stated, was burdensome and needed to be clarified given that the HOA has been in existence since 1984, has no office, and various persons have been officers over the past years. Petitioner’s clarification on May 6, 2018 for “starting” with particular documents was timely responded to by the HOA on May 14, 2018 with an email/attachment of documents. Once Petitioner said “Thank You” on May 25, 2018, and until Petitioner requested to review more documents, the HOA appropriately determined that the May 6, 2018 records review request was satisfied.

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

83. Although the hearing record indicated that Petitioner hand wrote a November 23, 2018 note asking for certain documents and “copies,” the hearing record does not demonstrate when he emailed such a request to the HOA.⁵²

⁵⁰ BLACK’S LAW DICTIONARY 1220 (8th ed. 1999).

⁵¹ While the initial hearing record failed to detail in what location, by whom, or by what method the HOA records were kept, the evidence at the rehearing demonstrated only that the HOA records are kept at Board member’s homes.

⁵² Ms. Andree’s testimony was undisputed that, at the records review, Petitioner had not given her that note but had told her he would email such request to the HOA.

1 “received” more than ten days prior to the meeting; such a position is a misreading of the
2 statutory requirement. Furthermore, A.R.S. § 33-1804(B) provides that a failure of a
3 member to receive the “actual notice” does not affect the validity of the action taken at the
4 meeting. The HOA is the prevailing party on this Petition/Complaint.

5 **ORDER**

6 IT IS ORDERED that the HOA be deemed the prevailing party with regard to
7 Complaint One, Complaint Two, and Complaint Three because Petitioner has not
8 proven the alleged violations in those three Petitions. Petitioner bears his filing fees.

9 ORDERED this day, March 25, 2020.

10 /s/ Kay Abramsohn
11 Administrative Law Judge

12 **NOTICE**

13 **This administrative law judge order, having been issued as a result of**
14 **a rehearing, is binding on the parties. A.R.S. § 32-2199.02(B). A party**
15 **wishing to appeal this order must seek judicial review as prescribed**
16 **by A.R.S. § 41-1092.08(H) and title 12, chapter 7, article 6. Any such**
17 **appeal must be filed with the superior court within thirty-five days**
18 **from the date when a copy of this order was served upon the parties.**
19 **A.R.S. § 12-904(A).**

20 Transmitted electronically to:

21 Judy Lowe, Commissioner
22 Arizona Department of Real Estate

23 Transmitted through US Mail to:

24 Gregory L. Czekaj
25 3749 N. Avenida Arbodela
26 Tucson, Arizona 85716

27 Marybeth Andree
28 3719 N Avenida Arbodela
29 Tucson, AZ 85719