

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 William Brown
4 Petitioner

No. 18F-H1717041-REL

5 vs

6 Terravita Country Club, Inc.
7 Respondent

**ADMINISTRATIVE LAW JUDGE
DECISION**

8
9 **HEARING:** September 22, 2017

10 **APPEARANCES:** Petitioner William Brown appeared on his own behalf.
11 Respondent Terravita Country Club, Inc. was represented by Dax R. Watson.

12 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer

13
14 **FINDINGS OF FACT**

15 1. Terravita Country Club, Inc. (Respondent) is an association of homeowners
16 located in Arizona.

17 2. William Brown (Petitioner) filed a petition with the Arizona Department of
18 Real Estate (Department) on or about June 28, 2017, alleging that Respondent had
19 violated the provisions of A.R.S. § 33-1803. Petitioner's statement of the issue provided
20 as follows:

21 On or before December 26, 2016 and on or before January 9, 2017
22 Respondent failed to comply with the statutory notice to member of violation
23 of A.R.S. § 33-1803.

24 3. The Administrative Law Judge determined that the issue presented was
25 vague and required clarification. After Petitioner was given an opportunity to provide that
26 clarification, the Administrative Law Judge concluded that Petitioner's issue presented
27 was as follows:

28 Prior to imposing reasonable monetary penalties on Petitioner for violations
29 of the declaration, bylaws and rules of the association, Respondent failed to
30 provide Petitioner proper notice in violation of A.R.S. § 33-1803(B).

 4. On or about November 29, 2016, Petitioner allegedly left a box of matches
at the front desk of Respondent's clubhouse with three pieces of paper inside on which
were typed Director's House, Desert Pavilion, and Country Club Clubhouse.

1 5. On or about December 2, 2016, based on Petitioner's alleged conduct,
2 Thomas Forbes, Respondent's General Manager, sent a letter to Petitioner notifying him
3 that he was immediately suspended from all rights and privileges of the Terravita Country
4 Club property until such time that the Country Club Infractions Committee concluded its
5 process, made a recommendation to Respondent's Board of Directors, and the Board of
6 Directors made its final determination.

7 6. The December 2, 2016 letter was sent to Petitioner via United States Postal
8 Service (USPS) first class mail and certified mail. Petitioner signed for the certified mail
9 on December 8, 2016.

10 7. On or about December 14, 2016, Mr. Forbes sent a letter to Petitioner
11 notifying him that the Terravita Country Club Infractions Committee would meet on
12 January 9, 2017 to hear evidence and conduct interviews regarding the November 29,
13 2016 incident.

14 8. The December 14, 2016 letter was sent to Petitioner via USPS first class
15 mail and certified mail. Because Petitioner had filed a temporary change of address with
16 the USPS, the certified mail was forwarded to Coldspring, Texas. The USPS tracking
17 information establishes that on December 24, 2016, the certified mail was "out for
18 delivery."

19 9. Petitioner denied that the USPS left any notification at his Coldspring, Texas
20 address indicating that it was attempting to deliver certified mail.

21 10. After Petitioner failed to claim and sign for the certified mail, the USPS
22 returned the letter to Respondent on January 12, 2017, and was received by Respondent
23 on January 17, 2017.

24 11. On January 9, 2017, the Terravita Country Club Infractions Committee met.
25 Petitioner did not attend the meeting either in person, by telephone, or in writing.

26 12. On or about January 9, 2017, the Terravita Country Club Infractions
27 Committee sent a letter to Petitioner notifying him that it was recommending to
28 Respondent's Board of Directors that Petitioner's membership "be suspended indefinitely
29 and that further disciplinary action, up to and including a fine be considered for the
30 egregious act of threatening [sic] persons and property." The letter indicated that the Board
would consider the recommendation at a Board meeting on January 23, 2017.

1 13. The January 9, 2017 letter was sent to Petitioner via USPS first class mail
2 and certified mail. No evidence was submitted that Petitioner signed for the certified mail.

3 14. On January 31, 2017, Respondent's Board of Directors met and reviewed
4 the Terravita Country Club Infractions Committee's recommendation. Petitioner did not
5 attend the meeting either in person, by telephone, or in writing.

6 15. On or about January 31, 2017, Respondent's Board of Directors sent a letter
7 to Petitioner notifying him that it had decided to suspend Petitioner's membership
8 privileges indefinitely, to impose a fine of \$2,500.00, and to recoup expenses incurred
9 related to the infraction totaling \$5,000.00.

10 16. The January 31, 2017 letter was sent to Petitioner via USPS first class mail
11 and certified mail. No evidence was submitted that Petitioner signed for the certified mail.

12 **CONCLUSIONS OF LAW**

13 1. The Department has jurisdiction to hear disputes between a property owner
14 and a homeowners association. A.R.S. § 32-2199 *et seq.*

15 2. In this proceeding, Petitioner bears the burden of proving by a
16 preponderance of the evidence that Respondent violated A.R.S. § 33-1803(B). A.A.C.
17 R2-19-119.

18 3. A preponderance of the evidence is "[t]he greater weight of the evidence, not
19 necessarily established by the greater number of witnesses testifying to a fact but by
20 evidence that has the most convincing force." BLACK'S LAW DICTIONARY 1220 (8th ed. 2004).

21 4. A.R.S. § 33-1803(B) provides, in pertinent part, as follows:

22 After notice and an opportunity to be heard, the board of directors may
23 impose reasonable monetary penalties on members for violations of the
24 declaration, bylaws and rules of the association.

25 5. Notice is not defined in Title 33, Chapter 16. Notice is commonly defined as
26 "[l]egal notification required by law or agreement, or imparted by operation of law as a
27 result of some fact (such as the recording of an instrument); definite legal cognizance,
28 actual or constructive, of an existing right or title." BLACK'S LAW DICTIONARY 1090 (8th ed.
2004).

29 6. Actual notice is commonly defined as "[n]otice given directly to, or received
30 personally by, a party." BLACK'S LAW DICTIONARY 1220 (8th ed. 2004). Constructive notice

1 is commonly defined as “[n]otice arising by presumption of law from the existence of facts
2 and circumstances that a party had a duty to take notice of” or “notice presumed by law to
3 have been acquired by a person and thus imputed to that person.” BLACK’S LAW DICTIONARY
4 1220 (8th ed. 2004).

5 7. Petitioner asserted that, because there was no evidence that the December
6 14, 2016 letter was actually received by him, Respondent had failed to provide him with
7 “actual notice” of the January 9, 2017 meeting of the Terravita Country Club Infractions
8 Committee. Petitioner argued that the January 9, 2017 and January 31, 2017 letters were
9 then irrelevant because he did not receive the initial notice.

10 8. Petitioner did not provide any authority that the “notice” required in A.R.S. §
11 33-1803(B) had to be “actual notice.” To accept Petitioner’s argument, a homeowner would
12 be able to avoid receiving “actual notice” by simply refusing to sign for a certified mailing, as
13 Respondent alleged Petitioner did in this case.

14 9. Petitioner’s assertion that the USPS failed to notify him of the certified letter
15 at any time between December 24, 2016, and January 12, 2017, was not credible. Thus,
16 Petitioner received constructive notice of the January 9, 2017 meeting of the Terravita
17 Country Club Infractions Committee via the certified mailing for which he refused to sign
18 and the first class mailing of the same letter that was presumably delivered to his
19 temporary address in Coldspring, Texas.

20 10. It is further noted that A.R.S. § 33-1803(B) provides that the *Board of*
21 *Directors* may impose penalties after notice and an opportunity to be heard. Thus, the
22 January 9, 2017, letter is also at issue here.

23 11. While Respondent did not provide any evidence that the January 9, 2017
24 letter was delivered, attempted to be delivered, or returned to sender, it is presumed that
25 the first class mailing of the same letter was delivered to Petitioner at his address of
26 record.

27 12. Therefore, this Tribunal concludes that Respondent did not violate the
28 provisions of A.R.S. § 33-1803(B).

29 **RECOMMENDED ORDER ON REHEARING**

30 In view of the foregoing, it is ORDERED that Petitioner’s petition in this matter is
denied. Pursuant to A.R.S. § 32-2199.02(B), this Order is binding on the parties unless a

1 rehearing is granted pursuant to A.R.S. § 32-2199.04 based on a petition setting forth the
2 reasons for the request for rehearing, in which case the order issued at the conclusion of
3 the rehearing would be binding on the parties.

4 *In the event of certification of the Administrative Law Judge Decision by the*
5 *Director of the Office of Administrative Hearings, the effective date of the Order will be five*
6 *days from the date of that certification.*

7 Done this day, October 11, 2017.

8 /s/ Tammy L. Eigenheer
9 Administrative Law Judge

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11 Transmitted electronically to:

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13 Judy Lowe, Commissioner
14 Arizona Department of Real Estate
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