

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2 Steven D. Stienstra
3 Petitioner,

4 v.
5 Cedar Ridge Homeowners Association,
6 Respondent.

No. 19F-H1918033-REL-RHG

**ADMINISTRATIVE LAW JUDGE
REHEARING DECISION**

7 **REHEARING:** March 12, 2020

8 **APPEARANCES:** Attorneys Diana Elston and Keith D. Collett, of Jones, Skelton &
9 Hochuli, PLC., represented Cedar Ridge Homeowners Association (HOA) as petitioner
10 for the rehearing. Steven D. Stienstra (Petitioner) appeared on his own behalf as
11 respondent for the rehearing.

12 **ADMINISTRATIVE LAW JUDGE:** Kay Abramsohn

13 **FINDINGS OF FACT**

14 1. The Arizona Department of Real Estate (Department) has
15 jurisdiction to receive petitions, hear disputes between a property owner and a
16 homeowners association, and take other actions pursuant to Arizona Revised Statutes
17 (A.R.S.), Title 33, Chapter 16.

18 2. Cedar Ridge Homeowners Association (HOA) is an association of
19 home owners located in Sedona, Arizona. Respondent's Board of Directors (Board) is a
20 voluntary Board.

21 3. Steven D. Stienstra (Petitioner) purchased a residence in the HOA
22 in August of 2017.

23 4. In November 2018, Petitioner filed a one-issue petition (Petition)
24 with the Department alleging that HOA had violated the provisions of A.R.S. § 33-1806.01
25 and the HOA CC&Rs - Section 1.1 and Section 18. See Exhibit I.

26 5. On or about December 18, 2018, the HOA Secretary filed an
27 answer to the petition denying all allegations.

28 6. At the initial hearing session on October 7, 2019, while the parties
29 presented evidence and argument regarding the alleged violation, they both indicated that
30 the "issue" in this matter was legal fees.¹

¹ Whether legal fees were due was dependent on the final determination regarding the alleged violations by Respondent.

1 7. Based on his position that HOA did not properly undertake to, or
2 perform and provide due process for, enforcement of the CC&Rs as to rental activity,
3 Petitioner argued that he should be released from any liability for the asserted legal fees.²

4 8. HOA argued that, based on “facts and knowledge within its
5 possession” regarding the rental activity, it reasonably sought legal advice regarding
6 enforcement of the CC&Rs and incurred legal fees that were now owed to HOA by
7 Petitioner.³

8 9. At the initial hearing, Petitioner presented twenty-five exhibits,
9 designated as Exhibits 1 through 25. HOA presented thirteen exhibits, designated as
10 Exhibits A through M.

11 10. The official record of the hearing is the audio record made at the
12 time of the hearing.⁴

13 11. Following the October 7, 2019 hearing, the Administrative Law Judge
14 issued a Decision dated November 15, 2019 in which she concluded that Petitioner had
15 established the alleged HOA violation and that his Petition should be granted with the
16 HOA reimbursing Petitioner for the \$500.00 filing fee.

17 12. On or about December 19, 2019, after the issuance of the Administrative
18 Law Judge Decision, HOA filed a Homeowner’s Association (HOA) Dispute Rehearing
19 Request citing as particular grounds for the request that the ALJ Decision was “arbitrary,
20 capricious, and an abuse of discretion, and was not support by the evidence.”

21 13. Within the rehearing request, HOA alleged that the ALJ had not
22 considered the HOA evidence regarding whether the HOA had reason to believe that
23 there were continued violations of the CC&R’s short-term leasing prohibition. HOA further
24 alleged that the ALJ had erred in an interpretation of the CC&Rs and had not considered
25 evidence regarding the steps HOA took to ensure compliance and “proper” enforcement
26 of its CC&Rs.

27 ² At rehearing, HOA argued that Petitioner’s “perception” of a violation was “irrelevant” as to whether the
28 Board’s actions were reasonable.

29 ³ At rehearing, HOA argued that it did not have to demonstrate that it “chose the best course of action
30 when choosing how to enforce its CC&Rs against [Petitioner].”

⁴ In preparation for the rehearing, HOA obtained a copy of the official recording and a court reporter
prepared a transcript (undated), which the HOA designated as Exhibit R for the rehearing.

1 14. On January 22, 2020, the Commissioner of the Arizona Department of
2 Real Estate issued an Order Granting Rehearing and Notice of Hearing (Order). In that
3 Order, the Commissioner indicated “the Department hereby grants the [HOA]’s request
4 for rehearing for the reasons outlined in the ... Rehearing Petition ...”

5 15. On March 12, 2020, the Tribunal conducted the requested rehearing. At
6 the rehearing, the exhibits from the first hearing were considered admitted to the
7 rehearing record; the number and letter designations have not changed. Additionally,
8 during the rehearing, HOA relied on admitted Exhibits N, O, P, Q, and R.

9 16. The Findings of Fact in this Rehearing Decision are the result of
10 evidence and arguments from the Initial Hearing and from the Rehearing. Overall, some
11 but not all factual evidence from the Initial Hearing was repeated in the rehearing session,
12 and new factual evidence and legal arguments were presented through the rehearing
13 process.

14 17. Petitioner purchased the home, intending to use the home as a
15 vacation get-away not only for the immediate family but also for friends.⁵ Petitioner’s son
16 began living in the home and managing the schedule for family and friends vacationing in
17 the area and staying at the home. In order to track multiple friends and family staying at
18 the home at various times, Petitioner’s son (Son) set up an account with VRBO, an
19 Expedia Group website containing listings for property rentals around the world. While
20 not intended to be a revenue source, the rentals began to expand to persons other than
21 family members and did produce some revenue between approximately December 2017
22 or January 2018 and April 2018.

23 18. On April 3, 2018, HOA Board Secretary, Vic Burolla penned a
24 memo indicating that he had called Petitioner about a motor home with Canadian plates
25 parked in Petitioner’s driveway in violation of a CC&R prohibiting the parking of motor
26 homes anywhere in the development.⁶ See Exhibit H. Other than telling Petitioner to

27 ⁵ In August 2017, Petitioner had acknowledged the CC&R restrictions on short-term rentals. See Exhibit
28 B. In September of 2017, HOA sent out to all homeowners a mailing that included a reminder about the
29 CC&R restrictions on short-term rentals. See Exhibit C. Another mailing in December 2017 also
30 mentioned the restrictions. See Exhibit D.

⁶ By the time of the hearing, Mr. Burolla was no longer Respondent’s Secretary.

1 move the motor home “out of” the development, Mr. Burolla had no suggestions for
2 Petitioner.⁷

3 19. At some point, in April 2018, HOA Board President, Bill Ferguson,
4 called Petitioner about rental activity at the property.⁸ The participants have widely variant
5 recollections of exactly what was said and in what tone. However, based on the testimony
6 regarding that call, it appears that the phone call was intended to bring to Petitioner’s
7 attention that the CC&Rs prohibited short-term rentals of less than 30 consecutive days.⁹
8 Absent a recording of such call, no particular findings can be made regarding specific
9 CC&R information shared during that phone call.

10 20. While Mr. Ferguson indicated that he could not recall the exact
11 wording, he testified at the initial hearing that the conversation was “not going in a positive
12 direction” and that it was his impression that Petitioner was not going to stop the short-
13 term rentals. Mr. Ferguson recalled he kept repeating to Petitioner “shut it down.”

14 21. The hearing record does not support that a phone call is, in any
15 manner, an enforcement mechanism of alleged violations of CC&RS; therefore, it simply
16 is a courtesy or informational call.

17 22. At the initial hearing, Petitioner testified that he had acknowledged
18 to Mr. Ferguson during the phone call that there had been short-term rentals and that he
19 had stated to Mr. Ferguson they would stop the short-term rentals, *i.e.*, would comply with
20 the CC&Rs from then on.¹⁰

21 23. At the initial hearing, Son indicated that Petitioner had called him

22 ⁷ The CC&Rs indicate that motor homes may be parked “within a completely enclosed garage with closed
23 doors.” See Exhibit 2, Section 9.

24 ⁸ By the time of the administrative hearing, Mr. Ferguson was no longer HOA President.

25 ⁹ At hearing, Mr. Ferguson testified that he knew about multiple cars at the home and that he had been
26 contacted by another homeowner who had seen the VRBO listings. The hearing record does not reflect
27 that, at that point, any other leasing violations were of concern to Mr. Ferguson. There were other
28 underlying concerns that clouded this case and the parties’ tense relationship: (1) while cleaning up the
29 overgrown lot after purchasing the home, Petitioner had a trailer in the driveway and received a call from
30 the HOA about that being a violation (additionally, a letter was sent [Exhibit D]); (2) there were prior
comments about multiple cars at the property; and (3) there were some demands to produce copies of
leases to the tenants.

¹⁰ However, through his cross-examination, Petitioner also questioned Mr. Ferguson whether he had
recalled Petitioner saying some very specific things and/or trying to discuss the matter; Mr. Ferguson
recalled hanging up on Petitioner and Petitioner calling him back.

1 after the Ferguson call and that he then shut down short-term rentals.¹¹ Son testified that
2 he took down two of the three VRBO listings and left one up, setting that listing up to not
3 take any bookings for less than 30 days.¹²

4 24. Mr. Ferguson indicated at the hearings that, after the phone call, he
5 called a Board meeting and the Board then decided to contact an attorney and send a
6 letter to Petitioner about compliance with the CC&Rs.¹³ Mr. Burolla echoed that action
7 when he indicated, at initial hearing, that the Board had relied on the advice of its attorney
8 in sending the May 11, 2018 Cease & Desist Letter.

9 25. At rehearing, Mr. Burolla indicated that, in April 2018 and May
10 2018, they had discussed the reasons for, and benefits of, proceeding under either
11 Section 1.1 or Section 18.¹⁴ However, at initial hearing, Mr. Burolla had stated that he was
12 “not aware of any specific instructions in the CC&Rs” about notifying a homeowner about
13 a violation, and that there was no description therein about how to notify a homeowner.¹⁵

14 26. At rehearing, Mr. Burolla noted that, while the Board had believed
15 that it had the choice to enforce the CC&Rs under either section, it had seemed more
16 expeditious, to be able to collect, to go with Section 1.1 because Section 1.1 dealt with
17 legal fees (Board expenses) and not with a [future] lien (in Section 18).¹⁶

18 ¹¹ Son was not on the phone with Petitioner and Mr. Ferguson. Son recalled that the call from Petitioner
19 was prior to the May 11, 2018 letter.

20 ¹² Son essentially indicated that there was some confusion as to short-term rentals due to a new state law
21 that had been passed.

22 ¹³ HOA does not have regularly scheduled Board meetings, except one to elect officers, but generally
23 meets when the Board members feel there is a need to meet; in this case. Mr. Burolla noted that they
24 would not have called a homeowners meeting as the issue at hand dealt only with Petitioner and there
25 were protection/confidentiality concerns. Calling for a meeting of the Board members would be an
26 indication that the members were apparently not satisfied with Petitioner's responses to Mr. Ferguson's
27 phone call. The first noted contact with an attorney was April 26, 2018. See Exhibit K; see *also* Exhibit Q
28 (unredacted copies of billings). Because the first attorney letter to Petitioner is dated May 11, 2018, this
29 referenced Board determination to consult with an attorney happened after the April 2018 telephone
30 conversation.

¹⁴ See March 12, 2020 Hearing record, at 15:05-15:16, 16:04-16:40, 17:44-19:27; see *also* Exhibit Q.
There are no written communications as to these conversations or discussions.

¹⁵ October 7, 2019 [First] Audio Hearing Record at 1:11:52 – 1:12:39.

¹⁶ The Tribunal appreciates the HOA's candor in presenting specific written communications. See Exhibit
P (communication between attorney and Mr. Burolla). However, while these email communications do
discuss both Sections 1.1 and 18, these communications were in August of 2018, well after the May 11,
2018 letter and subsequent letters and appear to be related to whether or not the Board should hold the
meeting requested by Petitioner.

1 of the violations being caused by your VRBO rentals of
2 multiple units within the Property. You say that you ceased
3 rentals, but acknowledge that the listing stayed up on the
4 VRBO website. ... You claim the listing would not have
5 allowed a booking, but there was no statement in the listing
6 saying the unit was not open for booking. CRHOA has no duty
7 to try to pay for a rental to “see if it would go through”.

8 It is important to note in your [April] call with Mr. Ferguson that
9 you indicated that did not believe that your rentals could be
10 restricted. You did not say that you would be ceasing such
11 operations.

12 ...

13 You have [now] indicated in writing that you will not again rent
14 the Property for less than the required minimum term, that
15 does not alter your months of prior violations. While the
16 CRHOA will therefore no longer consider filing suit to enjoin
17 you from VRBO rentals, based upon your violations of the
18 CC&Rs as a breach of contract, CRHOA hereby demands
19 payment from you on or before July 2, 2018 in the amount of
20 \$1,500.00 to recover attorney’s fees and costs for bringing
21 you into compliance. Please note that this is a number
22 authorized by the Board as a flat amount to resolve the matter;
23 however, if a suit or collection process is necessary to collect
24 such amount, CRHOA reserves the right to pursue collection
25 of all its fees and costs in excess of that number.

26
27 30. HOA’s position was that the remaining listing, as could be seen on VRBO,
28 “remained active”¹⁸ and the fact that the “presence of vehicles outside the home changed
29 on a regular basis” demonstrated to the Board that the [short-term] leasing was still going
30 on.¹⁹

31 31. On June 17, 2018, HOA sent another Cease & Desist letter to
32 Petitioner. See Exhibit 9. The letter states, in pertinent part:

33 In our May demand to cease and desist, we noted that short
34 term rentals of the property were prohibited. We also explicitly
35 stated that Section 1.1 of the CC&Rs also requires that a

36
37 ¹⁸ HOA Pre-hearing Memorandum at 3.

38 ¹⁹ October 7, 2019, [First] Audio Hearing Record at 1:20:18 - 1:20:58. When questioned as to whether a
39 phone call to Petitioner might have clarified the situation, Mr. Burolla agreed it may have clarified the
40 matter but further stated “there’s no reason to suspect we would have been told the truth.” *Id.* at 1:32:30
– 1:32:58.

1 lease must be for no less than the "owner's entire lot." After
2 you and your son were told to cease renting the Property out
3 through [VRBO], you and your son apparently decided to
4 continue violating the CC&Rs by trying to rent the Property in
5 three separate units through Facebook Marketplace ...

6 What is particularly egregious about this ongoing intentional
7 pattern of activity to violate the CC&Rs is that your son ...
8 actually acknowledges in the Facebook post that very intent.
9 He clearly indicates that he is renting a two bedroom, one bath
10 "basement unit" while noting that "there are two other month-
11 to-month renters in separate parts of this home. He still calls
12 himself a "property manager" that "lives on location." He even
13 states that this was a "short-term vacation rental" that is "now
14 transitioning to monthly rentals." Your son's statements are
15 further supported by the neighborhood observation of multiple
16 cars parked there daily. You are responsible for your son's
17 actions in the Property and your son is not able to rent the
18 Property piecemeal any more than you are.

19 ...

20 If you do not cease and desist from all rentals of your Property
21 for a period of less than thirty days as well as renting less than
22 all of you Property in one lease, on or before August 17, 2018,
23 the Board has directed our office to file suit as authorized in
24 Section 1.1 of the CC&Rs. ... You are now required to also
25 pay \$2,600.00 in attorney's fees for the repeated necessity of
26 our firm's involvement to bring you into compliance.

27 32. The matter was not resolved informally after the filing of the
28 Petition.

29 33. Initially, Petitioner had believed that the law permitted "vacation"
30 rentals. Son indicated there were three VRBO listings (apparently to demonstrate the
various sleeping accommodations). Petitioner called Son after Petitioner received the
phone call from Bill Ferguson regarding the CC&R, and Son subsequently discontinued
all active bookings, taking down two of the listings but kept one listing posted. The hearing
and rehearing evidence provides several explanations for that remaining post: to "show"
the accommodation; to be able to contact persons who had booked for less than 30 days
in order to cancel that booking; and, to have a calendar reference for already blocked-out
dates (that were planned for the family's own use). Son indicated that, although the listing

1 was still posted, it was not possible to “book” the rental because it was not an active listing.
2 In his explanation in response to the June 1, 2018 letter, Petitioner noted that a person
3 only had to click on any date and a message on the listing would have popped up
4 indicating that there was a minimum 30-day booking.²⁰ See Exhibit 8.

5 34. The provision of copies of leases to the Board was another matter
6 of contention between the parties.²¹ It is not clear whether and when any or all of the
7 redacted leases were provided to the Board.²² In regard to a copy of a lease being
8 demonstrative of activity of leasing, the hearing record does not evidence any copies of
9 short-term leases prior to the April 2018 phone call to Petitioner from Mr. Burolla.
10 However, Petitioner does not dispute the fact that there were short-term leases prior to
11 April 2018; Petitioner disputes that there were any short-term leases after April 2018.²³
12 Further, the hearing record does not evidence any copies of short-term leases executed
13 after the April 2018 phone call by Petitioner or Son with any tenant.

14 35. Based on an explanation provided by Petitioner following the June
15 17, 2018 letter, Petitioner had not been aware of Son’s Facebook posting offering to lease
16 bedrooms separately. See Exhibit 11. Once Petitioner was so informed, he told Son to
17 take the posting down; Petitioner’s explanation further indicates that there were no leases
18 from the Facebook posting.

19 36. Upon request of Petitioner, and despite the Board maintaining that
20 he was not entitled to a meeting (because the Board had proceeded under Section 1.1,
21 which did not provide for such²⁴), three members of the Board met with Petitioner on
22 September 4, 2018.²⁵ This was a meeting agreed to with specific conditions; the meeting

23 ²⁰ Neither party walked through the VRBO booking process at the time of the hearing. However, at both
24 hearings, Son insisted that if anyone had tried to book, the website would have indicated the listing was
unavailable.

25 ²¹ While this was a complaint mentioned in Petitioner’s Petition, it was largely ignored by the parties
26 during the hearing, as they had both indicated that the “issue” was legal fees.

27 ²² In this regard, see Exhibits 14 and 15.

28 ²³ See Exhibit 10 (para 2).

29 ²⁴ In its letter agreeing to meet with Petitioner, Mr. Burolla informed Petitioner that Section 18 applied
30 when the HOA intended to impose “a fine” and that Section 18 did not apply when the violations were of
the more specific rental requirement set forth in Section 1.1. See Exhibit 12.

²⁵ The Board members were Secretary Burolla, Treasurer Griffin, and Vice-president Tucker. Another
member, Dick Ellis may have come in after the meeting started. See Exhibit A at 56:42.

1 was not arranged as an official or a special Board meeting. See Exhibits 12 and 14.
2 However, an audio recording was made as well as a subsequent transcript. See Exhibit
3 A.

4 37. The unofficial meeting transcript reflects the tense relationship
5 between the parties. For example, at one point, after Petitioner and Son again indicated
6 that the short-term leases had stopped, that the listings were taken down, that leases had
7 been provided, and that there was “nobody under lease,” Ms. Tucker asked “[w]ho’s there
8 then?” to which Petitioner replied “[i]t’s not anybody’s business who’s in our house, really.”
9 See Exhibit A at 23:19 to 23:24. Another example is a discussion about the number of
10 cars, where Mr. Burolla stated that the Board was not complaining about the cars and Son
11 noted the Cease and Desist Letter had stated “multiple cars parked there daily”²⁶ to which
12 Mr. Burolla replied “[t]hat is evidence of something else that’s going on, that might be a
13 violation.”

14 38. Section 1.1 of the CC&Rs provides as follows:

15 Any agreement for the leasing or rental of a lot (hereinafter in
16 this Section referred to as “lease”) shall provide that the terms
17 of such lease shall be subject in all respects to the provisions
18 of this Declaration and the By-laws of the Association. Said
19 lease will be restricted to a single family and shall further
20 provide that any failure by the occupant thereunder to comply
21 with the terms of the foregoing documents shall be a default
22 under the lease. All leases shall be in writing. No owner shall
23 be permitted to lease his property for transient or hotel
24 purposes, which shall be defined as rental [of] any period of
25 less than thirty (30) consecutive days. No owner may lease
26 less than such owner’s entire lot. Any owner who shall lease
27 the owner’s lot shall be responsible for *assuring compliance
28 by the occupant* with the Declaration and the By-laws of the
29 Association.²⁷ *Failure by an owner to take legal action,
30 including the institution of a forcible entry and detainer
procedure against an occupant who is in violation of this
Declaration and By-laws within ten (10) days after receipt of
written demand to do so from the Board of Directors, shall
entitle the Association, through the Board, to take any and all*

28 ²⁶ See Exhibit 9, page 2.

29 ²⁷ Emphasis added here. In the context of this Section, the owner is responsible for compliance with the
30 CC&Rs by the lessee of the Property, i.e., the “occupant.”

1 *such action as attorney in fact for owner* including the
2 institution of proceedings in forcible entry and detainer *on*
3 *behalf of such owner against owner's occupant.* Any
4 expenses incurred by the Association, including attorney's
5 fees and costs of suit, shall be repaid to it by such owner as a
6 special assessment levied against such owner and the
7 owner's lot. In the event of a failure of the lot owner to pay
8 such special assessment within thirty (30) days of its due date,
9 for which the owner shall also be personally liable, the amount
10 of the unpaid assessment shall constitute a lien upon the lot
11 owned by the owner. The lien may be enforced in equity as the
12 case of a real estate mortgage judicial like foreclosure in
13 accordance with Arizona law and such policies as the Board of
14 Directors may from time to time adopt. The foreclosure
15 judgment may award to the Association reasonable attorney
16 fees and taxable court costs incurred in connection with the
17 foreclosure, such fees and costs to be fixed by the court
18 without a jury.

19 39. Section 18 of the CC&Rs is entitled "Enforcement of Covenants."
20 Section 18 requires that, when the Board believes there has been a breach or a
21 threatened breach of the covenants, the Board's required enforcement action is to "notify
22 the [owner] in writing of the breach." See Exhibit 2. Section 18 also requires that the
23 owners are to be given 30 days thereafter to appear before the Board and respond.
24 Section 18 further requires that the owner is to be given a time period, as reasonably
25 determined by the Board not to exceed 60 days to remedy the breach. Finally, if the
26 breach is not remedied, the Board is authorized to levy a fine, which would be a special
27 assessment and result in a lien on the owner's Property.

28 40. At rehearing, Petitioner argued that the HOA had not followed the
29 enforcement steps set forth the Section 18 of the CC&Rs. Petitioner maintained that Son
30 had stopped the rental activities once notified clearly of the prohibitions of, first, short-term
leases and, then, the less-than-full-lot lease. Essentially, Petitioner argued that the HOA
took unnecessary actions against them and he should not be held responsible for the
asserted attorney's fees.

41. At rehearing, for the first time, HOA cited the application of A.R.S. §
10-3830, arguing that HOA had discharged its enforcement duties in good faith relying on

advice from its attorney and, thus, the ALJ had erred and the HOA should not have been held to have violated the CC&Rs. Additionally, HOA argued, at rehearing, that the Petitioner's short-term leases had been a violation of the CC&Rs, and that even after being warned about rentals, the subsequent monthly rental of less than the full home was a continued violation of the CC&Rs by Petitioner and, thus, Petitioner had "unclean hands" and he was not able seek relief from the Department regarding the HOA actions.²⁸

CONCLUSIONS OF LAW

1. The Department has jurisdiction to receive petitions, hear disputes between a property owner and a homeowners association, and take other actions pursuant to Arizona Revised Statutes (A.R.S.), Title 33, Chapter 16.

2. In this proceeding, Petitioner bear the burden of proving by a preponderance of the evidence that HOA violated A.R.S. § 33-1806.01 and the Respondent's own CC&Rs pursuant to Arizona Administrative Code (A.A.C.) R2-19-119.

3. A preponderance of the evidence is "[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW DICTIONARY 1182 (6th ed. 1990).

4. Petitioner alleged that HOA violated Section 1.1 and Section 18 of the CC&Rs and A.R.S. § 33-1806.01 in its enforcement actions against Petitioner.

5. A.R.S. § 33-1806.01(A) provides that a planned community property owner may use his or her property as a rental "unless prohibited in the declaration and shall use it in accordance with the declaration's rental time period restrictions."²⁹

6. Section 1.1 of the CC&Rs contains multiple provisions; these provisions are not connected to one single action or the activity of the same person.

²⁸ HOA argued that Petitioner should not have been allowed to assert any violation by the HOA, and/or may not seek an equitable remedy. In determining whether there was a violation by the HOA regarding enforcement of a valid CC&R provision, the Administrative Law Judge is not able to enjoin or prohibit the HOA from enforcement of a valid CC&R provision; the remedy sought by Petitioner is not equitable but is monetary in nature.

²⁹ A.R.S. § 33-1806.01(C) provides that the HOA may require disclosure regarding a tenant only of the name of the tenant, contact information of the adult (tenant), the time period of the lease, description of the cars, and the license plate numbers.

7. Section 1.1 mandates that a lease agreement is subject to the CC&Rs. Leases must be in writing. Leases are restricted to a single family.³⁰ Owners are not permitted to lease for transient or hotel purposes, defined as “rental [of] any period of less than thirty (30) consecutive days.” Finally, the owner may not lease less than the entire property. When an owner creates a lease agreement that violates these lease provision requirements, that circumstance would be a violation by the owner.

8. The hearing record demonstrated that Petitioner, or more specifically Son, was “managing” the property and as a part of that management, had been coordinating known persons (family and friends) to come and stay at the home. At some point, beginning in December of 2017 or January of 2018, Son also leased out portions of the home to unknown persons (*i.e.*, tenants) for a consideration.

9. Section 1.1 of the CC&Rs mandates that “any failure *by the occupant* [under a lease agreement] to comply with the CC&Rs “shall be a default under the lease” and indicates that one proposed legal action regarding such failure, and resulting default, is institution of a forcible entry and detainer procedure *against the occupant who is in violation*. Thus, the Administrative Law Judge concludes that the written demand language is connected to requiring an owner to take legal action against a lessee who has failed to comply with the CC&Rs. The 10-day period is a time frame within which an owner is supposed to take legal action against the lessee. Actions that the Board may take after the 10-day period are on behalf of the owner against the lessee. Those were not the exact circumstances in this case.

10. Son was not an occupant under a lease.

11. Once the May 11, 2018 letter was sent to Petitioner, he had ten days to take legal action to be in compliance with Section 1.1, *i.e.*, to have Son stop any and all leases for less than 30-days. The evidence of record demonstrates that Son had previously ceased all short-term rentals after the April 2018 phone call from Petitioner. Thus, while the May 11, 2018 letter can be determined to have been appropriately sent to Petitioner, the letter was of no effect, as that short-term leasing had ceased.

³⁰ Enforcement of this provision is questionable at best.

12. The hearing record further demonstrates that HOA simply did not believe Petitioner had stopped short-term rentals, or believed that rentals of some sort continued, based on the VRBO listing and the presence of cars. The hearing record does not demonstrate that miscommunication contributed to this HOA belief.³¹ Despite Petitioner indicating to HOA that the VRBO listing would not allow any potential renter to book the listing, HOA determined to continue enforcement action.

13. However, the hearing record also further demonstrates that, through Son's confusion about "vacation" rentals and/or the specifics of Section 1.1, Son continued to manage the property and sought monthly rentals while he continued to reside, off and on, at the home. Admittedly, this was a violation of Section 1.1. When Petitioner was made aware of such activity, he again mandated Son to desist, and Son gave notice to the "monthly" couple that was at the home that their lease would be over.

14. Based on the foregoing, the Administrative Law Judge concludes that HOA proceeded, based on advice of an attorney, with its May 11, 2018 Cease and Desist Letter regarding the short-term lease violations attributed to the owner, Petitioner. However, such conclusion does not end the matter, it simply denotes that the HOA sought legal advice regarding their options and then acted upon the legal advice, proceeding to further retain the attorney to write the letter. The HOA incurred expenses in the form of legal fees.

15. Section 1.1 provides that if the owner does not take legal action against the occupant within ten days, that the HOA may "take and all *such* action on behalf of the owner *against the occupant*." Emphasis added here. Here, the hearing record demonstrates that Petitioner took action to stop the leasing. Therefore, no "legal action" was required by HOA against the occupant and, in this case, no such legal action was taken by HOA against Son; therefore, there were no expenses incurred pursuant to the parameters of Section 1.1 by the HOA on behalf of the owner against the occupant to be repaid to the HOA. The remaining letters to Petitioner were not within the parameters required when utilizing Section 1.1 as enforcement action. Accordingly, the

³¹ Again, based on the hearing record, there can be no accurate reflection of discussion during the April 2018 phone call.

Administrative Law Judge concludes that the remaining letters sent by HOA were not within the purview of Section 1.1 or Section 18 of the CC&Rs.

16. Even if the June 1, 2018 letter were to be considered a second enforcement action under Section 1.1 against Petitioner, it failed to give Petitioner the requisite ten days to take “legal action.”

17. The June 1, 2018 letter indicated that, because Petitioner had violated the CC&Rs as a “breach of contract,” the HOA was demanding a “payment” in the amount of \$1,500.00 “to recover attorney’s fees and costs for bringing you into compliance.” However, that letter then specified that the stated amount of \$1,500.00 was “authorized by the Board as a flat amount to resolve the matter.” In no instance, would an amount of “attorney’s fees and costs” be determined by anything other than the actual fees and costs. Therefore, the stated amount could only be looked at as either a settlement offer or as some sort of fine, which is not authorized under Section 1.1 but only under Section 18.³² In any event, the Administrative Law Judge concludes that the asserted legal fees are not assigned to Petitioner.

18. Finally, whether the Board determined to follow the advice of an attorney or not, it is implausible that the Board’s Secretary was “unaware” of any specific instructions in the CC&Rs as to how to proceed with a CC&R violation enforcement action. At rehearing, Mr. Burolla had explained that they/he had discussed the options of proceeding either under Section 1.1 or under Section 18 with the attorney. Section 18 of the CC&Rs clearly states that, when the Board believes there is “a breach or threatened breach” a written notice is to be given to the owner along with allowing a 30-day time frame within which the owner may appear before “the Board of Directors.”³³ A verbal warning, in this case the call from Mr. Ferguson, while appropriate in the nature of education and in the spirit of garnering compliance with the CC&Rs, is not an “enforcement” action under the

³² If there had been some such “legal action” as allowed by Section 1.1, the amount is to be repaid “as a special assessment levied against such owner and the owner’s lot.”

³³ “To appear before the Board of Directors to respond to the notice” can only mean to appear at a Board meeting, whether a regular meeting or a special meeting, and not to have a discussion with a few members of the Board.

1 CC&Rs and does not comply with the Board's responsibilities of enforcement as set forth
2 in either Section 1.1 or Section 18 of the CC&Rs.

3 **REHEARING ORDER**

4 IT IS ORDERED that the Petitioner is the prevailing party and HOA be required to
5 reimburse Petitioner the \$500.00 filing fee.

6 **NOTICE**

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

14 Done this day, April 1, 2020.

15 /s/ Kay A. Abramsohn
16 Administrative Law Judge

17 Transmitted electronically to:

18 Judy Lowe, Commissioner
19 Arizona Department of Real Estate

20 Transmitted through U.S. Mail to:

21 Steven D. Stienstra
22 9923 E Jensen St.
23 Mesa, AZ 85207

24 Diana J. Elston,
25 Keith D. Collett
26 JONES, SKELTON & HOCHULI, P.L.C.
27 40 North Central Avenue, Suite 2700
28 Phoenix, Arizona 85004
29
30