

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Debra K. Morin,
4 Petitioner,
5 v.
6 Solera Chandler Homeowners' Association,
7 Inc.,
8 Respondent.

No. 20F-H2020051-REL-RHG

**ADMINISTRATIVE LAW JUDGE
REHEARING DECISION**

9 **TELEPHONIC HEARING:** December 16, 2020.

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

12 **ADMINISTRATIVE LAW JUDGE:** Kay Abramsohn

13
14 **FINDINGS OF FACT**

15 **Background and Procedure**

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

19 2. Petitioner has lived in Solera for four years.

20 3. On or about March 12, 2020, Petitioner filed a two-issue petition (Petition)
21 with the Department alleging Solera had violated the following:

22 (a) the Articles of Incorporation¹ (A)(5) and (A)(6);²

23 (b) the By-Laws³ (A)(3.11.13), (3.11.18.), (3.12);

24
25 ¹ See full document, Solera Exhibit A. The full documents are referenced herein, because for the original
26 administrative hearing, on each of the points she argued, Petitioner had prepared a series of numbered
27 exhibits isolating out the various portions of the various HOA documents in connection with a written
28 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).

29 ² On review of all the hearing and rehearing record documents, it is noted that the "(A)" designation listed
in the document references appears to indicate "Article."

30 ³ See full document, Solera Exhibit B.

- 1 (c) the By-Laws (A)(4.8.1);
2 (d) the CC&Rs⁴ (A)(1) in 1.4;
3 (e) the CC&Rs (A)(2) in 2.1;
4 (f) the CC&Rs (A)(7) in 7.1;
5 (g) the R&Rs⁵ (A)(1) in 1.1, in 1.2, and in 1.4; and
6 (h) the Solera Code of Ethics for Board Members #1, #6, #7, #8, and #9.

7 4. Petitioner's Issue #1 was as follows: Solera, the Solera Board of Directors
8 (Board), and Premier Management Company (Premier) "do not allow direct
9 communication from homeowners." Petitioner indicated that she wanted this "policy"
10 rescinded and that she had raised this issue at a March 4, 2020 Board Meeting.

11 5. Petitioner's Issue #2 was as follows: Solera, the Board, and Premier "are not
12 providing oversight to the General Manager in maintaining all Areas of Association
13 Responsibility ... in good condition and repair at all times." Petitioner indicated that "all"
14 the landscaping in the Areas of Association Responsibility (AREAS) is "still having
15 uncontrolled weeds" and that the Community Center and the AREAS were "not
16 maintained in good condition and repair at all times."

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

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

28 ⁴ CC&Rs references the Solera Declaration of Covenants, Conditions, and Restrictions (CC&R) for
Springfield Lakes. See full document, Solera Exhibit C.

29 ⁵ R&Rs references the Solera Rules and Regulations. See full document, Solera Exhibit D.

30 ⁶ This reference was not further explained at any time.

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

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

5 9. On May 12, 2020, Solera renewed its Motion to Dismiss.⁸

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

8 11. 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 12. 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."¹⁰ Based on that ruling,
19 Solera's Motion to Dismiss was effectively denied.

20 13. At the original hearing, Petitioner focused on documenting each AREAS
21 location at which she had observed weeds or maintenance issues. In that regard,
22
23

24 ⁷ 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 ⁸ Petitioner had not withdrawn her Petition, or either issue in the Petition, after receiving Solera's Motion to
30 Dismiss.

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

¹⁰ Absent the presence of this issue within Petition Issue #2, the Petition would have been dismissed.

Petitioner presented over eighty (80) photographs, some of which were taken before and some of which were taken after the Petition was filed.¹¹

14. As to other items she had observed in AREAS, Petitioner complained of the Community Center exterior,¹² street conditions, street asphalt and sealing repairs, storm drains,¹³ sidewalks,¹⁴ water pooling and/or intrusion issues,¹⁵ walls, curbing, exposed landscaping lights wiring, exposed landscaping drip irrigation lines, tree removal and stumps,¹⁶ and weeds in granite rock locations.¹⁷

15. At the original hearing, Petitioner's position was the same as to all maintenance issues she observed and raised, which was that the same maintenance standard must be applied to Solera (based on CC&R Article 7, Section 7.1) that is being applied to the homeowners (based on CC&R Article 7, Section 7.2) regarding Solera's responsibility to "maintain in good condition and repair at all times" their respective AREAS and homes/lots.¹⁸

16. At the original hearing, Petitioner argued that the homeowners have no discretion with regard to any delay in taking care of issues and Solera should not be able to take months to address an issue.¹⁹

¹¹ Some of the photographs were comparison photographs, ostensibly showing the same location after passage of time.

¹² See Exhibits A27-33 (photographs and email dated February 21, 2020).

¹³ See Exhibits A 58-59. At the original hearing, during cross examination, Ms. Frazier indicated that, to her knowledge, the storm drains were cleaned out in June 2020.

¹⁴ See Exhibit A47 (Petitioner email dated February 21, 2020).

¹⁵ See Exhibits A33-39.

¹⁶ See Exhibit A184-187 (Petitioner email dated February 21, 2020 and photographs).

¹⁷ See Exhibit A127 (Petitioner email dated February 21, 2020). As a part of her evidence, Petitioner cited to several sources which are not justiciable in this Tribunal: Premier company standards and City of Chandler Ordinances. See Exhibits A22-23 and A131-138. Additionally, Petitioner cited to Solera Design Guidelines, which were not mentioned in the Petition and which would appear to be a product of the Solera Architectural Review Committee. See Exhibits A24 and A40-46

¹⁸ Petitioner's written statement (Statement) filed on May 19, 2020 as to Issue #2, referenced R&Rs, Article 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.

¹⁹ 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.

17. At the original hearing, Petitioner argued that the General Manager is not monitoring and maintaining the AREAS and, thus, Solera is responsible to do so and, further, that Solera, the Board, and Premier are all culpable for these problems.²⁰

18. The hearing evidence regarding Petitioner's complaint to Solera about weeds is representative of the overall situation she believes exists as to Solera, the Board and Premier.²¹

19. Following the two original administrative hearing sessions, the Administrative Law Judge issued an Administrative Law Judge Decision (Decision) dated August 19, 2020, concluding that, pursuant to the CC&Rs, Solera is the "sole judge" regarding appropriate maintenance, repair and replacement of all AREAS" and that Petitioner had not demonstrated that Solera was in violation of its governing documents "through any failure to maintain in good condition and repair at all times the AREAS." The Decision further concluded that Solera was in compliance with its governing documents "including CC&R Article 7, Section 7.1" and that Solera was the prevailing party, and dismissing the Petition.

20. On or about September 24, 2020, after receiving the Decision, Petitioner filed a Homeowner's Association (HOA) Dispute Rehearing Request (Rehearing Request), stating her specific grounds as follows:

- a. irregularities in the proceeding causing confusion and disruption of her presentation;
- b. failure by the Administrative Law Judge to issue the Decision within mandated time frames;
- c. misconduct by the prevailing party through disingenuous testimony of the Solera witness;
- d. misconduct by Counsel for Solera through a pre-hearing letter and regarding disclosure process;

²⁰ Several times during the original 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.

²¹ See Exhibit A127 (Petitioner email dated February 21, 2020). Each of Petitioner's notices to Solera on February 21, 2020 take the same approach.

- 1 e. the Decision being arbitrary, capricious, or an abuse of discretion in
2 incompletely citing CC&R Article 7, Section 7.1;²² and finally,
3 f. taking exception with multiple factual statements within the Decision,
4 and stating it was “preposterous to conclude that [she] had not
5 demonstrated that Solera Homeowners Association Board of
6 Directors, Premier Management Company, and General Manager
7 [had] failed to maintain all AREAS of Association Responsibility in
8 good condition and repair at all times as the maintenance standard
9 requires of the Association common areas as well as all homeowners,”
10 arguing that “[t]here must be equal consideration to have a valid
11 contract.”

12 21. On or about October 23, 2020, the Commissioner of the Arizona
13 Department of Real Estate issued an Order Granting Rehearing and Notice of Hearing
14 (Order). In the Order, the Commissioner indicated “the Department hereby grants the
15 Petitioner’s request for rehearing for the reasons outlined in the Petitioner’s Rehearing
16 Request,” stating that Petitioner had claimed:

17 [I]rregularities in the proceedings or any order of abuse of
18 discretion by the Administrative Law Judge that deprived a
19 party of a fair hearing; misconduct by the Department,
20 Administrative Law Judge or the prevailing party; that the
21 findings of fact or decision is arbitrary, capricious, or an abuse
22 of discretion; and, that the findings of fact or decision is not
23 supported by the evidence or is contrary to law.

24 22. On December 16, 2020, the Tribunal conducted a rehearing.²³

25 23. The rehearing record includes the hearing record from the original hearing
26 and the hearing record from the rehearing. The rehearing record includes the Rehearing
27

28 ²² In her Rehearing Request, Petitioner admitted that while the Decision had justified coming to that
29 conclusion, such statement in the Decision “[did] not hold the reasonable person standard nor the letter of
30 the law by mirroring” Solera statements in the Solera Motion to Dismiss by “selecting only part of the
citing and not its entirety.” See Rehearing Request, Item #7. In this regard, Petitioner argued that the
governing documents cannot “be manipulated by leaving out words, inserting different words, or even
omitting half of the cited sentence to change the meaning to achieve a desired result.”

²³ At rehearing, Petitioner acknowledged that the Attachments A through M had been obtained from Solera
in response to Petitioner’s [August 24, 2020] record request, which was a records request she made after
the original hearing. See Rehearing Audio Record (RAR) at 2:24:40 – 2:24:55; see also Attachment M.

Request and its attachments (Attachment), and the other filings made by the parties to the Department regarding the Rehearing Request.

24. Based on consideration of the evidence presented at the original hearing and at the rehearing, the Administrative Law Judge finds as follows:

a. In correction of the Decision's Finding of Fact (FOF) #28, Petitioner first opened, and then testified, at rehearing that, "during that period," (which she testified to be January 2020 and February 2020), one hundred and eleven (111) homeowners received one or more violation notices regarding weeds, debris, and trimming.²⁴ After acknowledging in cross-examination that she had not provided any documentation to the rehearing record in support of such a number, Petitioner corrected her testimony to be that "numerous" homeowners had received notices.²⁵

b. At rehearing, Petitioner argued that the "stronger" City of Chandler (City) standards²⁶ should have been considered by the Administrative Law Judge. In these matters, a Petitioner is limited to jurisdictional and justiciable issues. In this case, City standards are neither under review in this matter nor relevant to the matter; the instant matter consists solely of a petition against a homeowner's association alleging violations of the association's governing documents.

c. The Landscape Maintenance & Service Contract (Contract), effective January 1, 2017, between Solera and Integrated Landscape Management LLC, (ILM) is not a Solera governing document.²⁷

²⁴ See RAR at 0:21:10 – 0:21:35. At the original hearing, Petitioner made an unsupported statement in her Closing argument, *not during her testimony*, regarding homeowners having been cited regarding violations as to weeds. In the Rehearing Request, Petitioner noted that, in her Closing at the original hearing, she had referred to the "period as the pictures I have shown ..." in regard to violation notices. As determined in the Decision in FOF 26, only 4 of the 118 photographs of weeds presented at the original hearing were dated prior to the filing of the Petition.

²⁵ See RAR at 1:15:54 – 1:18:10

²⁶ See A131-138.

²⁷ See Rehearing Request Attachment D. At rehearing, Petitioner argued that because the Contract mentions the "general manager" multiple times, Petitioner had demonstrated that Ms. Frazier's testimony as found in Decision FOF #18 [*i.e.*, that she did not make decisions about maintenance issues] was incorrect.

1 d. The Premier Community Management (Premier) document entitled
2 "Job Description – General Manager – Solera Chandler HOA" is a template
3 document used by Premier when hiring managers;²⁸ the document is not a
4 Solera governing document. Ms. Frazier did not recall executing such a
5 document with Premier when she was hired.²⁹

6 e. At rehearing, Petitioner presented photographic evidence from July,
7 August and September of 2020 regarding storm drains; these photographs
8 document leaves/debris in various locations.³⁰ Petitioner argued, therefore,
9 the storm drains had not been cleaned out in May or June of 2020 as Ms.
10 Frazier had testified in the original hearing. However, other than a footnote,
11 the Decision did not make any specific findings addressing Ms. Frazier's
12 testimony regarding storm drains.³¹

13 f. At rehearing, Ms. Frazier noted that the debris shown in Attachment
14 I, page 2, lower left photograph, is a build-up of debris from the Lone Tree
15 Golf Course and that, if it goes out into street and to the other side, it would
16 be a different matter.³² She indicated that the debris shown in that
17 photograph is the responsibility of the adjacent Lone Tree Golf Course and
18 not the responsibility of Solera to clean out.

19 g. At rehearing, Petitioner presented a September 3, 2020 email (and
20 its email stream) from Ms. Frazier indicating that Solera did not have an
21 Arborist, and that Solera did not have more than one company on contract
22 regarding the trees.³³ Petitioner argued that this new evidence contradicted
23 Ms. Frazier's testimony as found in Decision FOF #24.

24 ²⁸ See Rehearing Request Attachment C. At rehearing, Petitioner argued that this document contradicted
25 Ms. Frazier's testimony as found in Decision FOF #18 [*i.e.*, how Ms. Frazier described her job duties].

26 ²⁹ See RAR at 2:32:05 – 2:33:05; see also RAR at 3:10:36 – 3:11:00.

27 ³⁰ See Rehearing Request Attachment I. Petitioner testified that these photographs demonstrate caked-in
28 and decomposing debris, which defeats the purpose of a location for the water to run off instead of
29 ponding.

30 ³¹ Exhibits A58 and A60 were photographs taken in March and April of 2020 after the Petition was filed;
A58 and A59 were the same photograph. See Rehearing Request Attachment I.

³² See Rehearing Request Attachment I, page 2; see also RAR at 2:42:45 – 2:43:38.

³³ See Rehearing Request Attachment J.

1 h. At rehearing, Ms. Frazier stated that the landscaping company ILM
2 had separate divisions and that one of the divisions handled trees over ten
3 feet tall.

4 i. At rehearing, Petitioner argued that the Decision FOF#19 gave
5 Solera permission to violate CC&Rs Article 6, Section 6.15, by finding that
6 Ms. Fraizer indicated Solera “typically” did a review of its Reserves
7 “annually.” Petitioner argued the CC&Rs only allow review every five
8 years.³⁴ However, the Petition did not allege any violation of CC&R Article
9 6.³⁵ New issues, *i.e.*, issues not stated in the Petition, are not permitted in
10 either an original hearing or a rehearing.

11 j. At rehearing, as to the curbs, Petitioner argued that the portion of
12 AREAS that she was concerned about was, in fact, the responsibility of
13 Solera and was not the responsibility of City.³⁶

14 k. At rehearing, as to the wires, Petitioner argued that they were
15 uncovered for the entire two years after the eucalyptus trees were removed.

16 l. At rehearing, as to weeds, Petitioner argued that Solera was not
17 being charged by the landscaping company for the use of “dye” as to the
18 weeds and that Ms. Frazier’s testimony about the use of “dye” to show that
19 Solera was addressing the weeds had prejudiced the Decision.

20 m. At rehearing, Petitioner indicated that she had reached a place at
21 which the “overwhelming complacency” of the Board had driven her to
22

23 ³⁴ See RAR at 1:02:31 – 1:12:40; see also Rehearing Request Statement at Item 8A. Petitioner’s
24 arguments here were threefold: that it was error on the part of the Administrative Law Judge to have
25 prevented Petitioner from presenting evidence about the Reserves in the original hearing, and then to
26 have allowed Ms. Frazier to testify about it, and, finally, to have reflected such testimony in the Decision.
27 Petitioner requested to have the information stricken from the Decision, arguing that the testimony was
28 false. In Closing, Petitioner opined that the Reserve information should not be included in the Decision.
29 See RAR at 4:00:20 – 4:00:45.

30 ³⁵ See Decision at FOF #2.

³⁶ See Rehearing Request Attachment E. At rehearing, both parties tried to distinguish those “curb”
areas, whether arguably Solera’s or City’s responsibility; however, because Petitioner’s underlying issue
of Solera’s mandate, or failure, to have maintained any portion of AREAS, is determined based on the
language of the CC&Rs, the specific location is not relevant to the hearing record.

1 prepare her multiple emails on February 21, 2020,³⁷ and that the emails
2 demonstrated Solera's lack of responsiveness and also demonstrated that
3 Solera does not have a system of checks and balances to address
4 "maintenance" of AREAS at all times.³⁸

5 n. At rehearing, Petitioner essentially argued that the Tribunal was
6 either uninformed or unaware of the Department's process or the
7 Department's instructions to the public, which she argued did not say that
8 documents presented at hearing were limited to the period prior to a Petition
9 being filed but did say that additional evidence could be presented at
10 hearing.³⁹ Petitioner further argued that, unless some rule of law states
11 otherwise, such "additional" evidence should be considered by the
12 Tribunal.⁴⁰

13 o. At rehearing, Petitioner reemphasized her production at the original
14 hearing of an "enormity" of photographic evidence that, in her opinion,
15 documented examples of Solera's failure to maintain all AREAS of
16 Association Responsibility "in good condition and repair at all times."

17 p. At rehearing, Petitioner argued that the Administrative Law Judge
18 had given little consideration to the breadth of the evidence (*i.e.*, the "310
19 pictures") showing that the Board had neglected all AREAS when the
20 Decision concluded that Petitioner had not demonstrated that Solera,
21 Premier, and General Manager had failed to maintain all AREAS of
22 Association Responsibility in good condition and repair at all times
23 according to the CC&Rs "maintenance" standard in Article 7, Section 7.1.

24
25 ³⁷ See RAR at 2:19:35 - 2:20:00. Petitioner also argued that "undue weight" was given to the [February
26 21, 2020] emails which had "prejudiced" the Administrative Law Judge, causing her to not review all the
27 evidence, (*i.e.*, the 310 pictures) that Petitioner had submitted pursuant to the Department's instructions.
28 See RAR at 2:20:00 – 2:20:41.

29 ³⁸ However, at Closing, Petitioner indicated that, even though there may be systems are in place, they are
30 not being consistently applied to the AREAS. See RAR at 4:01:10 - 4:01:25

³⁹ See RAR at 1:18:17 – 1:21:57.

⁴⁰ Petitioner wondered to whom she should address such an issue for future pro-se parties.

1 q. At rehearing, Petitioner acknowledged that CC&R Article 7, Section
2 7.1 did state that the Board is the sole judge as to appropriate maintenance
3 and repair. However, Petitioner remained adamant that, nevertheless,
4 Solera is responsible to maintain the AREAS in good condition at all times,
5 just as homeowners are required to do pursuant to CC&R Article 7, Section
6 7.2.

7 r. In Closing, Petitioner argued that the “maintenance” standard
8 encompasses the entire development and that, for the development to be a
9 cohesive unit, the “maintenance” standard has to apply both to Solera and
10 to the homeowners.

11 25. The photographs in the hearing and rehearing record document the
12 existence, at those dates embedded in the photographs, of items that deal with
13 maintenance and repairs in various locations of Solera AREAS.

14 26. Petitioner’s overall position continues to be that the same maintenance
15 standard must be applied to Solera (from CC&R Article 7, Section 7.1) that Solera applies
16 to the homeowners (from CC&R Article 7, Section 7.2), and that each has a responsibility
17 to “maintain in good condition and repair at all times” their respective AREAS and
18 homes/lots.⁴¹

19 27. Solera’s position is that it met and continues to meet its CC&R
20 responsibilities to “manage, maintain, repair and replace” the AREAS. Solera re-urged its
21 original hearing positions that, pursuant to the CC&R Article 7, Section 7.1, the Board is
22 “the sole judge as to appropriate maintenance, repair and replacement” of all AREAS and
23 that Petitioner’s subjective opinions as to what, when, or how maintenance and/or repair
24 work ought to be done are simply not relevant.

25 **CONCLUSIONS OF LAW**

26 1. This matter lies within the Department’s jurisdiction. Pursuant to A.R.S. §§
27 32-2102 and 32-2199 et al., regarding a dispute between an owner and a planned

28 ⁴¹ Petitioner’s pre-hearing statement (Statement) filed on May 19, 2020 as to her Issue #2, further
29 referenced R&R Article 6, Section 6.4, stating that “[e]ach owner of a Lot is responsible for the maintenance
30 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.

community association, the owner or association may petition the department for a hearing concerning violations of condominium documents or violations of the statutes that regulate condominiums as long as the petitioner has filed a petition with the department and paid the appropriate filing fee as outlined in A.R.S. § 32-2199.05.

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

3. In these proceedings, a petitioner bears the burden of proving by a preponderance of the relevant evidence that a respondent had violated the planned community document(s') provisions or statutes alleged to have been violated.⁴²

4. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."⁴³ A preponderance of the evidence is "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."⁴⁴

5. CC&R Article 7, Section 7.1, Areas of Association Responsibility, provides, in pertinent part, that the Board "shall be the sole judge as to the appropriate maintenance, repair and replacement of all [AREAS], but all [AREAS], and the Improvements located thereon, shall be maintained in good condition and repair at all times."

⁴² See ARIZ. ADMIN. CODE (A.A.C) R2-19-119; see also A.A.C. R2-19-116 regarding the conduct of administrative hearings. Generally, when a petition is filed, it must be presumed that it is filed due to actions or inactions that took place prior to the filing, which actions or inactions precipitated the filing. Therefore, the most relevant information and documentation that is expected to be relied on to support the petition is documentation of the actions or inactions that precipitated the filing, *i.e.*, those actions that took place prior to the filing.

⁴³ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁴⁴ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

6. CC&R Article 7, Section 7.2, Lots, provides, in pertinent part:

Except as otherwise may be provided in a Supplemental Declaration, each Owner of a Lot shall be responsible for maintaining, repairing or replacing his Lot, and all buildings, Residential Units, landscaping or other Improvements situated thereon (including, without limitation, any landscaping installed within the street right-of-way contiguous to a Lot), except for any portion of the Lot which is in an Area so Association Responsibility. *All buildings, Residential Units, landscaping or other Improvements shall at all times be kept in good condition and repair as established by the Maintenance Standard.* All grass, hedges, shrubs, vines and plants of any type on a Lot shall be irrigated (to the extent necessary to produce healthy plant material), mowed, trimmed and cut at regular intervals so as to be maintained in neat and attractive manner. Trees, shrubs, vines, plants and grass which die shall be promptly removed and replaced with living foliage of like kind, unless different foliage is approved in writing by the Architectural Review Committee. ... All Lots upon which no Residential Units, buildings or other structures, landscaping or Improvements have been constructed shall be maintained in a weed free and attractive manner.

Emphasis added here.

7. "Maintenance Standard" is defined in CC&R Article 1, Section 1.30 as "the standard of maintenance of Improvements established from time to time by the Board and/or the Architectural Review Committee in the Design Guidelines, or in the absence of any such standards, the standards of maintenance of Improvements generally prevailing through the Project."⁴⁵

8. CC&R Article 9, Section 9.1, Enforcement, provides, pertinent part, that Solera "or any owner" shall have the right to enforce "the Project Documents in any manner provided for in the Project Documents or by law or in equity ..."⁴⁶ However, only the Board has the power to levy reasonable monetary penalties against an owner for

⁴⁵ In the original hearing exhibits, Petitioner provided two excerpts from Design Guidelines: A-24 and A-40 through A-46; while her exhibit list describes them as "Safety & Street Maintenance" and "Sidewalks" respectively, the excerpts deal with various areas within the development.

⁴⁶ "Project" is the entire development. See Solera Exhibit C (CC&R Article 1, Section 1.36). "Project Documents" are the CC&Rs, any supplemental to the CC&Rs, the By-Laws, the R&Rs and the Design Guidelines. See Solera Exhibit C (CC&R Article 1, Section 1.37).

violations of the documents when the owner is given notice and an opportunity to be heard.⁴⁷

9. CC&R Article 9, Section 9.5, Interpretation, provides, in pertinent part, which, with the exception of a judicial construction, Solera has “the exclusive right to construe and interpret the provisions of the [CC&Rs].”⁴⁸ Further, Solera’s construction or interpretation of the CC&Rs “is final, conclusive and binding as to all Persons and property benefited or bound by” the CC&Rs.⁴⁹

10. The hearing and rehearing records demonstrated that Petitioner’s Petition was brought based on her belief and opinion that the Board, Premier, and General Manager were non-responsive to her and to her complaints, and that they were not providing appropriate oversight in order to maintain the development’s AREAS. However, a homeowner’s dissatisfaction with management is not within the purview of this process or the jurisdiction of the Tribunal.⁵⁰ This statutory process permits disputes between homeowners and an association solely as to alleged violations of governing documents or alleged violations of applicable statutory provisions.⁵¹

11. The remaining allegation in this matter, is an allegation that Solera fails to maintain the AREAS in good condition and repair at all times as required in CC&R Article 7, Section 1. In this regard, Petitioner maintains that the same maintenance standard must be applied to Solera (from CC&R Article 7, Section 7.1) that is applied to all homeowners (from CC&R Article 7, Section 7.2) on their respective responsibilities to “maintain in good condition and repair at all times” their respective AREAS and homes/lots. Petitioner maintains that Solera is in violation of CC&Rs Article 7, Section 7.1 as demonstrated by her documentation of various maintenance issues within AREAS that she argued are not maintained “in good condition and repair at all time” at various times.

⁴⁷ See Solera Exhibit B (R&Rs, Article 9. Policy of Corrective Actions and Schedule of Fines.)

⁴⁸ *Id.* at 45.

⁴⁹ *Id.*

⁵⁰ During the hearings, Petitioner occasionally mentioned the value of the development/assets and/or the cost of vendor contracts in relation to her concerns about the way in which Board was managing the development or spending money on the contracts.

⁵¹ In this case, Petitioner had not brought forward any allegations of violations of applicable statutes.

12. The photographs in the hearing and rehearing record demonstrate the existence, at whatever dates are embedded in the photographs, of items dealing with maintenance and repair/disrepair of AREAS.⁵² All photographic evidence was reviewed for purposes of this Rehearing Decision.

13. While CC&R Article 9, Section 9.1 allows an owner to bring to the Board a complaint, in combination with CC&R Article 9, Section 9.5, the CC&Rs lift the Board's authority above that of a homeowner. CC&R Article 9, Section 9.9 provides that Solera has the right to record a notice of violation of the CC&Rs by/against a homeowner regarding determined violations of the applicable governing document; there is no such opportunity provided to homeowners within the governing documents.⁵³ Thus, it is clear, that pursuant to the governing documents, the Board's authority is lifted above that of a homeowner.

14. Because CC&R Article 7, Section 7.1 specifies that the Board is the sole judge regarding appropriate maintenance, repair and replacement of all AREAS, only Solera is charged with determining when and how to maintain, and perform repair and replacement AREAS within the development as a function of Solera's management and operation responsibilities. CC&R Article 7, Section 7.1 lifts the Board's authority above that of a homeowner when it specifies that the Board is the sole judge regarding appropriate maintenance, repair and replacement of all AREAS. On rehearing, Petitioner failed to provide legal support for her argument that the same maintenance standard is required to be applied to the Board as it is applied to a homeowner.

15. Given an exhaustive review of the hearing records and the exhibits presented for consideration in both hearings, the Administrative Law Judge concludes that Petitioner has failed to sustain her burden to establish a violation by Solera of the governing documents. The Administrative Law Judge concludes that Solera is in compliance with its governing documents including CC&R Article 7, Section 7.1. The

⁵² Based on the embedded dates, some of the photographs depict conditions which occurred after Petitioner filed the Petition.

⁵³ This statutory hearing process provides an avenue for homeowners to bring forward allegations, which are then heard and determined administratively, preventing a homeowner from being required to pursue litigation in the judicial system, as alluded to in CC&R Article 9, Section 9.1.

Administrative Law Judge concludes that Solera is the prevailing party in this rehearing, and, thus, the Rehearing Petition should be dismissed.

ORDER

IT IS ORDERED that Solera is the prevailing party with regard to the Rehearing, and Petitioner's appeal is dismissed.

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

ORDERED this day, January 8, 2021.

/s/ Kay Abramsohn
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile January 8, 2021 to:

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