

1                                   **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2  
3 Clifford Burnes and Maria Burnes,  
4                   Petitioners,

**No. 21F-H2120002-REL-RHG**

5 vs.

**FINAL ADMINISTRATIVE LAW  
JUDGE DECISION**

6 Saguaro Crest Homeowners Association,  
7 Inc.,  
8                   Respondent.

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9                   **HEARING:** July 20, 2021 at 1:00 PM.

10                   **APPEARANCES:** Cynthia F. Burnes, Esq. appeared on behalf of Clifford and  
11 Maria Burnes ("Petitioners"). John Crotty, Esq. appeared on behalf of Saguaro Crest  
12 Homeowners Association ("Respondent"). Petitioners observed.

13                   **ADMINISTRATIVE LAW JUDGE:** Jenna Clark.

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15                   After review of the hearing record in this matter, the undersigned Administrative  
16 Law Judge makes the following Findings of Fact and Conclusions of Law, and issues this  
17 FINAL ORDER to the Commissioner of the Arizona Department of Real Estate  
18 ("Department").

19                                   **FINDINGS OF FACT**

20                                   **BACKGROUND AND PROCEDURE**

21                   1.       The Department is authorized by statute to receive and to decide petitions  
22 for hearings from members of homeowners' associations and homeowners' associations  
23 in the State of Arizona.

24                   2.       On or about July 17, 2020, Petitioners filed a 4-issue petition<sup>1</sup> with the  
25 Department which alleged that (1) the Association allowed construction to take place on  
26 Lot 7 of the Saguaro Crest Community without the submission of required documents to  
27 the Association's Architectural Review Committee for approval in violation of section 5.5.

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30 <sup>1</sup> See Department's electronic file at HO21-20002\_Petition.pdf.

of the Covenants, Conditions and Restrictions ("CC&Rs")<sup>2</sup>; (2) the Association allowed construction to take place on Lot 7 of the Saguaro Crest Community without the required Construction Compliance Deposit in violation of section 4.0 of the Association's Architectural Design Guidelines; (3) the Association's Board of Directors conducted an unnoticed meeting to consider matter relevant to Petitioner Norm Burns on or about May 20, 2020, in violation of Arizona Revised Statute ("ARIZ. REV. STAT.") § 33-1804(A), (D), and (E)(1); and (4) the Association failed to fulfill Petitioners' records request in violation of ARIZ. REV. STAT. § 33-1805.

3. On or about August 11, 2020, Respondent returned its ANSWER to the Department whereby it denied all 4 of Petitioners' claims.<sup>3</sup>

4. On August 19, 2020, the Department referred this matter to the Office of Administrative Hearings ("OAH"), an independent state agency, for an evidentiary hearing on October 14, 2020<sup>4</sup>, to determine whether the following violations occurred:

**Issue 1 – Alleged violation of CC&Rs Section 5**

**Issue 2 – Alleged violation of Community Agricultural Design Guidelines Section 4.0**

**Issue 3 – Alleged violation of A.R.S. § 33-1804(A), (D), and (E)**

**Issue 4 – Alleged violation of A.R.S. § 33-1805<sup>5</sup>**

5. On March 22, 2021, the undersigned Administrative Law Judge issued an ADMINISTRATIVE LAW JUDGE DECISION ("DECISION") to the Commissioner of the Department.

6. On April 28, 2021, the Department received a DISPUTE REHEARING REQUEST from Petitioners on the grounds that there was alleged "Newly discovered material evidence that could not with reasonable diligence have been discovered and produced at

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<sup>2</sup> Prior to the hearing Petitioners amended this violation to include the entirety of Section 5, not just subsection 5.5

<sup>3</sup> See Department's electronic file at HO21-20002\_Respondent\_Petition.pdf.

<sup>4</sup> The matter was continued on October 05, 2020, and reset for December 11, 2020, at 1:00 p.m. whereby it was heard. However, because the parties were unable to conclude, the matter was again reset to 9:00 a.m. on March 01, 2021, and March 02, 2021.

<sup>5</sup> See Department's electronic file at HO21-20002\_Notice\_Hearing.pdf.

1 the original hearing” and because “[t]he findings of fact or decision is arbitrary, capricious,  
2 or an abuse of discretion.”<sup>6</sup>

3 7. On May 21, 2021, Petitioner’s rehearing request was granted by the  
4 Commissioner of the Department.<sup>7</sup>

5 8. On May 27, 2021, the Department issued a NOTICE OF REHEARING, and  
6 referred this matter back to OAH for an evidentiary hearing on July 20, 2021, regarding the  
7 same issues as the previous hearing.<sup>8</sup>

#### 8 **THE PARTIES AND GOVERNING DOCUMENTS**

9 9. Respondent is a homeowners’ association whose members own properties  
10 in the Saguaro Crest residential real estate development located in Tucson, Arizona.  
11 Membership for the Association is compromised of the Saguaro Crest subdivision.

12 10. Petitioner is a Saguaro Crest subdivision property owner and a member of  
13 the Association.

14 11. The Association is governed by its Covenants, Conditions, and Restrictions  
15 (“CC&Rs”)<sup>9</sup>, and overseen by a Board of Directors (“the Board”). The CC&Rs empower  
16 the Association to control certain aspects of property use within the development. When a  
17 party buys residential property in the development, the party receives a copy of the  
18 CC&Rs and agrees to be bound by their terms. Thus, the CC&Rs form an enforceable  
19 contract between the Association and each property owner.

20 12. An architectural committee is typically charged by an Association’s CC&Rs  
21 with the exclusive task of implementing Architectural Guidelines in order to maintain  
22 aesthetic standards within the community, and preserving the value of the development.

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23 <sup>6</sup> See HO21\_20002\_RHG\_RHGRequest.pdf.

24 <sup>7</sup> See HO21\_20002\_Order\_GranteeingRHG&Notice\_RHG.pdf.

25 <sup>8</sup> Additional notable administrative instances are as follows: On June 02, 2021, OAH issued a PREHEARING  
26 CONFERENCE ORDER to the parties; on June 29, 2021, Petitioners submitted a MOTION FOR CLARIFICATION  
27 regarding the prehearing conference; on July 07, 2021, a MINUTE ENTRY was issued that summarized all  
28 points and stipulations made during the prehearing conference held by the same date; on July 07, 2021,  
29 OAH received a PREHEARING MEMORANDUM from Respondent and Petitioners; on July 13, 2021, OAH  
30 received a MOTION TO RECORD GOOGLE MEETS HEARING from Petitioners, which was denied on July 19,  
2021; and on July 20, 2021, OAH received a MOTION TO CONTINUE HEARING AND COMPLETE RECORD and a  
REFILED MOTION TO RECORD GOOGLE MEETS HEARING from Petitioners, which were denied as untimely,  
moot, and without good cause respectively by the same date.

<sup>9</sup> See Department’s electronic file at HO19-18017\_SinVaca\_CCR.pdf.

1 These Architectural Guidelines establish an association's policies and procedures for  
2 alterations, modifications and improvements to an owners' property, common areas, and  
3 exclusive use common areas. Having governing rules and bylaws in place, including  
4 established architectural rules, helps ensure that an Association meets its fiduciary duty to  
5 care for and act in the best interests of the Association.

6 13. The Association's Amended CC&Rs were recorded with the Pima County  
7 Recorder's Office on August 15, 2006.<sup>10</sup>

- 8 a. Article 5 of the CC&Rs pertains to architectural and landscape control and is  
9 divided into 8 subsections regarding the Association's Architectural  
10 Committee, Purpose, Architectural Standards, Building Envelope, Approval  
11 of Plans for Improvements or Alteration, Decision of the Architectural  
12 Committee; Approval or Disapproval, Variances, and General Provisions.<sup>11</sup>

13 14. The Associations Architectural Design Guidelines were adopted by the  
14 Association's Board of Directors on May 12, 2018.<sup>12</sup>

- 15 a. Section 4.0 of the Architectural Design Guidelines states that a refundable  
16 \$5,000.00 Construction Compliance Deposit is required.

#### 17 **REHEARING EVIDENCE**

18 15. The Department's electronic rehearing file; including the NOTICE OF  
19 REHEARING, Petitioners' Rehearing Exhibit A, Petitioner's BRIEF ON REHEARING,  
20 Respondent's DEFENDANT PREHEARING MEMORANDUM, and the 21F-H2120002-REL  
21 hearing record; including Petitioner Exhibits A-HH and Respondent Exhibits 1-6, were  
22 admitted into the evidentiary record.

23 16. Respondent declined to call any witnesses.

24 17. Initially, the parties were permitted to be heard regarding Petitioner's  
25 MOTION TO CONTINUE HEARING AND COMPLETE RECORD and REFILED MOTION TO RECORD  
26 GOOGLE MEETS HEARING received by OAH on July 20, 2021. Petitioners' motion for

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28 <sup>10</sup> See Department's electronic file at HO21-20002\_Saguaro Crest CC&Rs.pdf.

29 <sup>11</sup> *Id.*

30 <sup>12</sup> See Department's electronic file at HO21-20002\_ Saguaro Crest 2018 Architectural design  
Guidelines.pdf.

1 continuance was denied for lack of good cause and untimeliness, and Petitioners' motion  
2 to record was denied as moot.

3 18. After opening remarks, Petitioners were required to make offers of proof  
4 regarding their disclosed witnesses and exhibits before the Tribunal regarding alleged  
5 "newly discovered material evidence that could not with reasonable diligence have been  
6 discovered and produced at the original hearing."

7 19. Petitioners offered no "new" evidence and instead conceded that they  
8 wished to present evidence which they had in their possession during the prior hearing,  
9 that they markedly had decided not to present prior to the closing 21F-H2120002-REL's  
10 evidentiary record. Petitioners also conceded their proposed additional exhibits had not  
11 "newly discovered" but again had not been offered during the prior hearing as a part of  
12 their presentation strategy for their case-in-chief and rebuttal.

13 20. Because Petitioners did not provide satisfactory offers of proof, as they  
14 conceded they were not in possession of any "new material evidence," Petitioners were  
15 precluded from recalling Mr. Burns or Mrs. Martinez as witnesses, or offering additional  
16 exhibits.

17 21. Therefore, the only substantive evidence of record is that which was entered  
18 in 21F-H2120002-REL as follows:

19 Issue #1 - Alleged violation of CC&Rs Section 5

- 20 a. The Association is an Arizona non-profit corporation created on June 18,  
21 2009.<sup>13</sup> The subdivision consists of 18 Lots.<sup>14</sup>  
22 b. As of the date of the hearing the Board of Directors was comprised of three  
23 persons: Esmerelda Martinez – President, Dave Madill – Vice President,  
24 and Julie Stevens – Treasurer. All Board positions are voluntary and unpaid.  
25 i. Esmerelda Martinez ("President Martinez") began her tenure on  
26 December 02, 2017. Dave Madill began his tenure on January 20,  
27 2018. Julie Stevens began her tenure on January 20, 2018.

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29 <sup>13</sup> See Petitioners Exhibit U.

30 <sup>14</sup> See Petitioners Exhibit Z.

- 1 c. On January 27, 2018, the Board of Directors executed a document naming  
2 Jamie Argueta, Joseph Martinez, and Norm Burnes ("Petitioner") to serve  
3 as Architecture Review Committee ("ARC") Members, effective December  
4 05, 2017.<sup>15</sup> ARC Members were advised that the committee's main goal "is  
5 to make the new home look like it belongs in the neighborhood – both in  
6 style and colors."<sup>16</sup>
- 7 i. The ARC Members had previously been provided a copy of  
8 construction plans for Lot 7, owned by Raul and Ramona Martinez,  
9 on December 16, 2017, for their review.
- 10 d. On January 03, 2018, the ARC Members unanimously approved of the new  
11 home construction on Lot 7.<sup>17</sup>
- 12 i. On October 16, 2017, Mr. Martinez submitted site plans and building  
13 specifications to the ARC. On October 23, 2017, the ARC responded  
14 to Mr. Martinez regarding issues with his proposed home placement,  
15 septic and driveway location, and color scheme.
- 16 ii. At an unknown time in 2018 additional construction plans were  
17 reviewed by the ARC.<sup>18</sup>
- 18 e. On May 04, 2018, the construction plans for Lot 7 were approved by Pima  
19 County.<sup>19</sup>
- 20 i. Construction of Lot 7 began on an unknown date in 2018.  
21 Contruction has not been completed.
- 22 f. Petitioners own Lot 6, which is next door to Lot 7.<sup>20</sup>
- 23 g. On October 21, 2018, Petitioner notified the Board of his concerns regarding  
24 the development of Lot 7.<sup>21</sup> Petitioner included several photos depicting the  
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26 <sup>15</sup> See Respondent Exhibit 1A.

27 <sup>16</sup> See Petitioners Exhibit B; see also Respondent Exhibit 1B.

28 <sup>17</sup> See Petitioners Exhibit C; see also Respondent Exhibit 1C.

29 <sup>18</sup> Neither party possesses copies of said plans.

30 <sup>19</sup> See Petitioners Exhibit AA.

<sup>20</sup> See Respondent Exhibit 1D.

<sup>21</sup> See Petitioner Exhibit GG.

view he believed he was “going to lose” and the build that would “be in my backyard.”<sup>22</sup>

- h. On April 14, 2020, after construction on Lot 7 began, Petitioner issued the following letter of concern about the placement of the Martinez’s residence with the Board of Directors and the ARC:

Having the house in Lot 7 house so close to my back yard is a constant source of stress for my family. Every day there are vehicles with their headlights pointing directly into the back windows of my house. That will never end. A large part of the value to me for my house was the view from the back patio. That's gone now. The view from my kitchen and bedroom windows are destroyed. People in the house on Lot 7 now have a direct view into our family member's windows. I feel our privacy is violated / gone. We are not happy living in this house. During the approval process for the Lot 7 home Jamie mentions how the house placement was originally further back and that "once the home was shown as moved lower and closer to the street, it was approved per the ARC request." Mr. Martinez did not honor the approved plan and has placed the house in the original position. Jamie was correct when he said In that original plan, the building itself would have obstructed an even more significant portion of the direct view from your backyard. That is what happened. When the frame for the foundation was laid out I reported the error to Joseph. The purpose of the ARC is to make sure the houses here are within harmony, to look like they belong in the neighborhood. Because of the (mis) placement of the house on lot 7, From my point of view (Literally) the house is not harmonious and does not "look like it belongs". I am asking the home owners association and the ARC to help rectify this error.<sup>23</sup>

*(All errors in original.)*

- i. On May 05, 2020, the Association responded to Petitioner that, “The construction location of the home on Lot 7 cannot be held accountable by referencing an aerial map. The construction location of the home should be held accountable by onsite survey verification per construction drawing dimensions.”<sup>24</sup>

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

<sup>23</sup> See Petitioners Exhibit K; see also Respondent Exhibits 3B and 3F.

<sup>24</sup> *Id.*

1 Issue 2 – Alleged violation of Community Agricultural Design Guidelines Section 4.0

- 2 j. On an unknown date in 2013, the Martinez family bought Lots 7 and 13 from  
3 Jamie Argueta. At the time of the sale, Mr. Argueta was a member of the  
4 Association's ARC.
- 5 k. In a meeting held on May 03, 2020, the Board of Directors decided,  
6 pursuant to ARIZ. REV. STAT. § 10-3821, to honor a Construction  
7 Compliance Deposit Waiver previously granted to the Martinez family.<sup>25</sup>
- 8 i. The discretionary waiver was originally granted during an economic  
9 turndown to incentivize purchases in the subdivision.
- 10 l. However, the Association does not possess a corporate record that any  
11 such Construction Compliance Deposit Waiver was previously granted to  
12 the Martinez family.

13 Issue 3 – Alleged violation of A.R.S. § 33-1804(A), (D), and (E)

- 14 m. On April 18, 2020, Petitioner requested a meeting with the Board of  
15 Directors to discuss the placement of the Martinez residence on Lot 7.<sup>26</sup>  
16 That same day, President Martinez agreed to hold a meeting with Petitioner  
17 and the Board the following day at 10:00 a.m.<sup>27</sup>
- 18 n. During his meeting with the Board on April 18, 2020, Petitioner complained  
19 to the Board that the construction on Lot 7 was obscuring the mountain  
20 views from his home, specifically from his backyard.<sup>28</sup> Petitioner asked the  
21 Board to require Mr. Martinez (1) pay to construct a wall tall enough block  
22 his home's view from Petitioners' property, (2) place the exterior lighting on  
23 the home below said wall to prevent reflection into Petitioners' home, (3)  
24 relocate the portable bathrooms on site outside of Petitioners' view, and (4)  
25 remit a \$5,000.00 payment to the Association as a construction deposit.
- 26 o. Petitioner was advised that his lighting concern was the only item of  
27 contention within the purview of the Association's jurisdiction. Petitioner was

28 <sup>25</sup> See Respondent Exhibit 2A-2B and 3E.

29 <sup>26</sup> *Id.*

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

<sup>28</sup> See Respondent Exhibit 3D.

1 also reminded that neither he nor any of his other ARC Members had  
2 required a deposit as a requirement of ARC approval. The Board noted that  
3 it would be unfair for Officers to ask for a deposit after-the-fact because it  
4 would be unfair to the Martinez family. The Board did, however, agree to  
5 convey Petitioners' wishes to Mr. Martinez, but asked Petitioner to recuse  
6 himself from the discussion. Jesus Carranza served as a substitute ARC  
7 Member for the meeting with Mr. Martinez whereby Petitioner's lists of  
8 request was delineated.

9 i. Neither Petitioner nor Mr. Martinez agreed to pay for the cost of a wall  
10 to be erected between their property lines, nor did either party agree  
11 to split the associated costs.

12 p. On May 20, 2020, acting under authority enumerated in ARIZ. REV. STAT §  
13 10-3821, the Association restricted Petitioner's participation as an ARC  
14 Member regarding all issued related to the construction of Lot 7.<sup>29</sup>  
15 Specifically, the Board notes, in pertinent part, that "[T]he Board of Directors  
16 hereby unanimously agree that [Petitioner] be removed as an ARC Member  
17 for all ARC related matters concerning Lot 7."<sup>30</sup>

18 i. The Association, through its Board of Directors, obtained individual  
19 signatures as unanimous consent in order to move forward with the  
20 unnoticed closed meeting.

21 q. On May 21, 2020, during a meeting between Petitioner and the Board, a  
22 copy of the meeting notes were delivered to Petitioner. Petitioner was  
23 advised that the lights he was concerned about were temporary, and that  
24 Mr. Martinez would have the portable bathroom relocated out of Petitioner's  
25 line of sight. Petitioner was further advised that Mr. Martinez declined to pay  
26 for a wall between the parties' property lines, and that he had also received  
27 a Construction Compliance Deposit waiver from the ARC Members that  
28 preceded Petitioner.

29 <sup>29</sup> See Petitioners Exhibit G; see also Respondent Exhibit 3A.

30 <sup>30</sup> *Id.*

Issue 4 – Alleged violation of A.R.S. § 33-1805

r. On June 04, 2020, Petitioners issued the following records request, in pertinent part, to the Association:

I am requesting to review ALL of the **documents** of the HOA, including financial documents. Additionally, I am requesting a copy of all HOA documents to be provided to me regarding the following items. As per the statute, the review should be fulfilled, and the copies should be provided within ten (10) days.

1. Any meetings where my family or I were discussed, or decisions were made regarding me or my family.
2. Any meetings where issues that I addressed were discussed, or decisions were made regarding any issues that I addressed.
3. I understand that Raul and Jaime have both stated that there is no documentation regarding the CCD waiver on Lot 7. Please confirm that there are no HOA records about that matter. If such records do exist, please provide me with a copy of those records.
4. Any meetings where any activity regarding Lot #7 were discussed or decisions were made.
5. All current insurance policies. Please see Art 13 of the CC&Rs.
6. All past and present ARC guidelines and the paperwork showing how those guidelines were adopted. Please provide the minutes of any meetings where the Members approved those ARC guidelines. Also provide evidence that the Amended Architectural Guidelines were recorded in Pima county.
7. A copy of all of the Project Documents as defined in Section 1.19 of the CC&Rs.
8. A copy of all documents submitted regarding Lot 7.
9. A copy of all final documents approved by the county for Lot 7.
10. The construction drawings for Lot 7 with dimensions showing the placement of the structure on the lot.
11. A copy of all actions taken by the Board of Directors under ARS Section 10-3821
12. A copy of all discussions and approvals by the ARC or the Board of Directors regarding Lot 7.
13. A copy of all documents showing written approval of new construction on any of the lots as required by ARS 33-1817 (B)(2)(b).
14. A copy of written reports following on-site formal reviews for the purpose of determining compliance with the approved plans of all new construction on any of the lots as required by ARS 33-1817 (B)(2)(c) and 33-1817 (B)(2)(d).

15. All notes, minutes, and findings, regarding the complaint filed by Norm and Maria Burnes on April 18, 2020.

16. On May 21, 2020, an "HOA Violation Complaint Form" was sent to Norm Burnes.

Please provide a copy of all records where that form was adopted by the HOA.

17. Please provide a copy of all complaints filed on the form listed in 16 above.<sup>31</sup>

(All errors and emphases in the original.)

s. On June 8, 2020, Petitioners received an email from the Association about reviewing the requested documents.<sup>32</sup> Specifically, Petitioners were advised that the requested documents, excluded from nondisclosure, would be available for review on June 16, 2020, from 10:00 a.m. until 11:00 a.m.

t. On June 16, 2020, the Association met with Petitioners. Petitioners were presented with a 40-item outline identifying which documents fulfilled each of Petitioner's enumerated records requests. A total of 342 pages were identified. Petitioners were permitted to review all 40 documents. Petitioners brought their own scanning machine but were prohibited from using it. Alternatively, Petitioners requested copies of all 40 documents.

u. On June 17, 2020, Petitioner made another request for a copy of the documents.

v. On June 21, 2020, Petitioner again requested copies of the documents from the Association.<sup>33</sup>

w. On June 23, 2020, the Association instructed Petitioner to submit a formal written request using the Association's REQUEST FOR REVIEW OF THE ASSOCIATION'S RECORDS form.<sup>34</sup> The Association also provided Petitioner with 2 pick-up options for the documents.<sup>35</sup>

<sup>31</sup> See Petitioners Exhibit M; see also Respondent Exhibit 3G.

<sup>32</sup> See Petitioners Exhibit T.

<sup>33</sup> See Petitioners Exhibit N; see also Respondent Exhibit 3H.

<sup>34</sup> See Petitioners Exhibit s P-Q.

<sup>35</sup> See Petitioners Exhibit P.

1 x. On June 24, 2020, Petitioner paid \$51.30 to the Association, signed his  
2 acknowledgement accepting review of the documents, and purchase  
3 agreement for the copies.<sup>36</sup>

4 i. Later that day, Petitioner notified the Association that “[S]ome of the  
5 attachments for some emails are not included within in this package  
6 from this documentation.” [sic]

7 y. On June 30, 2020, the Board confirmed their receipt of Petitioner’s June 04,  
8 2020, and June 21, 2020, letters.<sup>37</sup> Petitioner was advised that due to the  
9 nature and volume of Petitioner’s requests, and their concerns regarding  
10 statutory and community document compliance, the Board needed to  
11 schedule an open meeting to discuss how to proceed.

#### 12 **ADDITIONAL EVIDENCE**

13 z. The Association does not have the authority to halt construction that has  
14 begun after it has been approved by the local building authority, not does  
15 the Association have the authority to inspect or issue a citation to a  
16 construction site for alleged code compliance violations.

17 aa. The ARC was not afforded an opportunity to approve or deny changes or  
18 modifications made to Lot 7 plans, if any, after January 03, 2018, and was  
19 not made aware that any changes or modifications had taken place.

#### 20 **CLOSING ARGUMENTS**

##### 21 Respondent’s closing argument

22 22. In closing, Respondent opined that Petitioners’ presented “nothing new”  
23 and argued that the Tribunal’s prior ruling was just, proper and supported by the already  
24 filed evidence and already received testimony. Respondent beseeched to the Tribunal to  
25 sustain and reassert its prior Order.

##### 26 Petitioners’ closing argument

27 23. In closing, regarding Issue 1, Petitioners argued that sections 5.2 and 5.4 of  
28 the CC&Rs define the authority of the HOA’s Architectural Committee, and that said

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29 <sup>36</sup> *Id.*

30 <sup>37</sup> See Respondent Exhibit I.

committee may halt construction once they have begun as provided by sections 5.11 and 12.1 of the CC&Rs.

24. Regarding Issue 2, Petitioners argue that the burden of proof was on Respondent to establish that a waiver had been issued; the evidence of such was not a part of the underlying hearing record. Petitioners also argue that the testimony of their witness, Ms. Brown, should have been greater weight on this issue.

25. Regarding Issue 3, Petitioners argue that the burden of proof was improperly shifted regarding the “porch meeting”; identified as occurring on May 20, 2020, and also argued that the recognized exception was not clearly identified in the underlying decision. Moreover, Respondent argued that the Board failed to provide notice of the “emergency meeting” after the fact, or at the next duly scheduled meeting for their Members.

### **CONCLUSIONS OF LAW**

1. This matter lies within the Department’s jurisdiction pursuant to ARIZ. REV. STAT. §§ 32-2102 and 32-2199 et seq., regarding a dispute between an owner and a planned community association. The owner or association may petition the department for a hearing concerning violations of community documents or violations of the statutes that regulate planned communities as long as the petitioner has filed a petition with the department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(A), 32-2199.01(D), 32-2199.02, and 41-1092 et seq. OAH has the authority to hear and decide the contested case at bar. OAH has the authority to interpret the contract between the parties.<sup>38</sup>

3. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1243.<sup>39</sup>

4. “A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not.”<sup>40</sup> A preponderance of the evidence is “[t]he greater weight of the evidence, not necessarily established by the greater number of

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<sup>38</sup> See *Tierra Ranchos Homeowners Ass’n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

<sup>39</sup> See ARIZ. ADMIN. CODE R2-19-119.

<sup>40</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1 witnesses testifying to a fact but by evidence that has the most convincing force; superior  
2 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable  
3 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than  
4 the other.”<sup>41</sup>

5 5. Here, the material facts remain unchanged.

6 6. Based upon a review of the credible and relevant evidence in the record,  
7 Petitioners did not sustain their burden of proof regarding Issues 1 through 3. Petitioners  
8 sustained their burden of proof as to Issue 4.<sup>42</sup>

9 7. Additionally, Petitioners did not introduce any evidence or provide  
10 compelling arguments tending to suggest that “[t]he findings of fact or decision is arbitrary,  
11 capricious, or an abuse of discretion” as it related to Issues 1-3 of the underlying decision.

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12 <sup>41</sup> BLACK’S LAW DICTIONARY 1220 (8<sup>th</sup> ed. 1999).

13 <sup>42</sup> While it is clear that the construction on Lot 7 is not per plans approved by the ARC on January 03, 2018, it  
14 is also clear that the no additional plans were provided for the ARC’s consideration afterward. The ARC  
15 cannot approve or deny proposed plans unless they are submitted for review. Moreover, the record reflects  
16 that the build does comply with the local government’s building authority. No violation of CC&Rs Section 5  
17 has been established.

18 It is also clear that Lot 7 was granted a construction compliance deposit waiver. What is not clear is why the  
19 Association does not have a documented record to explain the details regarding how or when the waiver  
20 was issued. Because that is not a noticed issue, however, the inquiry is moot. No violation of Community  
21 Agricultural Design Guidelines Section 4.0 has been established.

22 It is also clear that on April 18, 2020, Petitioner asked to meet with the Board to discuss an urgent matter,  
23 and the Board obliged by scheduling a meeting for the next morning on April 19, 2020. Here, the Board’s  
24 failure to notice the meeting is excused as an exception. Moreover, the record reflects that Petitioner’s  
25 assertion that the Board removed him from the ARC is incorrect. The Board only removed Petitioner from all  
26 ARC related matters concerning Lot 7. No violation of ARIZ. REV. STAT. § 33-1804 has been established.

27 It is also clear that on June 04, 2020, Petitioner submitted a records request to Respondent that sought to  
28 review all of the Association’s records, including financials, and also asked for copies of all documents that  
29 fell into 17 enumerated categories. Petitioner specifically demanded that his requests be fulfilled within 10-  
30 days. The record reflects that Respondent had until June 18, 2020, to comply with both of Petitioner’s  
requests. The record also reflects that documents were made available to Petitioner on June 16, 2020, and  
copies of documents were provided to Petitioner on June 24, 2020. Notably, the documents provided to  
Petitioner on June 24, 2020, did not include email attachments referenced in the documentation. A violation  
of ARIZ. REV. STAT. § 33-1805 has been established.

- a. Respondent’s argument that Petitioner’s June 16, 2020, clarification regarding his document his  
request effectively reset the statutory deadline is rejected. The statute does not quantify how many  
records or what size of record(s) may be requested. While Petitioner’s request may be rightly  
perceived as vague and/or over-encompassed the crux of discoverable information in possession  
of Respondent, it was still up to the Association to timely clarify and provide Petitioner with the  
documents he requested, or obtain an extension.

8. Therefore, the undersigned Administrative Law Judge must again conclude that because Petitioners failed to sustain their burden of proof that the Respondent violated section 5 of the Association's CC&Rs, section 4.0 of the Association's Agricultural Design Guidelines, and ARIZ. REV. STAT. § 33-1804(A), (D), and (E), their petition must be denied, in part. Because Petitioners sustained their burden of proof that Respondent violated ARIZ. REV. STAT. § 33-1805 their petition must be granted, in part.

## FINAL ORDER

Based on the foregoing,

**IT IS ORDERED** that the March 22, 2021, DECISION holding Petitioners' petition regarding Issue 4 be granted, and Petitioners' petition regarding Issues 1-3 be denied is affirmed.

**IT IS FURTHER ORDERED** that the DECISION holding Respondent reimburse ¼ of Petitioners' filing fee (e.g. \$500.00) in certified funds is affirmed.

**IT IS FURTHER ORDERED** that DECISION ordering Respondent to henceforth comply with ARIZ. REV. STAT. § 33-1805 is affirmed.

**IT IS FURTHER ORDERED** that Respondent provide Petitioners with the aforementioned missing email attachments related to Petitioner's June 04, 2020, records request within 10-business days of the effective date of the FINAL ORDER in this matter.

**NOTICE**

**This Administrative Law Judge ORDER, having been issued as a result of a rehearing, is binding on the parties.<sup>43</sup> A party wishing to appeal this order must seek judicial review as prescribed by ARIZ. REV. STAT. § 41-1092.08(H) and Title 12, Chapter 7, Article 6. Any such appeal must be filed with the Superior Court within thirty-five (35) days from the date when a copy of this ORDER was served upon the parties.<sup>44</sup>**

Done this day, August 09, 2021.

<sup>43</sup> See ARIZ. REV. STAT. § 32-2199.02(B).

<sup>44</sup> See ARIZ. REV. STAT. § 12-904(A).

Office of Administrative Hearings

/s/ Jenna Clark  
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile August 09, 2021 to:

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By c. serrano