BEFORE THE DEPARTMENT OF REAL ESTATE

OFFICE OF ADMINISTRATION

IN AND FOR THE STATE OF ARIZONA

John Sellers, **Petitioner,** **vs.** **Rancho Madera Condominium Association,** **Respondent.**	**CASE NO. HO 17-16/021** **DOCKET NO. 17F-H1716021-REL** **FINAL ORDER**

Pursuant to Arizona Revised Statutes ("A.R.S.") § 41-1092.08, the attached Administrative Law Judge ("ALJ") Decision is adopted by the Commissioner of the Department of Real Estate ("Commissioner") and is accepted as follows:

ORDER

The Commissioner accepts the ALJ decision that the petition in this matter be denied.

Pursuant to A.R.S. § 41-1092.09, a party may file a motion for rehearing or review within thirty (30) days after the service of this final Order. A written request for rehearing should be addressed to Abby Hansen, 2910 N. 44th Street, Suite 100, Phoenix, Arizona, 85018.

This Order is a final administrative action and is effective immediately from the date service is complete. A party may appeal this final administrative decision by filing a complaint for judicial review pursuant to title 12, chapter 7, article 6. The Order will not be stayed unless a stay is obtained from the court in conjunction with the judicial review action.

DATED this 30th day of March, 2017.

Judy Lowe

Judy Lowe, Commissioner
DEPARTMENT OF REAL ESTATE

The foregoing mailed this 30th day of March, 2017,
via certified mail receipt number 7015 1520 0000 8792 1516 to:

John Sellers
6231 East Mark Way Unit 12
Cave Creek AZ 85331

Copy sent via certified mail receipt no. 7015 1520 0000 8792 1523 to:

Lydia Peirce Linsmeier, Esq.
Carpenter, Hazlewood, Delgado & Bolen, PLC
1400 E. Southern Ave. Suite 400
Tempe AZ 85282

COPY electronically transmitted to:

The Office of Administrative Hearings
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Phoenix, AZ 85007

By: AHansen
Abby Hansen
HOA Coordinator

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

John Sellers, Petitioner, vs. Rancho Madera Condominium Association, Respondent.	**No. 17F-H1716021-REL** **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: March 7, 2017, at 8:30 a.m.; the record was held open until March 21, 2017, to allow the parties to submit post-hearing memoranda on the meaning of the "financial and other records of the association" that Respondent is required to produce under A.R.S. § 33-1258(A).

APPEARANCES: John Sellers ("Petitioner") appeared on his own behalf; Rancho Madera Condominium Association ("Respondent") was represented by Lydia Peirce Linsmeier, Esq., Carpenter, Hazlewood, Delgado & Bolen, PLC.

ADMINISTRATIVE LAW JUDGE: Diane Mihalsky

FINDINGS OF FACT

BACKGROUND AND PROCEDURE

1. The Arizona Department of Real Estate ("the Department") is authorized by statute to receive and to decide Petitions for Hearings from members of homeowners' associations and from homeowners' associations in Arizona.

2. Respondent is a homeowners' association whose members own the condominiums in the Rancho Madera development.

3. Petitioner owns a condominium in and is a member of Respondent.

4. On or about December 20, 2016, Petitioner filed a petition with the Department that alleged that Respondent had violated A.R.S. § 33-1258 by refusing to provide bank account signature cards for Respondent's bank account at Mutual of Omaha and read-only user names and passwords for online access to that account.

5. The emails that Petitioner attached to the petition indicated that Respondent had provided copies of all bank statements, account opening documentation, forms for members' direct debit authorizations, the Board's resolution authorizing the opening of the bank account, the agreements between Respondent's property management company, Trestle Management Group ("Trestle"), and Mutual of Omaha regarding fees, indemnities, and netting agreements, Respondent's insurance certificate, and Respondent's management contract with Trestle.

6. Respondent's attorney filed an answer to the Petition, denying any violation of A.R.S. § 33-1258.

7. A hearing was held on March 7, 2017. Petitioner submitted ten exhibits and testified on his own behalf. Respondent submitted three exhibits and presented three witnesses' testimony: (1) Alan Simpson, the Vice President of Respondent's board; (2) Marc Kaplan, the President of Respondent's Board; and (3) Marc Vasquez, the Vice President of Trestle.

A.R.S. § 33-1258

8. A.R.S. § 33-1258 is part of the Uniform Condominium Act, Chapter 9 of Title 33, Arizona Revised Statutes, is entitled "Association financial and other records; applicability," and provides in relevant part as follows:

> A. Except as provided in subsection B of this section, all financial and other records of the association shall be made reasonably available for examination by any member or any person designated by the member in writing as the member's representative. The association shall not charge a member or any person designated by the member in writing for making material available for review. The association shall have ten business days to fulfill a request for examination. On request for purchase of copies of records by any member or any person designated by the member in writing as the member's representative, the association shall have ten business days to provide copies of the requested records. An association may charge a fee for making copies of not more than fifteen cents per page.
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> B. Books and records kept by or on behalf of the association and the board may be withheld from disclosure to the extent that the portion withheld relates to any of the following:

> 1. Privileged communication between an attorney for the association and the association.
>
> 2. Pending litigation.
>
> 3. Meeting minutes or other records of a session of a board meeting that is not required to be open to all members pursuant to section 33-1248.
>
> 4. Personal, health or financial records of an individual member of the association, an individual employee of the association or an individual employee of a contractor for the association, including records of the association directly related to the personal, health or financial information about an individual member of the association, an individual employee of the association or an individual employee of a contractor for the association.
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> 5. Records relating to the job performance of, compensation of, health records of or specific complaints against an individual employee of the association or an individual employee of a contractor of the association who works under the direction of the association.
>
> C. The association shall not be required to disclose financial and other records of the association if disclosure would violate any state or federal law.

FACTS

9. Respondent denied Petitioner's request for signature cards and read-only user names and passwords because it asserted that such documents did not exist or were not included in Respondent's records.

10. Petitioner argued that such documents must exist because they are required by federal banking statutes or regulations that were intended to fight terrorism. No evidence was offered that Respondent is a terrorist organization.

11. Mr. Simpson and Mr. Kaplan testified that they did not have user names and passwords for Respondent's account at Mutual of Omaha, although they believed that Respondent's treasurer may have had a user name and password to access Respondent's bank account online.

12. Mr. Vasquez testified that all signature cards for Respondent's bank accounts were held by the bank at which the accounts had been opened. Mutual of Omaha was the custodian of those cards.

CONCLUSIONS OF LAW

1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to file a petition with the Department for a hearing concerning violations of planned community documents or violations of statutes that regulate planned communities. That statute provides that such petitions will be heard before the Office of Administrative Hearings.

2. Petitioner bears the burden of proof to establish that Respondent violated A.R.S. § 33-1258 by a preponderance of the evidence.[1] Respondent bears the burden to establish affirmative defenses by the same evidentiary standard.[2]

3. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."[3] 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."[4]

4. The Uniform Condominium Act does not define the "financial and other records" that an association is required to furnish to its members upon their request beyond the language in A.R.S. § 33-1258. Petitioner does not allege that Respondent did not provide bank statements, cancelled checks, account opening documentation, the agreements between Trestle and Mutual of Omaha regarding fees, indemnities, and netting agreements, and other documents that will allow him to ascertain whether Respondent is prudently managing its members' assessments pursuant to its authority.

[1] *See* A.R.S. § 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); *see also Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952).
[2] *See* A.A.C. R2-19-119(B)(2).
[3] MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).
[4] BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

5. "In applying a statute . . . its words are to be given their ordinary meaning unless the legislature has offered its own definition of the words or it appears from the context that a special meaning was intended."[5] The plain meaning of A.R.S. § 33-1258 is that homeowners' associations must provide access to financial and other documents to its members upon request that will allow them to ascertain whether the association is prudently managing its members' assessments according to its authority under application statutes, the CC&Rs, bylaws, and any Board resolution or duly passed member mandate. Petitioner's argument that paper access to the account information is inferior to electronic access constitutes a policy argument that should be addressed to the Legislature. The plain language of the statute requires only that records of Respondent be made reasonably available for Petitioner's examination. Respondent complied with A.R.S. § 33-1258 by providing the documents described above.

6. Petitioner appeals Respondent's failure to provide signature cards and read-only user names and passwords for the Mutual of Omaha bank account. The user names and passwords are information, not a document. Neither the signature cards nor the read-only user names and passwords relate to Respondent's actual expenditure of members' assessments. Both only relate to the mechanisms that may be established by Mutual of Omaha to allow monies may be disbursed from the Respondent's bank account. Both records, if they exist, would be maintained by Mutual of Omaha, not Respondent. A.R.S. § 33-1258 does not require Respondent to create, maintain, or provide this information or documentation to Petitioner, either to serve his convenience or to allow him to ascertain Respondent's or Mutual of Omaha's compliance with federal banking statutes that are not incorporated in the Uniform Condominium Act. Therefore, Petitioner's petition should be dismissed.

RECOMMENDED ORDER

In view of the foregoing, it is ORDERED that Petitioner's petition in this matter is denied. Pursuant to A.R.S. § 32-2199.02(B), this Order is binding on the parties unless a rehearing is granted pursuant to A.R.S. § 32-2199.04 based on a petition setting forth

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

the reasons for the request for rehearing, in which case the order issued at the conclusion of the rehearing would be binding on the parties.

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

Done this day, March 29, 2017.

/s/ Diane Mihalsky
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate