IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Wesley T Chadwick, Petitioner, vs. Entrada Mountainside Homeowners Association, Respondent.	**No. 22F-H2221022-REL** **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: May 25, 2022 at 9:00 AM.

APPEARANCES: Wesley Chadwick ("Petitioner") appeared on his own behalf. Eadie Rudder, Esq. and Nick Eicher, Esq. appeared on behalf of Entrada Mountainside Homeowners Association ("Association" and "Respondent") with Danielle Miglo as a witness.

ADMINISTRATIVE LAW JUDGE: Jenna Clark.

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

FINDINGS OF FACT

BACKGROUND AND PROCEDURE

1. 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. On October 14, 2021, Petitioner filed a quadruple-issue petition with the Department which alleged as follows:

   a. The Association violated Article 4 Section 5 of the [Covenants, Conditions, and Restrictions ("CC&Rs")] by exceeding its authority in issuing a violation to "fix rock area" or remove certain vegetation when Article 4 Section 5 does not contain any language regarding such basis for violations.

b. The Association violated Article 10 Section 1 of the [CC&Rs] by failing to provide a warning notice followed by a $50 fine for the second notice with each new violation.
c. The Association violated Article 10 Section 9 of the [CC&Rs] by failing to provide specific steps necessary to cure the violation with each violation notice that was sent as required under the [CC&Rs].
d. The Association violated Article 10 Section 10 of the [CC&Rs] by issuing and enforcing notices of violation in an arbitrary and capricious manner in violation of state law.

(*All errors in original*.)

i. In the petition, Petitioner also asserted the following:

> The Association heard Petitioner's appeal following the sixth notice of violation dated June 16, 2021 at the next available Board meeting held on September 23, 2021. The Board failed to allow for an administrative hearing, but instead made a decision in executive session, and failed to inform the petitioner of the decision of the Board. This appeal is being made in response to the Board's decision at its Board meeting held September 23, 2021 in regards to the 6 notice of violation Petitioner received.

(*All errors in original*.)

3. On November 16, 2021, the Department issued notice of the underlying petition to Respondent.[1]

4. On December 13, 2021, Respondent returned its ANSWER to the Department whereby it denied the merits of Petitioner's allegations.[2]

5. Per the NOTICE OF HEARING, the Department referred this matter to the Office of Administrative Hearings ("OAH"), an independent state agency, for an evidentiary hearing on February 11, 2022, regarding the following issues:

> **Whether the Association violated community documents Covenants, Conditions, and Restrictions ("CC&Rs") Article 4 Sections 5; and Article 10 Sections 1, 9, and 10.[3]**

[1] Department's electronic file at H022-21022_Notice_Petition.pdf.
[2] Department's electronic file at H022-21022_Response_Petition.pdf. The Department received Respondent's ANSWER on December 15, 2021.
[3] *See* Department's electronic file at H022-21022_Notice_Hearing.pdf; *see also* Department's electronic file at H022-21022_HearingScheduled.pdf.

THE PARTIES AND GOVERNING DOCUMENTS

6. Respondent is a homeowners' association whose members own properties in a residential real estate development located in Phoenix, Arizona. Membership for the Association is comprised of the Entrada Mountainside subdivision.

7. Petitioner is an Entrada Mountainside subdivision property owner and member of the Association.

8. The Association is governed by its CC&Rs and overseen by a Board of Directors ("the Board"). The CC&Rs empower the Association to control certain aspects of property use within the development. When a party buys a residential unit in the development, the party receives a copy of the CC&Rs and agrees to be bound by their terms. Thus, the CC&Rs form an enforceable contract between the Association and each property owner.

9. On or about October 08, 1997, the Association's CC&Rs were recorded with the Maricopa County Recorder's Office.[4]

10. Entrada Mountainside CC&Rs Article IV, Use Restrictions, provides, in pertinent parts, as follows:

> 4.4 **Maintenance of Landscaping and Driveways**. Unless otherwise provided in a Recorded instrument approved by the Association or both Declarant and BFC, each Owner shall be responsible for the proper maintenance of all landscaping in the following locations: (i) his Lot (including set back areas and Common Areas located thereon) . . . . As used herein, maintenance shall include, but not be limited to, keeping the areas neatly trimmed, cultivated and free from trash, weeds and unsightly material.
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> 4.5 ***Nuisances: Construction Activities***. No weeds, dead trees or plants, rubbish or debris of any kind shall be places or permitted to accumulate upon or adjacent to any Lot or other area in the Project, and no odors or loud noises shall be permitted to arise or emit therefrom, so as to render any such property or activity thereon unsanitary, unsightly, offensive, or detrimental to any other property in the vicinity thereof or to the occupants of such other property. The Architectural Committee shall have the exclusive right to determine the existence of any nuisance.

(*Emphasis added*.)

[4] *See* Department's electronic file at H022-21022_CCRa.pdf.

11. Entrada Mountainside CC&Rs Article X, General Provisions, provides, in pertinent parts, as follows:

> 10.1 **Enforcement**. The Association 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, including, but not limited to, an action to obtain an injunction to compel removal of any Improvements constructed in violation of this Declaration or otherwise compel compliance with the Project Documents. The failure of the Association or an Owner to take enforcement action with respect to a violation of the Project Documents shall not constitute or be deemed a waiver of the right of the Association or any Owner to enforce the Project Documents in the future.
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> . . . .
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> 10.9 **Notice of Violation**. Upon fifteen (15) days prior to written notice to the Owner, the Association shall have the right to record a written notice of violation by any Owner or Resident of any restriction of other provision of the Project Documents. The notice shall be executed by an officer of the Association and shall contain substantially the following information: (i) the name of the Owner or Resident violating, or responsible for the violation of, the Project Documents; (ii) the legal description of the Lot against which the notice is being Recorded; (iii) a brief description of the nature of the violation; (iv) a statement that the notice is being Recorded by the Association pursuant to this Declaration; and (v) *a statement of the specific steps which must be taken by the Owner or occupant to cure the violation*. Recordation of a notice of violation shall serve as notice to the Owner and Resident, and any subsequent purchaser of the Lot, that there is such a violation. If, after the recordation of such notice, it is determined by the Association that the violation referred to in the notice does not exist or that the violation referred to in the notice has been cured, the Association shall state that the violation referred to in the notice of violation had been cured or that the violation did not exist. Failure by the Association to record a notice of violation shall not constitute a waiver of any such violation, constitute any evidence that no violation exists with respect to a particulate Lot or constitute a waiver of any right of the Association to enforce the Project Documents.
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> 10.10 **Laws, Ordinances and Regulations**.
>
> > 10.10.1 The covenants, conditions and restrictions set forth in this Declaration are independent of the obligation of the Owners and other Persons to comply with all applicable laws, ordinances and regulations, and compliance with this Declaration shall not relieve an Owner or any other Person from the obligation also to comply with all applicable laws, ordinances and regulations.

10.10.2 Any violation of any state, municipal or local law, ordinance or regulation pertaining to the ownership, occupation or use of any property within the Property is hereby declared to be a violation of this Declaration and subject to any or all of the enforcement procedures set forth herein.

(*Emphasis added*.)

HEARING EVIDENCE

12. Petitioner testified on his own behalf and submitted Exhibits 1-11 and 13-17. Respondent presented the testimony of Danielle Miglo and submitted Exhibits 1-25. The Department's electronic file was also admitted into the record. The substantive evidence of record is as follows:

a. The Association's property management company, Oasis Property Management ("OPM"), would drive through the subdivision twice monthly to perform unannounced compliance inspections. Inspections were usually performed from a vehicle parked curbside in front of a residence, or on the public sidewalk in front of a Member's home.

b. Petitioner has owned residential property in Entrada Mountainside subdivision since November 20, 2016. Petitioner was admittedly unaware of the Association's Architectural Review Committee's ("ARC") landscape guidelines as he had never reviewed the document before. Petitioner maintained the property's original front yard landscaping; consisting of mostly rocks and some greenery, sans modification, until late 2020 when he admittedly let some of the foliage and weeds become overgrown and unsightly.

c. On or about January 25, 2021, Petitioner received a PROPERTY INSPECTION letter from the Association, which provided in pertinent parts, as follows:

You are in violation of Article 4 Section 5: No weeds, dead trees or plants, rubbish or debris of any kind shall be placed or permitted to accumulate upon or adjacent to any lot or other area in the project. ***PLEASE REMOVE WEEDS**[5]

[5] Petitioner Exhibit 1.

i. A new photo of the alleged violation(s) was attached. No specific details were included. The letter also provided that Petitioner's failure to cure the violation within ten (10) days from the letter's issuance would result in a second violation notice and the possible assessment of a $50.00 fine.[6] Additionally, the letter further provided that Petitioner had twenty-one (21) days from the letter's issuance to appeal the violation, including a request for an administrative hearing before the Board of Directors.[7]

d. Petitioner did not appeal the Association's January 25, 2021, PROPERTY INSPECTION letter.

e. On February 09, 2021, Petitioner received a SECOND NOTICE OF VIOLATION letter from the Association, which provided in pertinent parts, as follows:

You are in violation of Article 4 Section 5: No weeds, dead trees or plants, rubbish or debris of any kind shall be placed or permitted to accumulate upon or adjacent to any lot or other area in the project. ***PLEASE REMOVE WEEDS**[8]

i. A new photo of the alleged violation(s) were attached. No specific details were included. The letter also provided that the Association had assessed a $50.00 fine against Petitioner due to his failure to cure the first violation letter.[9] The letter also provided that Petitioner's failure to cure the violation within ten (10) days from the letter's issuance would result in a third violation notice and the possible assessment of a $100.00 fine.[10] Additionally, the letter further provided that Petitioner had twenty-one (21) days from the letter's issuance to appeal the violation, including a request for an administrative hearing before the Board of Directors.[11]

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[6] *Id*.
[7] *Id*.
[8] Petitioner Exhibit 2.
[9] *Id*.
[10] *Id*.
[11] *Id*.

f. Petitioner did not appeal the Association's February 09, 2021, SECOND NOTICE OF VIOLATION letter.

g. On February 10, 2021, Petitioner paid $350.00 to have two (2) cacti from his front yard removed,[12] and an additional $100.00 to have the weeds removed.[13]

    i. Petitioner did not provide notice of his remediation attempts to the Association, or appeal the Association's January 25, 2021, PROPERTY INSPECTION letter.

h. On February 25, 2021, Petitioner received a THIRD NOTICE OF VIOLATION letter from the Association, which provided in pertinent parts, as follows:

    You are in violation of Article 4 Section 5: No weeds, dead trees or plants, rubbish or debris of any kind shall be placed or permitted to accumulate upon or adjacent to any lot or other area in the project. ***PLEASE REMOVE WEEDS**[14]

    i. A new photo of the alleged violation(s) was attached. No specific details were included. The letter also provided that the Association assessed a $100.00 fine against Petitioner due to his failure to cure the second violation letter.[15] The letter also provided that Petitioner's failure to cure the violation within ten (10) days from the letter's issuance would result in a fourth violation notice and the possible assessment of another $100.00 fine.[16] Additionally, the letter further provided that Petitioner had twenty-one (21) days from the letter's issuance to appeal the violation, including a request for an administrative hearing before the Board of Directors.[17]

i. On March 18, 2021, Petitioner emailed OPM to inquire about the violation letters.[18] In exchange for paying the imposed $50.00 fine, OPM waived the

[12] *See* Petitioner Exhibit 4.
[13] *See* Petitioner Exhibit 5.
[14] Petitioner Exhibit 3.
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] Petitioner Exhibit 6.

pending $100.00 fine against Petitioner but warned "[I]f you receive another Weed Violation within 90 days [Respondent] will charge the $100 fine again okay [sic]."[19]

j. On or about March 23, 2021, Petitioner received a REMINDER from the Association regarding an alleged $250.00 unpaid balance owed to the Association for "miscellaneous weed charges" violations incurred between February 09, 2021, and March 15, 2021.[20]

k. On or about March 23, 2021, Petitioner received a FOURTH NOTICE OF VIOLATION letter from the Association dated March 15, 2021, which provided in pertinent parts, as follows:

You are in violation of Article 4 Section 5: No weeds, dead trees or plants, rubbish or debris of any kind shall be placed or permitted to accumulate upon or adjacent to any lot or other area in the project. ***PLEASE REMOVE WEEDS fix rock area**[21] [sic]

i. A new photo of the alleged violation(s) was attached. No specific details were included. The letter also provided that the Association assessed a $100.00 fine against Petitioner due to his failure to cure the third violation letter.[22] The letter also provided that Petitioner's failure to cure the violation within ten (10) days from the letter's issuance would result in a fifth violation notice and the possible assessment of another $100.00 fine.[23] Additionally, the letter further provided that Petitioner had twenty-one (21) days from the letter's issuance to appeal the violation, including a request for an administrative hearing before the Board of Directors.[24]

l. Petitioner did not appeal the Association's March 23, 2021, FOURTH NOTICE OF VIOLATION letter.

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[19] *Id*.
[20] Petitioner Exhibit 13.
[21] Petitioner Exhibit 7.
[22] *Id*.
[23] *Id*.
[24] *Id*.

m. On or about March 30, 2021, Petitioner received a FIFTH NOTICE OF VIOLATION letter from the Association, which provided in pertinent parts, as follows:

You are in violation of Article 4 Section 5: No weeds, dead trees or plants, rubbish or debris of any kind shall be placed or permitted to accumulate upon or adjacent to any lot or other area in the project. ***PLEASE REMOVE WEEDS fix rock area**[25] [sic]

i. A new photo of the alleged violation(s) was attached. No specific details were included. The letter also provided that the Association assessed a $100.00 fine against Petitioner due to his failure to cure the fourth violation letter.[26] The letter also provided that Petitioner's failure to cure the violation within ten (10) days from the letter's issuance "may result in legal action."[27] Additionally, the letter further provided that Petitioner had twenty-one (21) days from the letter's issuance to appeal the violation, including a request for an administrative hearing before the Board of Directors.[28]

n. On April 05, 2021, Petitioner emailed OPM to inquire about the violation letters. In response, OMP provided Petitioner with a photograph taken March 30, 2021, of his front laws with three (3) circled areas of alleged CC&R violation(s); including holes, exposed irrigation lines, weeds, and overgrown plants.[29] Petitioner was advised, "Though the letter may have a bold statement of REMOVE WEEDS everything else in the section still needs to be addressed. Every letter has stated to remove weeds and fix rock area."[30] Additionally, OPM offered, "Once the items are fixed you can send in a request to me addressed to the board to have fines waived."[31]

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[25] Petitioner Exhibit 8.
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] Petitioner Exhibit 9.
[30] *Id*.
[31] *Id*.

i. On an unknown date around this time, Petitioner's wife was advised by OPM via telephone that the "exposed irrigation lines" needed to be covered and the "plant or vine" towards the front of the property required removal.

ii. Petitioner covered the irrigation lines with existing rock from his front yard, but did not address the flora at the front of his property. Petitioner advised the Association that the plant was not a vine, and had been present when he took possession of the home in 2016.

o. On or about April 09, 2021, Petitioner received a REMINDER from the Association regarding an alleged $200.00 unpaid balance owed to the Association for "miscellaneous weed charges" violations incurred between March 15, 2021, and March 15, 2021.[32]

p. In late May 2021, Petitioner submitted a formal request for the Board of Directors to administratively review his case and included a request to waive his pending fines.

q. After receiving no response, Petitioner contacted the Board in early June 2021, and was informed that his request(s) had been denied.

r. On or about June 16, 2021, Petitioner received a SIXTH NOTICE OF VIOLATION letter from the Association, which provided in pertinent parts, as follows:

You are in violation of Article 4 Section 5: No weeds, dead trees or plants, rubbish or debris of any kind shall be placed or permitted to accumulate upon or adjacent to any lot or other area in the project. ***PLEASE REMOVE WEEDS**[33]

i. A new photo of the alleged violation(s) was attached. No specific details were included. The letter also provided that the Association assessed a $100.00 fine against Petitioner due to his failure to cure the fifth violation letter.[34] The letter also provided that Petitioner's

[32] Petitioner Exhibit 14.
[33] Petitioner Exhibit 10.
[34] *Id*.

failure to cure the violation within ten (10) days from the letter's issuance "may result in legal action."[35] Additionally, the letter further provided that Petitioner had twenty-one (21) days from the letter's issuance to appeal the violation, including a request for an administrative hearing before the Board of Directors.[36]

s. On June 22, 2021, Petitioner again emailed OPM to inquire about the violation letters. In response, OPM advised that although the Board of Directors had received and reviewed Petitioner's appeal packet, they declined to waive any fees "until the violation was closed," but could remove $75.00 in fines once that occurred.[37] OMP also reiterated that the foliage towards the front of Petitioner's property looked like vines or weeds. Petitioner's request to be placed on the Board's next agenda was declined, as Petitioner was advised that each meeting included an open forum for homeowners to be heard.

    i. The following day Petitioner sent a close-up photograph of the plant at issue to rebut the Association's perception. OPM did not respond.

ADDITIONAL FACTS

t. Cynthia Ecker, current Board Vice President and 20 year member of the Board, had never received a PROPERTY INSPECTION letter or fine from the Association though she had uncovered irrigation lines visible from her front yard.

CLOSING ARGUMENTS

13. In closing, Respondent argued that CC&Rs Article 4, Section 5 granted it authority to issue compliance violation letters to homeowners, and that all six (6) letters issued to Petitioner outlined steps necessary to remedy the listed issues. Respondent opined that Petitioner complied in part, which was not sufficient to satisfy any of the letters.

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[35] *Id*.
[36] *Id*.
[37] *See* Petitioner Exhibit 11.

Respondent argued that Petitioner knew or should have known that the ARC's Landscape Guidelines and totality of CC&Rs Article 4, Section 5 applied, not just the portion quoted on the warning letters, were applicable. Per Respondent, Petitioner's cactus removal created a debris situation in his front yard and left his irrigation line exposed. Respondent argued that Petitioner never addressed the overgrowth towards the front of his yard. Ultimately, Respondent asked that all of its compliance violation letters issued to Petitioner be upheld, and that the related $350.00 outstanding balance owed by Petitioner be upheld.

14. In closing, Petitioner argued that Respondent's manner of landscaping enforcement; specifically, its lack of specificity to identify what items and/or areas in Petitioner's yard needed remediation, nullified most, if not all, of Respondent's violation letters as the evidence of record clearly established Petitioner made good-faith attempts to perform corrective work. Petitioner also argued that he believed the parties had reached a settlement agreement after the third violation letter was issued, and that Respondent's issuance of further violation letters constituted "moving the goal post," exacerbated by Respondent's arbitrary enforcement. Ultimately, Petitioner asked that Respondent's fourth, fifth, and sixth compliance violation letters be quashed, along with the related $350.00 outstanding balance.

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.[38]

[38] *See Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

3. In this proceeding, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent violated the provisions of the community document.[39]

4. "A preponderance of the evidence is such proof as convinces the trier of fact that the contention is more probably true than not."[40] 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."[41]

5. The issues to be addressed in this matter are whether the Association violated CC&Rs Article 4.5, 10.1, 10.9, and 10.10.

6. Here, what the Association did was essentially tell Petitioner to "fix this" without telling him exactly what needed fixing and affording him a reasonable opportunity to comply.

7. It is clear from the record that CC&Rs Article 4.5 is inapplicable as the regulation pertains solely to construction activities. There are no facts in the record to tenuously suggest that construction occurred during the relevant time period. What the record establishes is that Petitioner admittedly let his yard fall into an untidy state in late 2020, and that he received a warning letter from the Association shortly thereafter. That warning letter, however, as well as all of the warning letters that followed, failed to provide proper notice of the violation(s) as they were issued under the incorrect Article of the CC&Rs. CC&Rs Article 4.4 should have been used by Respondent. All of the warning letters at issue were vague, overbroad, and nondescript. Moreover, none of the Association's violation warning letters provided requisite steps Petitioner needed to take in order to satisfactorily remedy the alleged violation(s). The Association's directive to "**PLEASE REMOVE WEEDS**" or "**fix rock area**" would not indicate to a person of ordinary

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[39] *See* ARIZ. ADMIN. CODE R2-19-119.
[40] MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).
[41] BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

prudence, regardless of familiarity with the Association's ARC Landscape Guidelines or CC&Rs, to cover up exposed irrigation lines, remove a plant believed to be a vine, fill in holes, and/or make the lawn generally tidy and pleasing to the eye. Which is evinced by the fact that the Association provided Petitioner with photographs circled with specific areas of concern after issuing multiple warning letters about the same issues.

a. Petitioner's failure to timely file an appeal upon receipt of the PROPERTY INSPECTION letter, or subsequent warning letters, is moot.

8. To that end, there is no violation of Article 10.1, as warning letters 2-6 all stemmed from the same issue(s) in Petitioner's yard raised in the PROPERTY INSPECTION letter.

9. There is also no violation of Article 10.10 as Petitioner failed to allege that Respondent violated a specific law, ordinance or regulation. Petitioner also failed to establish that Respondent violated any specific state, municipal or local law, ordinance or regulation.

10. Based upon a review of the credible and relevant evidence in the record, Petitioner sustained his burden of proof as to his first allegation – a violation of CC&Rs Article 10.9. Petitioner did not sustain his burden of proof regarding Respondent's alleged violations of CC&Rs Article 4.5, 10.1, and 10.10.

11. Therefore, the undersigned Administrative Law Judge concludes that, because Petitioner established Respondent's violation of CC&Rs Article 10.9, his petition must be granted, in part. Because Petitioner failed to establish Respondent's violation(s) of CC&Rs Article 4.5 and Articles 10.1 and 10.10, his petition must be denied, in part.

ORDER

Based on the foregoing,

IT IS ORDERED that Petitioner's petition is granted, in part.

IT IS FURTHER ORDERED that Petitioner's petition is denied, in part.

IT IS FURTHER ORDERED that Respondent pay $500.00 to Petitioner; a pro rata portion of his filing fee, to be paid directly to Petitioner within thirty (30) days of this ORDER.

NOTICE

Pursuant to ARIZ. REV. STAT. §32-2199.02(B), this ORDER is binding on the parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. § 32-2199.04. Pursuant to ARIZ. REV. STAT. § 41-1092.09, a request for rehearing in this matter must be filed with the Commissioner of the Arizona Department of Real Estate within thirty (30) days of the service of this ORDER upon the parties.

Done this day, June 14, 2022.

Office of **A**dministrative **H**earings

/s/ Jenna Clark
Administrative Law Judge

Transmitted electronically to:

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