

1 **FINDINGS OF FACT**

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3 1. The Department of Fire, Building and Life Safety (the “Department”) is authorized by
4 statute to receive Petitions for Hearing from members of condominium associations and
5 from condominium associations in Arizona.

6 2. Montezuma is a condominium association consisting of seventeen condominium
7 units located in Lake Montezuma, Arizona.

8 3. Petitioner owns three condominium units in and is a member of Montezuma.

9 4. Petitioner filed a Petition with the Department alleging that Montezuma had violated
10 the provisions of A.R.S. §§ 33-1247, 33-1248, 33-1250, and 33-1805. Petitioner
11 specifically alleged that:

12 a) Montezuma failed to maintain the common areas of
13 Montezuma as required by A.R.S. § 33-1247.

14 b) Montezuma failed to conduct open meetings as required by
15 A.R.S. § 33-1248.

16 c) Montezuma failed to hold proper elections as required by
17 A.R.S. § 33-1250.

18 d) Montezuma failed to provide financial information as
19 required by A.R.S. § 33-1258.

20 5. Respondent’s Answer to the Petition alleged, in part, as follows:

21 a) Petitioner was delinquent in paying her association dues to
22 Montezuma.

23 b) Petitioner was mailed written notice of an association
24 meeting that was held on May 24, 2012, but Petitioner failed to
25 attend to the scheduled meeting or to inform Montezuma of any
26 issues that she wanted to have addressed.

27 c) Although the former association president had failed to call a
28 meeting for several years, very few people ever attended any of
29 the meetings.

30 d) Montezuma had been unable to perform some cosmetic
maintenance work because Petitioner and two other members
had failed to pay their association dues.

Petitioner’s Testimony¹

¹ 3/28/13 Hearing Record (hereinafter “H.R.”) at 18:45-1:25:45, and 11/20/13 Hearing Record (hereinafter “11/20/13 H.R.”) at 1:11:46-1:35:46.

1 6. Petitioner testified that she purchased her first condominium unit in Montezuma
2 during 2003. Petitioner stated that she purchased two additional condominium units in
3 2011. Petitioner testified that she utilizes all three condominium units as rental
4 properties.

5 7. Petitioner testified that that she filed the Petition against Montezuma because
6 Montezuma failed to provide maintenance for the common areas of Montezuma.
7 Petitioner stated that the lack of maintenance caused her to become concerned about
8 the financial status of Montezuma and to request financial records from Montezuma.

9 8. Petitioner testified that only two family-sized trash containers are provided for the
10 seventeen condominium units located in Montezuma. Petitioner stated that the two
11 family-sized trash containers are constantly overflowing and that the weeds "are high" in
12 the common areas.

13 9. Petitioner acknowledged that Montezuma had performed some maintenance on the
14 front of the condominium building. Petitioner testified that the rear of the condominium
15 building required proper maintenance and painting. Petitioner stated that there was a
16 broken wall in the common area that had been damaged since 2003.

17 10. Petitioner testified that Montezuma had refused to provide her with the requested
18 financial records until she filed the petition at issue. Petitioner acknowledged that
19 Montezuma has provided the financial records that she requested. Petitioner stated
20 that she requested that Montezuma furnish financial records in August 2011. Petitioner
21 testified that she requested the information to "see where the money was going."
22 Petitioner stated that Montezuma was not maintaining the common areas at that time.

23 11. Petitioner testified that in November 2012, she learned that there had been an
24 association meeting on May 24, 2012. Petitioner stated that she received no notice of
25 the association meeting. Petitioner testified that Montezuma had her email address and
26 that she would have attended the association meeting had she received notice of the
27 association meeting.

28 12. Petitioner acknowledged that she had utilized several different mailing addresses.
29 Petitioner testified that she had provided Montezuma with her current address in one of
30 her emails to Montezuma.

1 13. Petitioner acknowledged that Montezuma had provided additional trash containers
2 for the units after the March 28, 2013 hearing.

3 14. Petitioner testified that she had received copies of the minutes for the May 24, 2012
4 association meeting. Petitioner stated that there was no election of association officers
5 during the May 24, 2012 association meeting. Petitioner testified that there has not
6 been an election of association officers during the time that she has been a member of
7 Montezuma.

8 15. Petitioner testified that she did not trust the members of the board of Montezuma.
9 Petitioner stated that she filed the petition at issue because there had been no elections
10 and Montezuma had failed to provide requested financial information. Petitioner
11 acknowledged that she received the requested financial information in January or
12 February 2012.

13 16. Petitioner testified that the only notice of an annual meeting from Montezuma that
14 she received was in 2004. Petitioner stated that she had received no other notices of
15 annual meetings from Montezuma.

16 **Carol Ann Klagge's Testimony²**

17 17. Carol Ann Klagge (hereinafter "Ms. Klagge") testified that she is the treasurer for
18 Montezuma. Ms. Klagge stated that she has been the treasurer for Montezuma for over
19 ten years.

20 18. Ms. Klagge testified that Montezuma is a small condominium association with
21 seventeen units. Ms. Klagge stated that she owns three condominium units in
22 Montezuma. Ms. Klagge testified that six owners of condominium units reside in the
23 State of Arizona. Ms. Klagge testified that the other owners of condominium units live
24 out-of-state. Ms. Klagge stated that most of the condominium units are utilized as rental
25 units.

26 19. Ms. Klagge testified that Petitioner had provided Montezuma with several different
27 addresses.³ Ms. Klagge stated that she mailed written notice of the May 24, 2012
28 association meeting to Petitioner. Ms. Klagge testified that the written notice was not
29 returned to Montezuma as being undeliverable.

30 ² H.R. at 1:26:50-2:17:25, and 11/20/13 H.R. at 8:45-1:03.23.

³ See Exhibit R-4 (List of addresses for Petitioner).

1 20. Ms. Klagge testified that she and her husband, Jay Klagge (hereinafter "Mr.
2 Klagge"), and Tony Sturgeon (hereinafter "Mr. Sturgeon") were the only three
3 association members who attended the May 24, 2012 association meeting. Ms. Klagge
4 stated that according to Montezuma's Bylaws, only members in good standing can
5 participate in voting during the association meeting. Ms. Klagge testified that
6 association dues are assessed according to the size of the condominium units, with
7 larger units being assessed at a higher amount of dues than smaller units.

8 21. Ms. Klagge testified that she provided financial statements for Montezuma to all
9 members who attended the May 24, 2012 association meeting. Ms. Klagge stated that
10 she informed Petitioner in a previous email that she would be providing a financial
11 statement for Montezuma to all members who attended the May 24, 2012 association
12 meeting.

13 22. Ms. Klagge testified that Petitioner did not request that the financial statement be
14 provided to her prior to the May 24, 2012 association meeting. Ms. Klagge stated that
15 Petitioner did not attend the May 24, 2012 association meeting.

16 23. Ms. Klagge acknowledged that there was not an election of association officers
17 during the May 24, 2012 association meeting. Ms. Klagge testified that there was no
18 election because only three members were in attendance at the meeting. Ms. Klagge
19 stated that all three attending members were already officers of Montezuma and that
20 the three members agreed to continue in their current capacity. Ms. Klagge stated that
21 Mr. Klagge was the secretary for Montezuma and Mr. Sturgeon was the vice-president
22 for Montezuma. Ms. Klagge testified that they did not want to vote for themselves and
23 that there appeared to be no purpose to have a vote when only three members were
24 present and all three present members were willing to continue in their capacity as
25 officers of the association.

26 24. Ms. Klagge stated that the president of Montezuma had previously resigned and that
27 the position of president had not been filled. Ms. Klagge testified that she offered the
28 position of president of Montezuma to Petitioner. Ms. Klagge stated that Petitioner
29 declined the position. Ms. Klagge testified that it was hard to get anyone to help out and
30 that the association needed help.

1 25. Ms. Klagge testified that Montezuma provides a common sewer line and septic tank,
2 trash service, outside maintenance, and insurance for the exterior of the condominiums.
3 Ms. Klagge stated that Montezuma had previously provided for the maintenance of the
4 landscaping for the condominiums, the water for the landscaping, and nighttime exterior
5 security lighting. Ms. Klagge testified that Montezuma was struggling financially and
6 cutbacks in expenditures had to be made.

7 26. Ms. Klagge testified that Montezuma used to have two large multi-family sized trash
8 dumpsters. Ms. Klagge stated that Montezuma did not have the need or money to
9 provide two large multi-family sized dumpsters.

10 27. Ms. Klagge testified that the broken wall had been hit by a car. Ms. Klagge stated
11 that Montezuma had not repaired the damaged wall because Montezuma could not
12 afford to repair the wall. Ms. Klagge stated that the broken wall was still functional as a
13 wall.

14 28. Ms. Klagge testified that after the March 28, 2013 hearing on this matter,
15 Montezuma corrected the damaged wall, performed necessary painting work, and
16 provided additional trash dumpsters for the tenants of Montezuma. Ms. Klagge stated
17 that Montezuma was able to perform the remedial actions because Petitioner paid the
18 dues for her three condominium units to Montezuma. Ms. Klagge testified that
19 Montezuma had paid over \$7,000.00 for sewer repairs over the last twelve months. Ms.
20 Klagge stated that Montezuma had very limited financial resources. Ms. Klagge
21 acknowledged that Montezuma had increased its assessments by \$25.00 per lot for
22 2013.

23 29. Ms. Klagge acknowledged that Montezuma did have the power to impose a special
24 assessment if necessary. Ms. Klagge testified that there would be no need for a special
25 assessment if all of the unit owners paid their dues.

26 30. Ms. Klagge acknowledged that the notice of the meeting did not contain the word
27 "annual" and that it did not mention "elections" as a purpose for the meeting.

28 **31.** Ms. Klagge stated that there was no nomination of officers and no election of officers
29 at the May 24, 2012 meeting. Ms. Klagge testified that only three people were present
30 for the May 24, 2012 meeting. Ms. Klagge acknowledged that the three people present

1 could have conducted a formal election of officers but decided not to. Ms. Klagge
2 stated that Montezuma could not get members to become officers of Montezuma.

3 **32.** Ms. Klagge testified that Montezuma repeatedly tried to get members to run for
4 election and that no one was willing to run for election.

5 **Helen Bartels' Testimony⁴**

6 33. Helen Bartels (hereinafter "Ms. Bartels") testified that she owns a condominium unit
7 in Montezuma. Ms. Bartels stated that she used her condominium unit as rental
8 property. Ms. Bartels testified that she received written notice of the May 24, 2012
9 meeting. Ms. Bartels stated that she did not attend the May 24, 2012 meeting. Ms.
10 Bartels testified that she received an annual financial statement from Montezuma.

11 34. Ms. Bartels testified that she became a member of the board for Montezuma after
12 the March 28, 2013 hearing. Ms. Bartels stated that the condominium owners in
13 Montezuma would be hard-pressed to pay a special assessment. Ms. Bartels testified
14 that if sufficient money was available, the common areas should be maintained.

15 **PROVISIONS OF LAW REFERENCED AT HEARING**

16
17
18 1. A.R.S. § 12-541 provides as follows:

19 There shall be commenced and prosecuted within one year
20 after the cause of action accrues, and not afterward, the
21 following actions:

22

23 5. Upon a liability created by statute, other than a penalty or
24 forfeiture.

25 2. A.R.S. § 33-1243(J) provides, in relevant part, as follows:

26 Unless any provision in the condominium documents requires an
27 annual audit by a certified public accountant, the board of
28 directors shall provide for an annual financial audit, review or
29 compilation of the association. The audit, review or compilation
30 shall be completed no later than one hundred eighty days after the
end of the association's fiscal year and shall be made available

⁴ H.R. at 2:17:25-2:21:40, and 11/20/13 H.R. at 1:04-1:11:16.

1 upon request to the unit owners within thirty days after its
2 completion.

3 3. A.R.S. § 33-1247 provides as follows:

4 A. Except to the extent provided by the declaration, subsection
5 C of this section or section 33-1253, subsection B, the
6 association is responsible for maintenance, repair and
7 replacement of the common elements and each unit owner is
8 responsible for maintenance, repair and replacement of the
9 unit. On reasonable notice, each unit owner shall afford to the
10 association and the other unit owners, and to their agents or
11 employees, access through the unit reasonably necessary for
12 those purposes. If damage is inflicted on the common elements
13 or any unit through which access is taken, the unit owner
14 responsible for the damage, or the association if it is
15 responsible, is liable for the prompt repair of the damage.

16 B. For any residential rental units that have been declared a
17 slum property by the city or town pursuant to section 33-1905
18 and that are in the condominium complex, the association is
19 responsible for enforcing any requirement for a licensed
20 property management firm that is imposed by a city or town
21 pursuant to section 33-1906.

22 C. In addition to the liability borne by the declarant as a unit
23 owner under this chapter, the declarant alone is liable for the
24 maintenance, repair and replacement of any portion of the
25 common elements which the declarant reserves the right to
26 withdraw from the condominium, as long as the unit owner
27 maintains that right.

28 4. A.R.S. § 33-1248 provides as follows:

29 A. Notwithstanding any provision in the declaration, bylaws or
30 other documents to the contrary, all meetings of the unit
owners' association and the board of directors, and any
regularly scheduled committee meetings, are open to all
members of the association or any person designated by a
member in writing as the member's representative and all
members or designated representatives so desiring shall be
permitted to attend and speak at an appropriate time during the
deliberations and proceedings. The board may place
reasonable time restrictions on those persons speaking during
the meeting but shall permit a member or a member's

1 designated representative to speak once after the board has
2 discussed a specific agenda item but before the board takes
3 formal action on that item in addition to any other opportunities
4 to speak. The board shall provide for a reasonable number of
5 persons to speak on each side of an issue. Persons attending
6 may audiotape or videotape those portions of the meetings of
7 the board of directors and meetings of the members that are
8 open. The board of directors of the association may adopt
9 reasonable rules governing the audiotaping or videotaping of
10 open portions of the meetings of the board and the
11 membership, but such rules shall not preclude such
12 audiotaping or videotaping by those attending. Any portion of a
13 meeting may be closed only if that portion of the meeting is
14 limited to consideration of one or more of the following:

15 1. Legal advice from an attorney for the board or the
16 association. On final resolution of any matter for which the
17 board received legal advice or that concerned pending or
18 contemplated litigation, the board may disclose information
19 about that matter in an open meeting except for matters that
20 are required to remain confidential by the terms of a settlement
21 agreement or judgment.

22 2. Pending or contemplated litigation.

23 3. Personal, health or financial information about an individual
24 member of the association, an individual employee of the
25 association or an individual employee of a contractor for the
26 association, including records of the association directly related
27 to the personal, health or financial information about an
28 individual member of the association, an individual employee of
29 the association or an individual employee of a contractor for the
30 association.

4. Matters 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.

5. Discussion of a unit owner's appeal of any violation cited or
penalty imposed by the association except on request of the
affected unit owner that the meeting be held in an open
session.

1 B. Notwithstanding any provision in the condominium
2 documents, all meetings of the unit owners' association and the
3 board shall be held in this state. A meeting of the unit owners'
4 association shall be held at least once each year. Special
5 meetings of the unit owners' association may be called by the
6 president, by a majority of the board of directors or by unit
7 owners having at least twenty-five per cent, or any lower
8 percentage specified in the bylaws, of the votes in the
9 association. Not fewer than ten nor more than fifty days in
10 advance of any meeting of the unit owners, the secretary shall
11 cause notice to be hand delivered or sent prepaid by United
12 States mail to the mailing address of each unit or to any other
13 mailing address designated in writing by the unit owner. The
14 notice of any meeting of the unit owners shall state the time
15 and place of the meeting. The notice of any special meeting of
16 the unit owners shall also state the purpose for which the
17 meeting is called, including the general nature of any proposed
18 amendment to the declaration or bylaws, any changes in
19 assessments that require approval of the unit owners and any
20 proposal to remove a director or officer. The failure of any unit
21 owner to receive actual notice of a meeting of the unit owners
22 does not affect the validity of any action taken at that meeting.

16 C. Notwithstanding any provision in the declaration, bylaws or
17 other condominium documents, for meetings of the board of
18 directors that are held after the termination of declarant control
19 of the association, notice to unit owners of meetings of the
20 board of directors shall be given at least forty-eight hours in
21 advance of the meeting by newsletter, conspicuous posting or
22 any other reasonable means as determined by the board of
23 directors. An affidavit of notice by an officer of the association is
24 prima facie evidence that notice was given as prescribed by
25 this section. Notice to unit owners of meetings of the board of
26 directors is not required if emergency circumstances require
27 action by the board before notice can be given. Any notice of a
28 board meeting shall state the time and place of the meeting.
29 The failure of any unit owner to receive actual notice of a
30 meeting of the board of directors does not affect the validity of
any action taken at that meeting.

27 D. Notwithstanding any provision in the declaration, bylaws or
28 other condominium documents, for meetings of the board of
29 directors that are held after the termination of declarant control
30 of the association, all of the following apply:

1. The agenda shall be available to all unit owners attending.

2. An emergency meeting of the board of directors may be called to discuss business or take action that cannot be delayed until the next regularly scheduled board meeting. The minutes of the emergency meeting shall state the reason necessitating the emergency meeting. The minutes of the emergency meeting shall be read and approved at the next regularly scheduled meeting of the board of directors.

3. A quorum of the board of directors may meet by means of a telephone conference if a speakerphone is available in the meeting room that allows board members and unit owners to hear all parties who are speaking during the meeting.

4. Any quorum of the board of directors that meets informally to discuss association business, including workshops, shall comply with the open meeting and notice provisions of this section without regard to whether the board votes or takes any action on any matter at that informal meeting.

E. It is the policy of this state as reflected in this section that all meetings of a condominium, whether meetings of the unit owners' association or meetings of the board of directors of the association, be conducted openly and that notices and agendas be provided for those meetings that contain the information that is reasonably necessary to inform the unit owners of the matters to be discussed or decided and to ensure that unit owners have the ability to speak after discussion of agenda items, but before a vote of the board of directors is taken. Toward this end, any person or entity that is charged with the interpretation of these provisions shall take into account this declaration of policy and shall construe any provision of this section in favor of open meetings.

F. This section does not apply to timeshare plans or associations that are subject to chapter 20 of this title.

5. A.R.S. § 33-1250 provides as follows:

A. If only one of the multiple owners of a unit is present at a meeting of the association, the owner is entitled to cast all the votes allocated to that unit. If more than one of the multiple owners are present, the votes allocated to that unit may be cast only in accordance with the agreement of a majority in interest of the multiple owners unless the declaration expressly

1 provides otherwise. There is majority agreement if any one of
2 the multiple owners casts the votes allocated to that unit
3 without protest being made promptly to the person presiding
4 over the meeting by any of the other owners of the unit.

4 B. During the period of declarant control, votes allocated to a
5 unit may be cast pursuant to a proxy duly executed by a unit
6 owner. If a unit is owned by more than one person, each owner
7 of the unit may vote or register protest to the casting of votes by
8 the other owners of the unit through a duly executed proxy. A
9 unit owner may not revoke a proxy given pursuant to this
10 section except by actual notice of revocation to the person
11 presiding over a meeting of the association. A proxy is void if it
12 is not dated or purports to be revocable without notice. The
13 proxy is revoked on presentation of a later dated proxy
14 executed by the same unit owner. A proxy terminates one year
15 after its date, unless it specifies a shorter term or unless it
16 states that it is coupled with an interest and is irrevocable.

13 C. Notwithstanding any provision in the condominium
14 documents, after termination of the period of declarant control,
15 votes allocated to a unit may not be cast pursuant to a proxy.
16 The association shall provide for votes to be cast in person and
17 by absentee ballot and may provide for voting by some other
18 form of delivery. Notwithstanding section 10-3708 or the
19 provisions of the condominium documents, any action taken at
20 an annual, regular or special meeting of the members shall
21 comply with all of the following if absentee ballots are used:

- 20 1. The absentee ballot shall set forth each proposed action.
- 21 2. The absentee ballot shall provide an opportunity to vote for
22 or against each proposed action.
- 23 3. The absentee ballot is valid for only one specified election or
24 meeting of the members and expires automatically after the
25 completion of the election or meeting.
- 26 4. The absentee ballot specifies the time and date by which the
27 ballot must be delivered to the board of directors in order to be
28 counted, which shall be at least seven days after the date that
29 the board delivers the unvoted absentee ballot to the member.
- 30 5. The absentee ballot does not authorize another person to
cast votes on behalf of the member.

1 D. Votes cast by absentee ballot or other form of delivery are
2 valid for the purpose of establishing a quorum.

3 E. Notwithstanding subsection C of this section, an association
4 for a timeshare plan as defined in section 32-2197 may permit
5 votes by a proxy that is duly executed by a unit owner.

6 F. If the declaration requires that votes on specified matters
7 affecting the condominium be cast by lessees rather than unit
8 owners of leased units all of the following apply:

9 1. The provisions of subsections A and B of this section apply
10 to lessees as if they were unit owners.

11 2. Unit owners who have leased their units to other persons
12 shall not cast votes on those specified matters.

13 3. Lessees are entitled to notice of meetings, access to records
14 and other rights respecting those matters as if they were unit
15 owners. Unit owners shall also be given notice, in the manner
16 prescribed in section 33-1248, of all meetings at which lessees
17 may be entitled to vote.

18 G. Unless the declaration provides otherwise, votes allocated to
19 a unit owned by the association shall not be cast.

20 H. This section does not apply to timeshare plans or
21 associations that are subject to chapter 20 of this title.

22 I. For the purposes of this section, "period of declarant control"
23 means the time during which the declarant or persons
24 designated by the declarant may elect or appoint the members
25 of the board of directors pursuant to the condominium
26 documents or by virtue of superior voting power.

27 6. A.R.S. § 33-1258 provides as follows:

28 A. Except as provided in subsection B of this section, all financial and
29 other records of the association shall be made reasonably available
30 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

1 person designated by the member in writing as the member's
2 representative, the association shall have ten business days to
3 provide copies of the requested records. An association may charge
4 a fee for making copies of not more than fifteen cents per page.

5 B. Books and records kept by or on behalf of the association and the
6 board may be withheld from disclosure to the extent that the portion
7 withheld relates to any of the following:

8 1. Privileged communication between an attorney for the association
9 and the association.

10 2. Pending litigation.

11 3. Meeting minutes or other records of a session of a board meeting
12 that is not required to be open to all members pursuant to section 33-
13 1248.

14 4. Personal, health or financial records of an individual member of
15 the association, an individual employee of the association or an
16 individual employee of a contractor for the association, including
17 records of the association directly related to the personal, health or
18 financial information about an individual member of the association,
19 an individual employee of the association or an individual employee
20 of a contractor for the association.

21 5. Records relating to the job performance of, compensation of,
22 health records of or specific complaints against an individual
23 employee of the association or an individual employee of a
24 contractor of the association who works under the direction of the
25 association.

26 C. The association shall not be required to disclose financial and
27 other records of the association if disclosure would violate any state
28 or federal law.

29 D. This section does not apply to an association for a timeshare plan
30 that is subject to chapter 20 of this title.

7. A.R.S. § 33-1260 provides as follows:

A. For condominiums with fewer than fifty units, a unit owner shall mail or deliver to a purchaser or a purchaser's authorized agent within ten days after receipt of a written notice of a pending sale of the unit, and for condominiums with fifty or more units, the association shall mail or deliver to a purchaser or a purchaser's authorized agent within ten days after receipt of a written notice of a pending sale that contains the name and

1 address of the purchaser, all of the following in either paper or
2 electronic format:

3 1. A copy of the bylaws and the rules of the association.

4 2. A copy of the declaration.

5 3. A dated statement containing:

6 (a) The telephone number and address of a principal contact
7 for the association, which may be an association manager, an
8 association management company, an officer of the association
9 or any other person designated by the board of directors.

10 (b) The amount of the common expense assessment for the
11 unit and any unpaid common expense assessment, special
12 assessment or other assessment, fee or charge currently due
13 and payable from the selling unit owner. If the request is made
14 by a lienholder, escrow agent, unit owner or person designated
15 by a unit owner pursuant to section 33-1256, failure to provide
16 the information pursuant to this subdivision within the time
17 provided for in this subsection shall extinguish any lien for any
18 unpaid assessment then due against that unit.

19 (c) A statement as to whether a portion of the unit is covered by
20 insurance maintained by the association.

21 (d) The total amount of money held by the association as
22 reserves.

23 (e) If the statement is being furnished by the association, a
24 statement as to whether the records of the association reflect
25 any alterations or improvements to the unit that violate the
26 declaration. The association is not obligated to provide
27 information regarding alterations or improvements that occurred
28 more than six years before the proposed sale. Nothing in this
29 subdivision relieves the seller of a unit from the obligation to
30 disclose alterations or improvements to the unit that violate the
declaration, nor precludes the association from taking action
against the purchaser of a unit for violations that are apparent
at the time of purchase and that are not reflected in the
association's records.

(f) If the statement is being furnished by the unit owner, a
statement as to whether the unit owner has any knowledge of

1 any alterations or improvements to the unit that violate the
2 declaration.

3 (g) A statement of case names and case numbers for pending
4 litigation with respect to the unit filed by the association against
5 the unit owner or filed by the unit owner against the association.
6 The unit owner or the association shall not be required to
7 disclose information concerning the pending litigation that
8 would violate any applicable rule of attorney-client privilege
9 under Arizona law.

10 (h) A statement that provides "I hereby acknowledge that the
11 declaration, bylaws and rules of the association constitute a
12 contract between the association and me (the purchaser). By
13 signing this statement, I acknowledge that I have read and
14 understand the association's contract with me (the purchaser). I
15 also understand that as a matter of Arizona law, if I fail to pay
16 my association assessments, the association may foreclose on
17 my property." The statement shall also include a signature line
18 for the purchaser and shall be returned to the association within
19 fourteen calendar days.

20 4. A copy of the current operating budget of the association.

21 5. A copy of the most recent annual financial report of the
22 association. If the report is more than ten pages, the
23 association may provide a summary of the report in lieu of the
24 entire report.

25 6. A copy of the most recent reserve study of the association, if
26 any.

27 7. A statement summarizing any pending lawsuits, except those
28 relating to the collection of assessments owed by unit owners
29 other than the selling unit owner, in which the association is a
30 named party, including the amount of any money claimed.

B. A purchaser or seller who is damaged by the failure of the
unit owner or the association to disclose the information
required by subsection A of this section may pursue all
remedies at law or in equity against the unit owner or the
association, whichever failed to comply with subsection A of
this section, including the recovery of reasonable attorney fees.

1 C. The association may charge the unit owner a fee of no more
2 than an aggregate of four hundred dollars to compensate the
3 association for the costs incurred in the preparation of a
4 statement or other documents furnished by the association
5 pursuant to this section for purposes of resale disclosure, lien
6 estoppel and any other services related to the transfer or use of
7 the property. In addition, the association may charge a rush fee
8 of no more than one hundred dollars if the rush services are
9 required to be performed within seventy-two hours after the
10 request for rush services, and may charge a statement or other
11 documents update fee of no more than fifty dollars if thirty days
12 or more have passed since the date of the original disclosure
13 statement or the date the documents were delivered. The
14 association shall make available to any interested party the
15 amount of any fee established from time to time by the
16 association. If the aggregate fee for purposes of resale
17 disclosure, lien estoppel and any other services related to the
18 transfer or use of a property is less than four hundred dollars on
19 January 1, 2010, the fee may increase at a rate of no more
20 than twenty per cent per year based on the immediately
21 preceding fiscal year's amount not to exceed the four hundred
22 dollar aggregate fee. The association may charge the same fee
23 without regard to whether the association is furnishing the
24 statement or other documents in paper or electronic format.

17 D. The fees prescribed by this section shall be collected no
18 earlier than at the close of escrow and may only be charged
19 once to a unit owner for that transaction between the parties
20 specified in the notice required pursuant to subsection A of this
21 section. An association shall not charge or collect a fee relating
22 to services for resale disclosure, lien estoppel and any other
23 services related to the transfer or use of a property except as
24 specifically authorized in this section. An association that
25 charges or collects a fee in violation of this section is subject to
26 a civil penalty of no more than one thousand two hundred
27 dollars.

25 E. This section applies to a managing agent for an association
26 that is acting on behalf of the association.

27 F. A sale in which a public report is issued pursuant to sections
28 32-2183 and 32-2197.02 or a sale pursuant to section 32-
29 2181.02 is exempt from this section.
30

1 G. This section does not apply to timeshare plans or
2 associations that are subject to chapter 20 of this title.

3 H. For the purposes of this section, unless the context
4 otherwise requires, "unit owner" means the seller of the
5 condominium unit title and excludes any real estate
6 salesperson or real estate broker who is licensed under title 32,
7 chapter 20 and who is acting as a salesperson or broker, any
8 escrow agent who is licensed under title 6, chapter 7 and who
9 is acting as an escrow agent and also excludes a trustee of a
10 deed of trust who is selling the property in a trustee's sale
11 pursuant to chapter 6.1 of this title.

12 8. A.R.S. § 33-1805 provides as follows:

13 A. Except as provided in subsection B of this section, all
14 financial and other records of the association shall be made
15 reasonably available for examination by any member or any
16 person designated by the member in writing as the member's
17 representative. The association shall not charge a member or
18 any person designated by the member in writing for making
19 material available for review. The association shall have ten
20 business days to fulfill a request for examination. On request
21 for purchase of copies of records by any member or any person
22 designated by the member in writing as the member's
23 representative, the association shall have ten business days to
24 provide copies of the requested records. An association may
25 charge a fee for making copies of not more than fifteen cents
26 per page.

27 B. Books and records kept by or on behalf of the association
28 and the board may be withheld from disclosure to the extent
29 that the portion withheld relates to any of the following:

30 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 33-1804.

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,

1 including records of the association directly related to the
2 personal, health or financial information about an individual
3 member of the association, an individual employee of the
4 association or an individual employee of a contractor for the
5 association.

6 5. Records relating to the job performance of, compensation of,
7 health records of or specific complaints against an individual
8 employee of the association or an individual employee of a
9 contractor of the association who works under the direction of
10 the association.

11 C. The association shall not be required to disclose financial
12 and other records of the association if disclosure would violate
13 any state or federal law.

14 **By-Laws cited during hearing**

15 9. Section 3: Annual Meetings⁵

16 The general agenda of the meeting, convened and conducted
17 by the President, is as follows:

- 18 a. Call to Order.
- 19 b. Reading of the Minutes of the previous meeting.
- 20 c. Reading of the Treasurer's Report.
- 21 d. Reading of the President's Report.
- 22 e. Old Business.
- 23 f. New Business.
- 24 g. Election of Officers.
- 25 h. Adjournment.

26 10. Section 5: Elections and Officers⁶

27 The Offices of the Association include President, Vice
28 President, Treasurer and Secretary. These offices are subject
29 to the following guidelines:

30 ⁵ See Exhibit No. R-7 (By-Laws).

⁶ See Exhibit No. R-7 (By-Laws).

- a. Only members can nominate candidates to these offices.
- b. Only members can vote for candidates for these offices.
- c. Only duly elected members can hold these offices.
- d. A member can only hold one office at any given time.
- e. Officers must be elected by a majority vote (at least 51% of the lots represented by eligible voters) present at the meeting by presence or proxy.
- f. Elections can only take place during formally announced meeting[s] of the Association.

CONCLUSIONS OF LAW

- 1. A.R.S. § 41-2198.01 permits an owner or a condominium association 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. The burden of proof at an administrative hearing falls to the party asserting a claim, right, or entitlement and the standard of proof on all issue in this matter is by a preponderance of the evidence. See A.A.C. R2-19-119.
- 3. Proof by “preponderance of the evidence” means that it is sufficient to persuade the finder of fact that the proposition is “more likely true than not.” *In re Arnold and Baker Farms*, 177 B.R. 648, 654 (9th Cir. BAP (Ariz.) 1994).
- 4. Credible testimony and evidence established that the common areas of Montezuma contained a broken wall that required correction, weeds, inadequately sized overflowing trash containers, and peeling paint on the exterior of the condominiums. This Tribunal concludes that Montezuma failed to maintain the common areas of the association in violation of the charged provision of A.R.S. § 33-1247. The fact that Montezuma has now repaired the wall and provided additional trash containers does not alter the fact that Petitioner prevailed on this issue at the March 28, 2013 hearing.

1 5. Credible testimony and evidence established that Montezuma conducted an
2 annual meeting on May 24, 2012. Notice of the meeting was mailed to Complainant in
3 accordance with applicable statute. Petitioner failed to attend the May 24, 2012
4 meeting. This Tribunal concludes that Petitioner failed to meet her burden of proving
5 that Montezuma violated the charged provision of A.R.S. § 33-1248.

6 6. Montezuma failed to hold proper elections as required by applicable statute.
7 Montezuma failed to hold proper elections as required by the provisions of section five
8 of Montezuma's By-Laws. There was no dispute that there was no election. This
9 Tribunal concludes that Montezuma violated the charged provision of A.R.S. § 33-1250.

10 7. Credible testimony and evidence established that Petitioner requested financial
11 information from Montezuma via email on August 12, 2011. Montezuma responded to
12 Petitioner's email but did not provide the requested financial information. There was no
13 dispute that Montezuma provided Petitioner with the requested financial information
14 prior to the administrative hearing in January or February, 2012. Petitioner sustained
15 her burden of proving by a preponderance of the evidence that Montezuma failed to
16 provide Petitioner with the requested financial reports within the ten (10) day period
17 provided by A.R.S. § 32-1258. The Petition at issue was filed with the Department on or
18 about November 14, 2012. A.R.S. § 12-541(5) provides a one-year statute of
19 limitations. Petitioner did not file her petition with the Department within the one year
20 period of time allowed by statute. This Tribunal concludes that the expiration of the one-
21 year statute of limitations precludes finding that Montezuma violated the charged
22 provision A.R.S. § 33-1258.

23
24 **RECOMMENDED ORDER ON REHEARING**

25
26 In view of the foregoing, it is ORDERED that Petitioner be deemed the prevailing
27 party in this matter for two (2) of the four (4) violations charged in her petition.⁷

28 It is further ORDERED that Montezuma shall fully comply with the applicable
29 provisions of A.R.S. § 33-1247, A.R.S. and § 33-1250 in the future.

30

⁷ This Tribunal finds that all four alleged violations were of equal substance.

1 It is further ORDERED that Montezuma pay Petitioner One Thousand Dollars
2 (\$1,000.00), which constitutes one-half (1/2) of her filing fee of Two Thousand
3 dollars (\$2,000.00), to be paid to the Department in this matter within ninety (90)
4 days of this Order.

5 It is further ORDERED that Montezuma shall provide written proof to the
6 Department within one hundred and eighty (180) days of this Order that (1) the
7 weeds in the common areas have been eliminated or properly controlled.

8 *In the event of certification of the Administrative Law Judge Decision by the*
9 *Director of the Office of Administrative Hearings, the effective date of this Order will*
10 *be five (5) days from the date of that certification.*

11 Done this day, January 2, 2014.

12 /s/ M. Douglas
13 Administrative Law Judge

14 Transmitted electronically to:

15
16 Gene Palma, Director
17 Department of Fire Building and Life Safety
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