

1 Pursuant to A.R.S. § 41-1092.09, a party may file a motion for rehearing or
2 review within thirty (30) days after the service of this final Order. A written request for
3 rehearing should be addressed to Joni Cage, 1110 West Washington, Suite 100, Phoenix,
4 Arizona, 85007.

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

9 **DATED this 17th day of January, 2014.**

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14 **Gene Palma, Director**
15 **DEPARTMENT OF FIRE, BUILDING**
AND LIFE SAFETY

16 **The foregoing mailed this 17th day of January, 2014,**
17 **via certified mail receipt no. 7012 1010 0003 7341 4990 to:**

18 Denise Park
19 c/o Harper Law PLC
20 2350 E. Germann Road, Suite 38
21 Chandler, AZ 85286

22 **Copy sent via certified mail receipt no. 7012 1010 0003 7341 5003 to:**

23 Montezuma Fairway Villas Homeowners Association
24 c/o O'Steen & Harrison, PLC
25 300 W. Clarendon Ave., Suite 400
26 Phoenix, AZ 85013-3424
27

1 Copy electronically transmitted to:

2 Office of Administrative Hearings
3 1400 W. Washington, Suite 101
4 Phoenix, AZ 85007

5 By: Joni Cage
6 Joni Cage
7 Complaint Program Manager
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Received
JAN 07 2013

Office of Administrative Hearings
Office of Manufactured Housing

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

DENISE PARK,

No. 12F-H1213010-BFS-rhg

Petitioner,

ADMINISTRATIVE
LAW JUDGE DECISION

vs

MONTEZUMA FAIRWAY VILLAS
HOMEOWNERS ASSOCIATION,

Respondent.

HEARING: November 20, 2013, at 8:00 a.m. The record was held open to allow the parties sufficient time to prepare and submit legal memoranda.

APPEARANCES: Denise Park (hereinafter "Petitioner") was represented by her attorney, J. Roger Wood, Esq., J. Roger Wood PLLC. Montezuma Fairway Villas Homeowners Association (hereinafter "Montezuma") was represented by its attorney, Jonathon V. O'Steen, Esq., O'Steen & Harrison, PLC.

ADMINISTRATIVE LAW JUDGE: M. Douglas

Evidence and testimony were presented and legal memorandums submitted by both parties. On rehearing, Petitioner asserts that the rehearing testimony shed no new light on any of the previous Findings of Fact and Conclusions of Law. Petitioner asserts that the March 15, 2013 Order should remain undisturbed and in full effect. On rehearing, Montezuma asserts that that Montezuma did not violate the provisions of A.R.S. § 33-1250. Montezuma asserts that since only three members of Montezuma were present, no election was required. Montezuma asserts that there was no violation of A.R.S. § 33-1258 because the applicable one-year statute of limitations had expired. Montezuma asserts that Montezuma's failure to maintain the common area for Montezuma was not a violation of A.R.S. § 33-1247 because Petitioner had failed to pay her homeowner's dues for over two years and Montezuma was unable to pay for the maintenance of the common areas without Petitioner's dues. After review of the

1 record for the both the original hearing and the rehearing, the following Findings of
2 Fact, Conclusions of Law and Recommended Order on Rehearing are made:

3 **FINDINGS OF FACT**
4

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

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

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

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

- 14 a) Montezuma failed to maintain the common areas of
15 Montezuma as required by A.R.S. § 33-1247.
16 b) Montezuma failed to conduct open meetings as required by
17 A.R.S. § 33-1248.
18 c) Montezuma failed to hold proper elections as required by
19 A.R.S. § 33-1250.
20 d) Montezuma failed to provide financial information as
21 required by A.R.S. § 33-1258.

22 5. Respondent's Answer to the Petition alleged, in part, as follows:

- 23 a) Petitioner was delinquent in paying her association dues to
24 Montezuma.
25 b) Petitioner was mailed written notice of an association
26 meeting that was held on May 24, 2012, but Petitioner failed to
27 attend to the scheduled meeting or to inform Montezuma of any
28 issues that she wanted to have addressed.
29 c) Although the former association president had failed to call
30 a meeting for several years, very few people ever attended any
of the meetings.
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

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

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

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

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

10. Petitioner testified that Montezuma had refused to provide her with the requested financial records until she filed the petition at issue. Petitioner acknowledged that Montezuma has provided the financial records that she requested. Petitioner stated that she requested that Montezuma furnish financial records in August 2011. Petitioner testified that she requested the information to "see where the money was going."

Petitioner stated that Montezuma was not maintaining the common areas at that time.

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

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

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

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

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

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

19 **Carol Ann Klagge's Testimony²**

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

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

29 19. Ms. Klagge testified that Petitioner had provided Montezuma with several different
30

1 addresses.³ Ms. Klagge stated that she mailed written notice of the May 24, 2012
2 association meeting to Petitioner. Ms. Klagge testified that the written notice was not
3 returned to Montezuma as being undeliverable.

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

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

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

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

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

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

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

15 27. Ms. Klagge testified that the broken wall had been hit by a car. Ms. Klagge stated
16 that Montezuma had not repaired the damaged wall because Montezuma could not
17 afford to repair the wall. Ms. Klagge stated that the broken wall was still functional as a
18 wall.

19 28. Ms. Klagge testified that after the March 28, 2013 hearing on this matter,
20 Montezuma corrected the damaged wall, performed necessary painting work, and
21 provided additional trash dumpsters for the tenants of Montezuma. Ms. Klagge stated
22 that Montezuma was able to perform the remedial actions because Petitioner paid the
23 dues for her three condominium units to Montezuma. Ms. Klagge testified that
24 Montezuma had paid over \$7,000.00 for sewer repairs over the last twelve months.
25 Ms. Klagge stated that Montezuma had very limited financial resources. Ms. Klagge
26 acknowledged that Montezuma had increased its assessments by \$25.00 per lot for
27 2013.

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

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

3 31. Ms. Klagge stated that there was no nomination of officers and no election of
4 officers at the May 24, 2012 meeting. Ms. Klagge testified that only three people were
5 present for the May 24, 2012 meeting. Ms. Klagge acknowledged that the three
6 people present could have conducted a formal election of officers but decided not to.
7 Ms. Klagge stated that Montezuma could not get members to become officers of
8 Montezuma.

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

11 **Helen Bartels' Testimony⁴**

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

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

21
22 **PROVISIONS OF LAW REFERENCED AT HEARING**

23
24 1. A.R.S. § 12-541 provides as follows:

25 There shall be commenced and prosecuted within one year
26 after the cause of action accrues, and not afterward, the
27 following actions:

28

29
30 ⁴ H.R. at 2:17:25-2:21:40, and 11/20/13 H.R. at 1:04-1:11:16.

1 5. Upon a liability created by statute, other than a penalty or
2 forfeiture.

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

4 Unless any provision in the condominium documents requires an
5 annual audit by a certified public accountant, the board of
6 directors shall provide for an annual financial audit, review or
7 compilation of the association. The audit, review or compilation
8 shall be completed no later than one hundred eighty days after
9 the end of the association's fiscal year and shall be made
 available upon request to the unit owners within thirty days after
 its completion.

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

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

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

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

29 4. A.R.S. § 33-1248 provides as follows:
30

1 A. Notwithstanding any provision in the declaration, bylaws or
2 other documents to the contrary, all meetings of the unit
3 owners' association and the board of directors, and any
4 regularly scheduled committee meetings, are open to all
5 members of the association or any person designated by a
6 member in writing as the member's representative and all
7 members or designated representatives so desiring shall be
8 permitted to attend and speak at an appropriate time during the
9 deliberations and proceedings. The board may place
10 reasonable time restrictions on those persons speaking during
11 the meeting but shall permit a member or a member's
12 designated representative to speak once after the board has
13 discussed a specific agenda item but before the board takes
14 formal action on that item in addition to any other opportunities
15 to speak. The board shall provide for a reasonable number of
16 persons to speak on each side of an issue. Persons attending
17 may audiotape or videotape those portions of the meetings of
18 the board of directors and meetings of the members that are
19 open. The board of directors of the association may adopt
20 reasonable rules governing the audiotaping or videotaping of
21 open portions of the meetings of the board and the
22 membership, but such rules shall not preclude such
23 audiotaping or videotaping by those attending. Any portion of a
24 meeting may be closed only if that portion of the meeting is
25 limited to consideration of one or more of the following:

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

24 2. Pending or contemplated litigation.

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

1 4. Matters relating to the job performance of, compensation of,
2 health records of or specific complaints against an individual
3 employee of the association or an individual employee of a
4 contractor of the association who works under the direction of
the association.

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

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

23 C. Notwithstanding any provision in the declaration, bylaws or
24 other condominium documents, for meetings of the board of
25 directors that are held after the termination of declarant control
26 of the association, notice to unit owners of meetings of the
27 board of directors shall be given at least forty-eight hours in
28 advance of the meeting by newsletter, conspicuous posting or
29 any other reasonable means as determined by the board of
30 directors. An affidavit of notice by an officer of the association
is prima facie evidence that notice was given as prescribed by
this section. Notice to unit owners of meetings of the board of
directors is not required if emergency circumstances require

1 action by the board before notice can be given. Any notice of a
2 board meeting shall state the time and place of the meeting.
3 The failure of any unit owner to receive actual notice of a
4 meeting of the board of directors does not affect the validity of
5 any action taken at that meeting.

6 D. Notwithstanding any provision in the declaration, bylaws or
7 other condominium documents, for meetings of the board of
8 directors that are held after the termination of declarant control
9 of the association, all of the following apply:

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

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

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

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

27 E. It is the policy of this state as reflected in this section that all
28 meetings of a condominium, whether meetings of the unit
29 owners' association or meetings of the board of directors of the
30 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.

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

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

4 A. If only one of the multiple owners of a unit is present at a
5 meeting of the association, the owner is entitled to cast all the
6 votes allocated to that unit. If more than one of the multiple
7 owners are present, the votes allocated to that unit may be
8 cast only in accordance with the agreement of a majority in
9 interest of the multiple owners unless the declaration expressly
10 provides otherwise. There is majority agreement if any one of
11 the multiple owners casts the votes allocated to that unit
12 without protest being made promptly to the person presiding
13 over the meeting by any of the other owners of the unit.

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

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

1. The absentee ballot shall set forth each proposed action.

2. The absentee ballot shall provide an opportunity to vote for
or against each proposed action.

1 3. The absentee ballot is valid for only one specified election or
2 meeting of the members and expires automatically after the
3 completion of the election or meeting.

4 4. The absentee ballot specifies the time and date by which the
5 ballot must be delivered to the board of directors in order to be
6 counted, which shall be at least seven days after the date that
7 the board delivers the unvoted absentee ballot to the member.

8 5. The absentee ballot does not authorize another person to
9 cast votes on behalf of the member.

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

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

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

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

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

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

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

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

I. For the purposes of this section, "period of declarant control"
means the time during which the declarant or persons
designated by the declarant may elect or appoint the members

1 of the board of directors pursuant to the condominium
2 documents or by virtue of superior voting power.

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

4 A. Except as provided in subsection B of this section, all financial
5 and other records of the association shall be made reasonably
6 available for examination by any member or any person designated
7 by the member in writing as the member's representative. The
8 association shall not charge a member or any person designated by
9 the member in writing for making material available for review. The
10 association shall have ten business days to fulfill a request for
11 examination. On request for purchase of copies of records by any
12 member or any person designated by the member in writing as the
13 member's representative, the association shall have ten business
14 days to provide copies of the requested records. An association may
15 charge a fee for making copies of not more than fifteen cents per
16 page.

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

20 1. Privileged communication between an attorney for the association
21 and the association.

22 2. Pending litigation.

23 3. Meeting minutes or other records of a session of a board meeting
24 that is not required to be open to all members pursuant to section
25 33-1248.

26 4. Personal, health or financial records of an individual member of
27 the association, an individual employee of the association or an
28 individual employee of a contractor for the association, including
29 records of the association directly related to the personal, health or
30 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.

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.

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

3
4 7. A.R.S. § 33-1260 provides as follows:

5 A. For condominiums with fewer than fifty units, a unit owner
6 shall mail or deliver to a purchaser or a purchaser's authorized
7 agent within ten days after receipt of a written notice of a
8 pending sale of the unit, and for condominiums with fifty or
9 more units, the association shall mail or deliver to a purchaser
10 or a purchaser's authorized agent within ten days after receipt
11 of a written notice of a pending sale that contains the name
12 and address of the purchaser, all of the following in either
13 paper or electronic format:

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

15 2. A copy of the declaration.

16 3. A dated statement containing:

17 (a) The telephone number and address of a principal contact
18 for the association, which may be an association manager, an
19 association management company, an officer of the
20 association or any other person designated by the board of
21 directors.

22 (b) The amount of the common expense assessment for the
23 unit and any unpaid common expense assessment, special
24 assessment or other assessment, fee or charge currently due
25 and payable from the selling unit owner. If the request is made
26 by a lienholder, escrow agent, unit owner or person designated
27 by a unit owner pursuant to section 33-1256, failure to provide
28 the information pursuant to this subdivision within the time
29 provided for in this subsection shall extinguish any lien for any
30 unpaid assessment then due against that unit.

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

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

1 (e) If the statement is being furnished by the association, a
2 statement as to whether the records of the association reflect
3 any alterations or improvements to the unit that violate the
4 declaration. The association is not obligated to provide
5 information regarding alterations or improvements that
6 occurred more than six years before the proposed sale.
7 Nothing in this subdivision relieves the seller of a unit from the
8 obligation to disclose alterations or improvements to the unit
9 that violate the declaration, nor precludes the association from
10 taking action against the purchaser of a unit for violations that
11 are apparent at the time of purchase and that are not reflected
12 in the association's records.

13 (f) If the statement is being furnished by the unit owner, a
14 statement as to whether the unit owner has any knowledge of
15 any alterations or improvements to the unit that violate the
16 declaration.

17 (g) A statement of case names and case numbers for pending
18 litigation with respect to the unit filed by the association against
19 the unit owner or filed by the unit owner against the
20 association. The unit owner or the association shall not be
21 required to disclose information concerning the pending
22 litigation that would violate any applicable rule of attorney-
23 client privilege under Arizona law.

24 (h) A statement that provides "I hereby acknowledge that the
25 declaration, bylaws and rules of the association constitute a
26 contract between the association and me (the purchaser). By
27 signing this statement, I acknowledge that I have read and
28 understand the association's contract with me (the purchaser).
29 I also understand that as a matter of Arizona law, if I fail to pay
30 my association assessments, the association may foreclose on
my property." The statement shall also include a signature line
for the purchaser and shall be returned to the association
within fourteen calendar days.

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

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

1 6. A copy of the most recent reserve study of the association, if
2 any.

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

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

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

D. The fees prescribed by this section shall be collected no
earlier than at the close of escrow and may only be charged
once to a unit owner for that transaction between the parties

1 specified in the notice required pursuant to subsection A of this
2 section. An association shall not charge or collect a fee
3 relating to services for resale disclosure, lien estoppel and any
4 other services related to the transfer or use of a property
5 except as specifically authorized in this section. An association
6 that charges or collects a fee in violation of this section is
7 subject to a civil penalty of no more than one thousand two
8 hundred dollars.

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

11 F. A sale in which a public report is issued pursuant to sections
12 32-2183 and 32-2197.02 or a sale pursuant to section 32-
13 2181.02 is exempt from this section.

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

16 H. For the purposes of this section, unless the context
17 otherwise requires, "unit owner" means the seller of the
18 condominium unit title and excludes any real estate
19 salesperson or real estate broker who is licensed under title
20 32, chapter 20 and who is acting as a salesperson or broker,
21 any escrow agent who is licensed under title 6, chapter 7 and
22 who is acting as an escrow agent and also excludes a trustee
23 of a deed of trust who is selling the property in a trustee's sale
24 pursuant to chapter 6.1 of this title.

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

26 A. Except as provided in subsection B of this section, all
27 financial and other records of the association shall be made
28 reasonably available for examination by any member or any
29 person designated by the member in writing as the member's
30 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.

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

4 1. Privileged communication between an attorney for the
5 association and the association.

6 2. Pending litigation.

7 3. Meeting minutes or other records of a session of a board
8 meeting that is not required to be open to all members
9 pursuant to section 33-1804.

10 4. Personal, health or financial records of an individual
11 member of the association, an individual employee of the
12 association or an individual employee of a contractor for the
13 association, including records of the association directly
14 related to the personal, health or financial information about an
15 individual member of the association, an individual employee
of the association or an individual employee of a contractor for
the association.

16 5. Records relating to the job performance of, compensation of,
17 health records of or specific complaints against an individual
18 employee of the association or an individual employee of a
19 contractor of the association who works under the direction of
the association.

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

23
24 **By-Laws cited during hearing**

25 9. Section 3: Annual Meetings⁵

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

28 a. Call to Order.

29
30 ⁵ See Exhibit No. R-7 (By-Laws).

1 b. Reading of the Minutes of the previous meeting.

2 c. Reading of the Treasurer's Report.

3 d. Reading of the President's Report.

4 e. Old Business.

5 f. New Business.

6 g. Election of Officers.

7 h. Adjournment.

8
9 10. Section 5: Elections and Officers⁶

10 The Offices of the Association include President, Vice
11 President, Treasurer and Secretary. These offices are subject
12 to the following guidelines:

13 a. Only members can nominate candidates to these offices.

14 b. Only members can vote for candidates for these offices.

15 c. Only duly elected members can hold these offices.

16 d. A member can only hold one office at any given time.

17 e. Officers must be elected by a majority vote (at least 51% of
18 the lots represented by eligible voters) present at the meeting
19 by presence or proxy.

20 f. Elections can only take place during formally announced
21 meeting[s] of the Association.

22 **CONCLUSIONS OF LAW**

23
24 1. A.R.S. § 41-2198.01 permits an owner or a condominium association to file a
25 petition with the Department for a hearing concerning violations of planned community
26 documents or violations of statutes that regulate planned communities. That statute
27 provides that such petitions will be heard before the Office of Administrative Hearings.
28
29

30 ⁶ See Exhibit No. R-7 (By-Laws).

1 2. The burden of proof at an administrative hearing falls to the party asserting a
2 claim, right, or entitlement and the standard of proof on all issue in this matter is by a
3 preponderance of the evidence. See A.A.C. R2-19-119.

4 3. Proof by "preponderance of the evidence" means that it is sufficient to persuade
5 the finder of fact that the proposition is "more likely true than not." *In re Arnold and*
6 *Baker Farms*, 177 B.R. 648, 654 (9th Cir. BAP (Ariz.) 1994).

7 4. Credible testimony and evidence established that the common areas of
8 Montezuma contained a broken wall that required correction, weeds, inadequately
9 sized overflowing trash containers, and peeling paint on the exterior of the
10 condominiums. This Tribunal concludes that Montezuma failed to maintain the
11 common areas of the association in violation of the charged provision of A.R.S. § 33-
12 1247. The fact that Montezuma has now repaired the wall and provided additional
13 trash containers does not alter the fact that Petitioner prevailed on this issue at the
14 March 28, 2013 hearing.

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

20 6. Montezuma failed to hold proper elections as required by applicable statute.
21 Montezuma failed to hold proper elections as required by the provisions of section five
22 of Montezuma's By-Laws. There was no dispute that there was no election. This
23 Tribunal concludes that Montezuma violated the charged provision of A.R.S. § 33-
24 1250.

25 7. Credible testimony and evidence established that Petitioner requested financial
26 information from Montezuma via email on August 12, 2011. Montezuma responded to
27 Petitioner's email but did not provide the requested financial information. There was no
28 dispute that Montezuma provided Petitioner with the requested financial information
29 prior to the administrative hearing in January or February, 2012. Petitioner sustained
30 her burden of proving by a preponderance of the evidence that Montezuma failed to

1 provide Petitioner with the requested financial reports within the ten (10) day period
2 provided by A.R.S. § 32-1258. The Petition at issue was filed with the Department on
3 or about November 14, 2012. A.R.S. § 12-541(5) provides a one-year statute of
4 limitations. Petitioner did not file her petition with the Department within the one year
5 period of time allowed by statute. This Tribunal concludes that the expiration of the
6 one-year statute of limitations precludes finding that Montezuma violated the charged
7 provision A.R.S. § 33-1258.

8
9 **RECOMMENDED ORDER ON REHEARING**

10
11 In view of the foregoing, it is ORDERED that Petitioner be deemed the prevailing
12 party in this matter for two (2) of the four (4) violations charged in her petition.⁷

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

15 It is further ORDERED that Montezuma pay Petitioner One Thousand Dollars
16 (\$1,000.00), which constitutes one-half (1/2) of her filing fee of Two Thousand
17 dollars (\$2,000.00), to be paid to the Department in this matter within ninety (90)
18 days of this Order.

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

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

25 Done this day, January 2, 2014.

26 /s/ M. Douglas
27 Administrative Law Judge
28

29 Transmitted electronically to:

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

1 Gene Palma, Director
2 Department of Fire Building and Life Safety

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