

1                                   **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2   The Gregory M and Donna P Hulbert  
3   Family Trust dated May 25, 1995,  
4   Petitioner,

5   v.

6   The Summit at Copper Square  
7   Condominium Association,  
8   Respondent.

No. 24F-H055-REL  
No. 24F-H049-REL

**ADMINISTRATIVE LAW JUDGE  
DECISION**

9                   **HEARING:** August 28, 2024, and October 24, 2024. Record held open until  
10   January 1, 2025.

11                   **APPEARANCES:**

12                   For Petitioners: Donna Hulbert.

13                   For Respondents: Attorney Daryl Wilson.

14                   **ADMINISTRATIVE LAW JUDGE:** Samuel Fox

15                   **EXHIBITS ADMITTED INTO EVIDENCE:** Notice of Hearing Files, provided by the  
16   Department of Real Estate, for 24F-H055-REL and 24-H049-REL. Petitioners' Exhibits  
17   1–8, 12, 14–20, 22, 24, 25, 27, 27A, 29, 30, 36–38, 42–45, and 52. Respondent's Exhibits  
18   1, 5, 7, 8, 9, 12.

19                                   **FINDINGS OF FACT**

20                                   **PETITIONERS' CLAIM**

21                   1.     The Summit at Copper Square Condominium Association (Respondent)  
22   was a Condominium Association in Phoenix, Arizona for Summit at Copper Square,  
23   located at 310 S 4<sup>th</sup> Street, Phoenix, Arizona 85004 (the Property).

24                   2.     The Gregory M and Donna P Hulbert Family Trust dated May 25, 1995  
25   (Petitioner), represented by Donna Hulbert, owned Unit 1302 in the Property, and was a  
26   member of Respondent.

3. Petitioner filed two petitions with the Arizona Department of Real Estate (Department): a four-issue petition on or about April 23, 2024, and a one-issue petition on or about June 5, 2024. The petitions alleged that Respondent had violated the CC&Rs, §§ 3.3.1, 3.3.2, 4.6.1, 4.6.2, 4.13, 5.1, 7.1, 7.12, 7.14, and A.R.S. § 33-1248(E), (F). Petitioner paid a \$2,500.00 filing fee for five issues; accordingly, only five issues could be considered. Based upon the issues presented in the petitions and the presentation at hearing, more than five issues were presented. As stated in the petitions, the issues were as follows:

1. Beginning around May 2022 and continuing to the present the HOA began borrowing money from the reserves to fund operating expenses and further failed to adequately fund reserves to cover future expected expenses due to an inadequate budget which violates sections 7.1, 7.12, and 7.14 of the Condominium Declaration and leads to this petition.
2. On January 19, 2024, the HOA installed a “puppy potty” on the common elements in violation of sections 4.6.1 and 4.6.2 and constituting a nuisance; leading to this petition to remove the offending addition.
3. In October of 2023 the HOA allowed the use of the common area by a news crew to cover baseball crowds for the post season and has approved their return in 2024, which is in violation of sections 3.3.1, 3.3.2, and 4.13 of the Condominium Declaration, resulting in this petition.
4. Since 2023 and continuing to the present the HOA does not give the required notice for each and every occasion in which the a quorum of the board is present to discuss association business, nor does the HOA provide adequate information as to the agenda items that are noticed to allow any meaningful evaluation of the items for comments by interested homeowners, which is in violation of ARS 33-1248 E and F, and gives rise to this petition.<sup>1</sup>
- [5.] This petition seeks to enforce Section 5.1 of the Declaration of Condominium which mandates the Association shall maintain, repair and replace all Common Elements; specifically it requests repair of the structural damage evidenced by concrete cracks in the garage ceiling as set forth in the report of Rowley and Reynolds dated March 14, 2023 and the report of Gervasio & Assoc., Inc., Consulting Engineers dated April 12, 2024.<sup>2</sup>

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<sup>1</sup> H049 Not. of Hr'g. File, Homeowners Association (HOA) Dispute Process Petition. (All errors included in original.)

<sup>2</sup> H055 Not. of Hr'g. File, Homeowners Association (HOA) Dispute Process Petition. (All errors included in original.)

1           4.       Respondent, through its Attorney, Daryl Wilson, filed written answers to  
2 the petitions, denying the allegations.

3           5.       The Department referred the petitions to the Office of Administrative  
4 Hearings, an independent state agency, for an evidentiary hearing.

5           6.       The matters were consolidated on August 21, 2024.

6           7.       Hearings were held on August 28, 2024, and October 24, 2024.  
7 Administrative Notice was taken of the agency record. Donna Hulbert testified on behalf  
8 of Petitioner and called Jay Parry Erb, a former member of Respondent's Board of  
9 Directors (Board), to testify. Greg Axelrod, president of the Board as of hearing, and  
10 Zackary Beckham, former president of the Board, testified for Respondent.

11                           **REFERENCED DECLARATION PROVISIONS<sup>3</sup>**

12           8.       Article 3.3.1 of the Declaration provided in relevant part as follows:  
13 Every Owner, Lessee and Occupant shall have a right and  
14 easement of enjoyment in and to the Common Elements, which  
15 right and easement shall be appurtenant to and shall pass with the  
16 title to every Unit, subject to the following provisions:

17           (a)      The right of the Association to adopt reasonable rules and  
18 regulations governing the use of the Common Elements. . . .

19           9.       Article 3.3.2 of the Declaration provided in relevant part as follows:  
20 The easement of enjoyment in and to the Common Elements shall not be  
21 conveyed, transferred, alienated or encumbered separate and apart from  
22 a Unit. Such right and easement of enjoyment in an to the Common  
23 Elements shall be deemed to be conveyed, transferred, alienated or  
24 encumbered upon the sale of any Unit, notwithstanding that the  
25 description in the instrument of conveyance, transfer, alienation or  
26 encumbrance may not refer to such right and easement.

27           10.      Article 4.6.1 of the Declaration provided in relevant part as follows:  
28 Except as expressly permitted by this Section no animals. . . shall be  
29 maintained or kept in any Unit or on any other portion of the  
30 Condominium. For purposes of this Section, a "Permitted Pet" shall mean  
31 a dog, cat, fish or small bird of a variety commonly kept as a household  
32 pet. Permitted Pets may kept in a Unit if they are kept, bred or raised  
33 solely as domestic pets and not for commercial purposes. Not more than  
34 a total of two (2) dogs or two domestic cats, or a combination thereof (but

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35 <sup>3</sup> See Condominium Declaration for The Summit at Copper Square, A Condominium, Compl. Exh. 1.  
36 (Errors present in the original).

not to exceed a two (2) total) shall be kept or maintained in a Unit; provided, however that except for service animals for a handicapped person, no dog or cat that weighs more than forty (40) pounds shall be kept in any Unit.

11. Article 4.6.2 of the Declaration provided in relevant part as follows: Owners and Occupants must use the service elevator to take a Permitted Pet in and out of the Building. No Permitted Pet shall be allowed in the Common Elements of the Building, except for ingress or egress by use of the service elevator. No Permitted pet shall be allowed to make an unreasonable amount of noise, cause an odor which is detectable outside the Unit, or be an annoyance to a person of ordinary sensibilities. No Permitted Pet shall be allowed to run loose on any part of the Common Elements, and no Permitted Pet shall be allowed on a Patio or Balcony. All Permitted Pets shall be kept on a leash when outside a Unit and all dogs shall be directly under the control of the Owner, Lessee or Occupant at all times. Any person bringing a Permitted Pet onto the Common Elements shall immediately remove any feces or urine deposited on the Common Elements by the Permitted Pet, and such person shall be liable to the Association for the cost of any cleaning of the Common Elements or the repair of any damage to the Common Elements caused or required by the Permitted Pet. Any Unit where a Permitted Pet is kept or maintained shall at all times be kept in a neat and clean condition. No structure for the care, housing, confinement, or training of any Permitted Pet shall be maintained on any portion of the Common Elements or in any Unit so as to be visible from the exterior of the Building or any other Unit. Each Owner, Lessee, Occupant or other Person bringing or keeping a Permitted Pet within the Condominium shall be absolutely liable to other Owners, Lessees, and Occupants and their invitees for any damage to Persons or Property caused by such Permitted Pet. Permitted Pets shall not be permitted to urinate or defecate on any Patio or Balcony, and no Permitted Pet shall be left unattended on any Patio or Balcony.

12. Article 4.13 of the Declaration provided in relevant part as follows: No nuisance shall be permitted to exist or operate upon the Condominium, and no activity shall be conducted upon the Condominium which is offensive or detrimental to any portion of the Condominium or to any Owner, Lessee or Occupant or is an annoyance to any Owner, Lessee or Occupant or which interferes with the quiet enjoyment of a Unit by the Owner, Lessee or Occupant thereof, including any criminal or illegal activity by any Owner, Lessee or Occupant or their guests. Except as part of a security system, no exterior speakers, horns, whistles, bells or other sound devices shall be located, used or placed on the Condominium without the prior written approval of the Board of Directors.

13. Article 5.1 of the Declaration provided in relevant part as follows: The Association shall maintain, repair and replace all Common Elements, except for the Limited Common Elements which the Unit Owners are obligated to maintain, repair and replace pursuant to Section 5.2. The Association shall also maintain, repair and replace the concrete floors of the Balconies and the walls or railings enclosing the Balconies, but the

1 Association shall not be responsible for the maintenance, repair or  
2 replacement of any carpeting or other floor covering that may be installed  
3 on a Balcony by the Owner, Lessee or Occupant thereof with the approval  
4 of the Association. The cost of all such maintenance, repairs and  
5 replacements shall be a Common Expense and shall be paid for by the  
6 Association. The Board of Directors shall be the sole judge as to the  
7 appropriate maintenance, repair and replacement of all Common  
8 Elements, but all Common Elements shall be maintained in good condition  
9 and repair at all times. The Declarant may, but shall not be obligated to,  
10 provide to the Association, a maintenance program for the maintenance,  
11 care, up-keep, repair, inspection and replacement of the Common  
12 Elements and Units (the "Maintenance Program"). If the Declarant  
13 provides a Maintenance Program to the Association, the Board of  
14 Directors shall utilize the Maintenance Program in the determination of the  
15 appropriate maintenance of the Common Elements. Neither the Declarant  
16 nor any of the Declarant's contractors, subcontractors, architects,  
17 engineers or consultants shall be liable to the Association or any Unit  
18 Owner for any maintenance, repair or replacement of the Common  
19 Elements that is required as a result of the failure to maintain, repair and  
20 replace the Common Elements in accordance with the Maintenance  
21 Program. If the Declarant does not provide a Maintenance Program to the  
22 Association, then the Association shall maintain, repair and replace the  
23 Common Elements in good condition and repair and in accordance with all  
24 manufacturer's specifications. No Owner, Lessee, Occupant or other  
25 Person shall construct or install any Improvements on the Common  
26 Elements or alter, modify or remove any Common Elements without the  
27 prior written approval of the Board of Directors. No Owner, Lessee,  
Occupant or other person shall obstruct or interfere with the Association in  
performance of the Association's maintenance, repair and replacement of  
the Common Elements or any components of the Units which the  
Association is obligated to maintain, repair or replace. Owners, Lessees  
and Occupants shall immediately notify the Association of (a) any broken  
or leaking water pipes, toilets, cloths washers or hot water heaters and (b)  
any water intrusion into the Buildings from the roofs or windows, and any  
Owner Lessee or Occupant who fails to provide such notification shall be  
liable to the Association and the other Owners, Lessees and Occupants  
for any damages that may be caused by such failure.

14. Article 7.1 of the Declaration provided in relevant part as follows:  
7.1.1 At least thirty (30) days before the beginning of each fiscal year of  
the Association commencing with the fiscal year in which the first Unit is  
conveyed to a Purchaser, the Board of Directors shall adopt a budget for  
the Association containing an estimate of the total amount of funds which  
the Board of Directors believes will be required during the ensuing fiscal  
year to pay all Common Expenses including, but not limited, to: (a) the  
amount required to pay the cost of maintenance, management, operation,  
repair and replacement of the Common Elements and those parts of the  
Units, if any, which the Association has the responsibility of maintaining,  
repairing, and replacing; (b) the cost of wages, materials, insurance  
premiums, services, supplies and other expenses required for the  
administration, operation maintenance and repair of the Condominium; (c)

the amount required to render to the Unit Owners all services required to be rendered by the Association under the Condominium Documents; and (d) such amounts as may be necessary to provide reserves for contingencies and replacements. The budget shall separately reflect any Common Expenses to be assessed against less than all of the Units. The Board of Directors is expressly authorized to adopt and amend budgets for the Association, and no ratification of any budget by the Unit Owners shall be required.

15. Article 7.12 of the Declaration provided in relevant part as follows:

7.12.1 Except as provided in Subsection 7.12.2, each Person who purchases or otherwise purchases or otherwise becomes the Owner of a Unit shall pay to the Association, immediately upon becoming the Owner of the Unit, a contribution (the "Reserve Contribution") to the reserves to be established pursuant to Section 7.14. The amount of the initial Reserve Contribution shall be set by the Board of Directors prior to the conveyance of the first Unit to a Purchaser. The Board of Directors may from time to time thereafter increase or decrease the amount of the Reserve Contribution.

16. Article 7.14 of the Declaration provided in relevant part as follows:

7.14.1 The Board of Directors shall establish reserves for the future periodic maintenance, repair or replacement of the major components of the Common Elements which the Association is obligated to maintain, repair and replace. The reserves may be funded from Regular Assessments, the Reserve Contributions paid pursuant to Section 7.12, the Initial Working Capital Fund payments paid pursuant to Section 7.11 or any other revenue of the Association. All amounts designated as reserves shall be deposited by the Board of Directors in a separate bank account (the "Reserve Account") to be held for the purposes for which they are collected and are to be segregated from and not commingled with any other funds of the Association. Withdrawal of funds from the Association's reserve account shall require the signatures of either (a) two (2) members of the Board of Directors; or (b) one (1) member of the Board of Directors and an officer of the Association who is not also a member of the Board of Directors. The Board of Directors shall obtain a reserve study at least once every three years, which study shall at a minimum include (a) identification of the major components of the Common Elements which the Association is obligated to repair, replace, restore or maintain which, as of the date of the study, have a remaining useful life of less than thirty (30) years; (b) identification of the probable remaining useful life of the identified major components as of the date of the study; (c) an estimate of the cost of repair, replacement, restoration, or maintenance of the identified major components during and at the end of their useful life; (d) an estimate of the total annual contribution necessary to defray the cost to repair, replace, restore, or maintain the identified major components during and at the end of their useful life, after subtracting total reserve funds as of the date of the study.

1           17.     Article 1.12 of the Declaration defined "Common Elements" to be "all  
2 portions of the Condominium other than the Units."

3           18.     Article 1.13 of the Declaration defined "Common Expenses" to be as  
4 follows:

5           the actual or estimated costs or expenses incurred or to be incurred by the  
6 Association or financial liabilities of the Association including, but not  
7 limited to, the following:

8           (a) the cost of maintenance, management, operation, repair and  
9 replacement of the Common Elements and all other areas within the  
10 Condominium which are maintained by the Association;

11           (b) the cost of management and administration of the Association,  
12 including, but not limited to, compensation paid by the Association to  
13 managers, accountants, attorneys, architects and employees;

14           (c) the cost of any utilities, trash pickup and disposal, landscaping, and  
15 other services benefiting the Unit Owners and their Units to the extent  
16 such services are paid for by the Association;

17           (d) the cost of fire, casualty, liability, worker's compensation and other  
18 insurance maintained by the Association as provided in this Declaration;

19           (e) reasonable reserves as deemed appropriate by the Board or required  
20 by the Condominium Documents;

21           (f) the cost of bonding of the directors, officers and employees of the  
22 Association, any professional managing agent or any other person  
23 handling the funds of the Association;

24           (g) all real property taxes or assessments levied against the Condominium  
25 as a whole or separately against the Common Elements;

26           (h) amounts paid by the Association for the discharge of any lien or  
27 encumbrance levied against the Common Elements or portions thereof;

          (i) any cost incurred by the Association in furtherance of the purposes of  
the Association, the discharge of the obligations imposed on the  
Association by the Condominium Documents or the Condominium Act or  
the exercise by the Association of any of the powers or rights granted to  
the Association by the Condominium Documents or the Condominium Act.

19           19.     Article 1.15 of the Declaration defined "Condominium" to be "the Parcel,  
20 together with the Building and all other Improvements located thereon."

21           20.     Article 13.12 of the Declaration provided in relevant part as follows:

22           Each Unit Owner shall be responsible for compliance by his agents,  
23 tenants, guests, invitees, licensees and their respective servants, agents,  
24 and employees with the provisions of the Condominium Documents. A  
25 Unit Owner's failure to insure compliance by such Persons shall be  
26 grounds for the same action available to the Association or any other Unit  
27 Owner by reason of such Unit Owner's own noncompliance.

## REFERENCED STATUTES

### **21.** A.R.S. § 33-1248(E) provided as follows:

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

1. The agenda shall be available in advance for 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 for the forty-eight hours required for notice. At any emergency meeting called by the board of directors, the board of directors may act only on emergency matters.

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.

### **22.** A.R.S. § 33-1248(F) provided as follows:

F. 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 in advance 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 or members is taken. Toward this end, any person or entity that is charged with the interpretation of these provisions, including members of the board of directors and any community manager, shall take into account this declaration of policy and shall construe any provision of this section in favor of open meetings.

## HEARING EVIDENCE

### **COMPLAINT NUMBER 1:**

Beginning around May 2022 and continuing to the present the HOA began borrowing money from the reserves to fund operating expenses and further failed to adequately fund reserves to cover future expected expenses due to an inadequate budget which violates sections 7.1, 7.12, and 7.14 of the Condominium Declaration and leads to this petition.

1           23.     Respondent had reserve studies completed every three years, and each  
2 study concluded with the issuance of a report and budget plan. The study reports  
3 described themselves as budgeting tools. The executive summaries described the  
4 objective of a reserve study and budgeting plan to be a fully-funded reserve account,  
5 minimizing the risk of cash flow issues and a resulting special assessment. The study  
6 assumed that interest on the reserve accounts would accrue to the reserves at a rate of  
7 either 1.00 or 2.00 percent annually after taxes; it also assumed inflation rate of 3.00  
8 percent annually. The study did not prohibit alternative funding sources.<sup>4</sup>

9           24.     The studies assigned to each component a *Useful Life*, which was “[t]he  
10 estimated time, in years, that a common area component [could] be expected to serve  
11 its intended function.”<sup>5</sup> Components did not need to be replaced when the *Useful Life*  
12 expires. For example, the 2023 study extended the Water Softener’s expected use  
13 beyond its *Useful Life*.<sup>6</sup>

14           25.     The 2017 study stated that the reserve was 38.2% funded, which was  
15 characterized as “fair” (not weak or strong) and “medium” risk for special assessments.  
16 It recommended monthly contributions of \$26,300, and the then-current monthly  
17 contribution was \$22,879.<sup>7</sup>

18           26.     The 2020 study stated that the reserve was 48.1% funded, which was  
19 characterized as “fair” (not weak or strong) and “medium” risk for special assessments.  
20 It recommended monthly contributions of \$30,000, and the then-currently monthly  
21 contribution was \$27,083.<sup>8</sup>

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23  
24           <sup>4</sup> Pet. Exh. 36 at 2, 5; Pet. Exh. 37 at 2, 4; Pet. Exh. 38 at 2, 4.

25           <sup>5</sup> Pet. Exh. 38 at 47.

26           <sup>6</sup> Pet. Exh. 37 at 56.

27           <sup>7</sup> Pet. Exh. 36.

<sup>8</sup> Pet. Exh. 37.

1           27.     The 2023 study stated that the reserve was 38.5% funded, which was  
2 characterized as “fair” (not weak or strong) and “medium” risk for special assessments.  
3 It recommended monthly contributions of \$45,000 in 2024, and the then-current monthly  
4 contribution was \$27,083.<sup>9</sup>

5           28.     Respondent’s property management company, First Service, conducted a  
6 variance analysis, dated July 31, 2024, which indicated that the Association had  
7 contributed \$317,556, year to date, to the reserve account, amounting to an average of  
8 approximately \$45,365.14 per month.<sup>10</sup> The budgeted contribution for the same period  
9 was \$270,158, amounting to an average of \$38,594.00 per month.<sup>11</sup>

10          29.     Ms. Hulbert argued that the Association should follow the reserve study.

11          30.     Ms. Hulbert argued that components should be replaced when their  
12 *Useful Life* expired in the reserve study. She believed it was inappropriate to defer to a  
13 building engineer regarding whether a component needed to be replaced. She  
14 contended that the reserve study providers were experts, and utilizing an engineer as  
15 an alternative expert for determining when items on the reserve list need to be replaced  
16 was inappropriate.

17          31.     Ms. Hulbert argued that she believed the reserve account was  
18 underfunded. She believed that the money was being misused for operating expenses.  
19 She further testified that by underfunding the reserve account, Respondent was more  
20 likely to need a special assessment to pay for items that ought to have been covered by  
21 the reserve account.

22          32.     Ms. Hulbert argued that even though the reserve funds were kept in a  
23 separate reserve account, the funds were being comingled with operating account funds

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24 <sup>9</sup> Pet. Exh. 38.

25 <sup>10</sup> Pet. Exh. 45 at 13.

26 <sup>11</sup> *Id.* at 10.

1 because use of the reserve funds were not clearly attributed to specific expenditures  
2 when money was withdrawn from the account. Ms. Hulbert contended that all funds  
3 that were withdrawn from the reserve account should have been directly traceable to  
4 the expenditure for which the funds were withdrawn.

5 33. Ms. Hulbert introduced several instances of approved withdrawals from  
6 the reserve accounts, which included two signatures.<sup>12</sup> Ms. Hulbert believed that it was  
7 improper to approve expenditures “not to exceed” a certain amount instead of as a  
8 specific dollar amount. She also stated that some uses of the funds were improper.

9 34. Ms. Hulbert argued that reserves were being mismanaged, positing that  
10 only items on the component list should be paid out of reserves.

11 35. Ms. Hulbert argued that the budget was underfunded in some specific  
12 areas, including water damage repair, legal costs, and taxes on taxable income.

13 36. Ms. Hulbert expressed her concern that the Association may not be  
14 paying bills.

15 37. Mr. Erb testified that he was Treasurer of the Board from approximately  
16 April 2023 to August 2023, when he resigned because he believed another Board  
17 member may try to have him removed from the Board by petition.

18 38. Mr. Erb testified that the variance report did not meet his expectations,  
19 stating he would expect to see an analysis section, an impact section, and a corrective  
20 action section.

21 39. Mr. Erb testified that budgeting was not done in accordance with generally  
22 accepted accounting principles.

23 40. Mr. Erb testified that when he joined the board, he was given documents  
24 that indicated an amount *due to reserves*, approximately \$390,000, which represented

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25 <sup>12</sup> Pet. Exh. 52.

1 money borrowed from the reserve account. He requested proof of the required  
2 signatures from First Service for the reserve withdrawals, but those were never provided  
3 to him. Based on conversations with First Services employees, he believed that funds  
4 had been withdrawn without following the proper procedures.

5 41. On or around May 5, 2023, Mr. Erb met with the First Services manager,  
6 controller, and accountant and a prior member of the Board; they discussed the loans  
7 from reserves, confirming his understanding that the funds were used for operating  
8 expenses and budget overruns. Employees at First Services believed that the Board  
9 had the authority to withdraw funds from the reserve account.

10 42. Mr. Erb testified about his concern that the documentation did not fully  
11 reflect a "loan" and that the line item reflecting due to reserves was insufficient.

12 43. Mr. Erb testified that the proposed budget increases were insufficient to  
13 meet real expenditures and make up for deficiencies.

14 44. Mr. Beckham testified about the budget process for the 2023 budget. He  
15 explained that a committee of residents and First Service made budget  
16 recommendations. Then, the Board considered the recommendations and put together  
17 a proposed budget. He testified that First Service proposed a four percent assessment  
18 increase for 2023.

19 45. Mr. Axelrod testified that the first budget he worked on was for 2024.  
20 There were several versions of a budget. Ultimately, the Board convened a committee  
21 of residents to propose another budget, and their proposal was close to the final budget.

22 46. Mr. Axelrod testified that there had been a history of flood damage and  
23 elevated legal fees. He testified that there were some years when assessments were  
24 not increased, but for 2024, assessments were increased by seven and a half percent.

1           47.     Mr. Axelrod testified that the 2024 budget met the reserve study's  
2 proposed \$45,000 per month contribution into the reserve account. Mr. Axelrod testified  
3 that First Service informed him that all contributions to the reserve fund were  
4 considered, which would include interest income.

5           48.     Mr. Axelrod testified that while the reserve study proposed a useful life for  
6 listed items, the building's engineer knew the building well, including how things were  
7 operating and when replacement would actually be necessary.

8           49.     Ms. Hulbert testified about water damage in 2024, and Mr. Axelrod  
9 testified that water damage was only relevant to the budget if it was the Association's  
10 responsibility; for example, when water jetting causes damage.

11          50.     As of July 2024, the budget had underestimated both operating expenses  
12 and income. Overall, the Association had a budget surplus.<sup>13</sup>

13                                   **COMPLAINT NUMBER 2:**

14     On January 19, 2024, the HOA installed a " puppy potty" on the common elements in  
15 violation of sections 4.6.1 and 4.6.2 and constituting a nuisance; leading to this petition  
to remove the offending addition.

16          **51.**     On or about January 19, 2024, Mr. Axelrod unveiled the puppy potty for  
17 use by the community. The puppy potty was located on the roof of the Property.<sup>14</sup>

18          **52.**     It was undisputed that the puppy potty was for use by dogs.

19          53.     Ms. Hulbert testified that the puppy potty may be a good idea; regardless,  
20 she was concerned about flagrant violations of the Declaration and community rules.  
21 Ms. Hulbert also testified that the puppy potty emitted an offensive odor. Ms. Hulbert  
22 also expressed safety concerns related to use of the roof.

23          54.     Mr. Axelrod testified that the general manager had proposed installing the  
24 puppy potty on the roof. Mr. Axelrod testified that the roof was never used because it

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25 <sup>13</sup> Pet. Exh. 45.

26 <sup>14</sup> Pet. Exh. 22.

1 had been kept locked; accordingly, he did not believe that it was part of the Common  
2 Elements. Mr. Axelrod testified that maintenance cleans the area at least three days  
3 per week.

4 55. Mr. Axelrod testified that the board did not take any action regarding the  
5 puppy potty.

6 **COMPLAINT NUMBER 3:**

7 In October of 2023 the HOA allowed the use of the common area by a news crew to  
8 cover baseball crowds for the post season and has approved their return in 2024, which  
is in violation of sections 3.3.1, 3.3.2, and 4.13 of the Condominium Declaration,  
resulting in this petition.

9 56. According to Mr. Axelrod's testimony, news crews had been on the  
10 Property twice: once for opening day of the Diamondbacks season and once for the  
11 World Series. During that time, the Association was having a party in the fifth floor pool  
12 area, and the news crews were limited to a specific area within the party. He also  
13 stated that there was a block party occurring at that time.

14 57. Ms. Hulbert argued that the common areas were for owners and guests,  
15 not for strangers. Ms. Hulbert believed that having strangers on the property was a  
16 violation of occupants' right to quiet enjoyment. Ms. Hulbert testified that the news crew  
17 was shining lights into units, flying a drone around the building, and that they were left  
18 unaccompanied at times.

19 58. Mr. Axelrod testified that he disagreed that the news crews were ever left  
20 unattended. He testified that he did not know whether the drone belonged to the news  
21 crew.

22 59. Ms. Hulbert testified that she was told that an easement was granted to  
23 the news crew for use of the property, but that not easement had been granted.

1           60.     Ms. Hulbert argued that there should have been a board action to allow  
2 the news crew on the property, but that only one or two board members approved their  
3 presence at the party.

4                                   **COMPLAINT NUMBER 4:**

5 Since 2023 and continuing to the present the HOA does not give the required notice for  
6 each and every occasion in which the a quorum of the board is present to discuss  
7 association business, nor does the HOA provide adequate information as to the agenda  
8 items that are noticed to allow any meaningful evaluation of the items for comments by  
9 interested homeowners, which is in violation of ARS 33-1248 E and F, and gives rise to  
10 this petition.

11           61.     Ms. Hulbert testified that the board often met in an executive session  
12 without providing information about what they were discussing. Ms. Hulbert asserted  
13 that the board needed to provide notice about topics being discussed in a closed  
14 sessions.

15           62.     Mr. Axelrod testified that agendas included when executive sessions were  
16 being held. He said that the building manager would also send notice of executive  
17 sessions. Mr. Axelrod testified that executive sessions were limited to permissible  
18 topics, and such sessions were only held when those topics need to be discussed. Mr.  
19 Axelrod testified that during his first meeting, some impermissible issues may have  
20 been discussed because he did not know about the limitations; by his second meeting,  
21 impermissible discussions were stopped.

22           63.     Ms. Hulbert testified that agendas often do not provide enough information  
23 to allow meaningful input by residents, and at meetings, some topics, which were not on  
24 the agenda, were discussed.

25           64.     Mr. Axelrod testified that all topics that the Board intended to discuss at  
26 meetings were included on the agendas. He also testified that if an urgent topic arose  
27 within 48 hours of the meeting, the issue might be addressed even if it was not on the  
agenda. He believed that had only happened once.

65. The parties both discussed remote attendance at meetings.

**COMPLAINT NUMBER 5:**

This petition seeks to enforce Section 5.1 of the Declaration of Condominium which mandates the Association shall maintain, repair and replace all Common Elements; specifically it requests repair of the structural damage evidenced by concrete cracks in the garage ceiling as set forth in the report of Rowley and Reynolds dated March 14, 2023 and the report of Gervasio & Assoc., Inc., Consulting Engineers dated April 12, 2024.

66. In 2015, the Respondent hired Gervasio & Assoc., Inc. (Gervasio) to plan a pool and deck renovation. During that process, Gervasio conducted site visits and identified "water penetration through the 5th floor slab," which was also the 4th floor ceiling.<sup>15</sup> Gervasio's plan was approved by the City of Phoenix, and a contractor was hired to perform the work pursuant to the approved plans.<sup>16</sup>

67. Around January 2020, a water leak from the pool and cracking in the parking garage were identified and investigated.<sup>17</sup>

68. Respondent hired Rowley & Reynolds, forensic engineers, to investigate the leak at the end of 2022, and the Rowley & Reynolds report was issued on or about March 14, 2023.<sup>18</sup> Regarding the parking garage, the report recommended that a structural engineer investigate the cracks.<sup>19</sup> Ms. Hulbert reviewed the report and provided feedback to Respondent on April 23 and 26, 2023.<sup>20</sup>

69. Gervasio was hired to inspect the cracking in the parking garage's 4th floor ceiling, inspecting the site on September 29, 2023.<sup>21</sup>

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<sup>15</sup> Pet. Exh. 7.

<sup>16</sup> Pet. Exh. 5.

<sup>17</sup> Pet. Exh. 5.

<sup>18</sup> Resp. Exh. 12.

<sup>19</sup> *Id.*

<sup>20</sup> Pet. Exh. 2.

<sup>21</sup> Pet. Exh. 5.

70. Gervasio inspected the site on January 24, 2024.<sup>22</sup> Gervasio provided its report to Respondent on or about April 12, 2024.<sup>23</sup> Its conclusions included the following:

Regardless of the source of the water leaks, the water infiltration is causing ongoing damage to the 5th floor structural slab. The extent of the damage to the reinforcing bars in the slab cannot be determined without further investigation.

We recommend a water test protocol be developed to determine the source(s) of the water infiltration into the crawl space and structural slab. The testing needs to start at selected areas of the lower deck and progress upward to higher levels, thus eliminating areas that do not cause leaks. Once the source(s) is discovered, remediation of the waterproofing system needs to be determined.

Destructive investigation also needs to be performed to determine the extent of damage to the structural concrete slab, walls, and columns. Based on this investigation, structural repair drawings need to be prepared and executed.<sup>24</sup>

71. The Petition was filed on June 5, 2024. Petitioner provided a substantial amount of information about what occurred after the petition date. While it was not relevant to the petition, the following is a brief summary:

Respondent fixed the leaks in the swimming pool.<sup>25</sup>

Respondent hired Gervasio to determine the extent of any damage to the building caused by the leak.<sup>26</sup>

Gervasio did not find signs of adverse structural movement, but they indicated that the extent of potential damage was not visible at the time of review.<sup>27</sup> The letter provided was incomplete. It failed to include Gervasio's recommendations, which was the most importation portion of this document for the given issue.

Respondent hired Gervasio to proceed with destructive testing.<sup>28</sup>

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

<sup>23</sup> *Id.*

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

<sup>25</sup> Pet. Exh. 6.

<sup>26</sup> Pet. Exh. 6.

<sup>27</sup> Pet. Exh. 7.

<sup>28</sup> Pet. Exh. 8.

Respondent notified the community that more inspections were needed around October 6, 2024.<sup>29</sup>

72. Ms. Hulbert testified that the destructive testing had been completed, and results of that test were still outstanding.

73. Ms. Hulbert testified that she believed Respondent was not acting expediently enough to correct the issue and that Respondent's pace was a violation of its obligations under Section 5.1. Ms. Hulbert believed that the issue would not have been addressed without the petition.

74. Mr. Axelrod testified that when he joined the Board, there was a pool leak, and nothing had been done for about sixteen months. However, the steps outlined above had been taken. Mr. Axelrod testified that he had not been told about any emergency structural concerns.

#### **CONCLUSIONS OF LAW**

1. A.R.S. § 32-2199 authorized the administrative law judge to “adjudicate complaints regarding and ensure compliance with . . . [t]itle 33, chapter 9 and condominium documents.” This Tribunal was not authorized to adjudicate complaints arising from other laws or regulations.

2. A.R.S. § 32-2199.01 permitted a member of a condominium association to file a petition with the Department for a hearing concerning the condominium association’s alleged violations as set forth in Title 33, Chapter 9. This matter lay within the Department’s jurisdiction. That statute provided that such petitions would be heard before the Office of Administrative Hearings.

3. A.R.S. § 32-2199.02 authorized the administrative law judge to “order any party to abide by the statute, condominium documents, community documents or contract provision at issue and may levy a civil penalty on the basis of each violation.”

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<sup>29</sup> Pet. Exh. 3.

1 This Tribunal was not authorized to order other remediation or order civil penalties for  
2 other conduct.

3 4. Petitioners bear the burden of proof to establish that Respondent violated  
4 applicable statutes, CC&Rs, and/or Bylaws by a preponderance of the evidence.<sup>30</sup>  
5 Respondent bears the burden to establish affirmative defenses by the same evidentiary  
6 standard.<sup>31</sup>

7 5. "A preponderance of the evidence is such proof as convinces the trier of  
8 fact that the contention is more probably true than not."<sup>32</sup> A preponderance of the  
9 evidence is "[t]he greater weight of the evidence, not necessarily established by the  
10 greater number of witnesses testifying to a fact but by evidence that has the most  
11 convincing force; superior evidentiary weight that, though not sufficient to free the mind  
12 wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one  
13 side of the issue rather than the other."<sup>33</sup>

14 **COMPLAINT NUMBER 1:**

15 Beginning around May 2022 and continuing to the present the HOA began borrowing  
16 money from the reserves to fund operating expenses and further failed to adequately fund  
reserves to cover future expected expenses due to an inadequate budget which violates  
sections 7.1, 7.12, and 7.14 of the Condominium Declaration and leads to this petition.

17 1. This claim and the arguments accompanying it appeared to allege multiple  
18 violations, including (1) improperly withdrawing funds from the reserve account, (2)  
19 using reserve funds for operating expenses, (3) inadequately funding the reserves to  
20 cover future expected expenses, and (4) inadequate budget practices.

21 2. Petitioner only paid for a single claim related to the stated issues.  
22  
23

24 <sup>30</sup> See A.A.C. R2-19-119(A) and (B)(1); see also *Vazzano v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952).

25 <sup>31</sup> See A.A.C. R2-19-119(B)(2).

26 <sup>32</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

27 <sup>33</sup> BLACK'S LAW DICTIONARY 1220 (8<sup>th</sup> ed. 1999).

3. Based on the testimony and documents provided, this Tribunal understood Petitioner's primary concern to be that the Respondent's 2024 budget was inadequate to fund the reserve account, leaving the Unit Owners at risk of a special assessment.

4. As stated in Declaration Section 7.1.1, the Board's obligation was to account for the total amount of funds it believed would be required for the stated purposes, including operating expenses and reserve contributions.

5. The Declaration did not require a perfect budget; it required a reasonable estimate. The Declaration did not require the budget to account for unexpected circumstances. The Declaration did not require the budget to reflect past unexpected circumstances if the Board did not believe such expenses would reoccur.

6. The Declaration did not require the reserve account to be funded at a specific level. The Declaration did not require the budget to reflect the reserve study.

7. Pursuant to Section 7.14 of the Declaration, the reserve account was “for the future periodic maintenance, repair or replacement of the major components of the Common Elements which the Association was obligated to maintain, repair and replace.” Therefore, the funds must have been used for that purpose. The Declaration further stated that the reserve study was tasked with the “identification of the major components of the Common Elements which the Association is obligated to repair, replace, restore or maintain which, as of the date of the study, have a remaining useful life of less than thirty (30) years.” Accordingly, the reserve study only represents a subset of major components that reserve funds may be spent on.

8. As of July 2024, the budget had a surplus.

9. As of July 2024, the reserve contributions had exceeded those recommended by the reserve study.

10. The preponderance of the evidence failed to establish that the Board violated its obligation to “adopt a budget for the Association containing an estimate of the total amount of funds which the Board of Directors believes will be required during the ensuing fiscal year.”

## COMPLAINT NUMBER 2:

2. On January 19, 2024, the HOA installed a “puppy potty” on the common elements in violation of sections 4.6.1 and 4.6.2 and constituting a nuisance; leading to this petition to remove the offending addition.

11. Declaration Section 4.6.2 states that (1) pets were not allowed in the Common Elements of the Building except to enter and leave; (2) pets were not allowed to make detectable odors outside the Unit; (3) pets were not allowed to run loose in the Common Elements; (4) all urine and feces shall be immediately removed, and the pet's custodian was liable for cleaning costs and any related damages; and (5) no structure for the care of pets was allowed on the Common Elements.

12. “Common Elements” included all parts of the building except for the units. Accordingly, the roof area was part of the Common Elements, even if it was previously inaccessible to residents.

13. The preponderance of the evidence established that the puppy potty was a structure for the care of pets, which accommodated pets other than entering and leaving the building.

14. The preponderance of the evidence established that the puppy potty violated Section 4.6.2 of the Declaration.

### COMPLAINT NUMBER 3:

3. In October of 2023 the HOA allowed the use of the common area by a news crew to cover baseball crowds for the post season and has approved their return in 2024, which is in violation of sections 3.3.1, 3.3.2, and 4.13 of the Condominium Declaration, resulting in this petition.

1           15. Declaration Sections 3.3.1 and 3.3.2 guaranteed an easement of  
2 enjoyment in and to the Common Elements, which provided owners, lessees, and  
3 occupants rights to use the Common Elements in accordance with reasonable rules and  
4 regulations for the use of the Common Elements.

5           16. Declaration Section 4.13 prohibited nuisances from being permitted to  
6 operate or exist on the Condominium. It further prohibited activity “which is offensive or  
7 detrimental to [the Condominium, an owner, a lessee, or an occupant]” or was an  
8 annoyance or interfered with the right of quiet enjoyment of a Unit. It also prohibited the  
9 use of sound devices “without the prior written approval of the Board of Directors.”

10           17. The Declaration did not define “offensive” or “annoyance” and neither  
11 party proffered definitions for those terms. Accordingly, this Tribunal considered  
12 “offensive” to be activities that a reasonable person would be offended by, and  
13 “annoyance” to be activities that unreasonably bothered a reasonable occupant.

14           18. Declaration section 13.12 allowed Unit Owners to have agents, tenants,  
15 guests, invitees, licensees, and their respective servants, agents, and employees on the  
16 Property and placed responsibility for such individuals on the Unit Owner.

17           19. The Declaration did not prohibit “strangers” from entering the Property or  
18 enjoying the Common Elements; it allowed invitees and the invitee’s servants, agents,  
19 and employees. The Declaration did not prohibit parties on the Common Elements.

20           20. Petitioner argued that the presence of strangers, lights, and noise were  
21 violations of the Declaration. Petitioner did not argue that the party was impermissible.

22           21. Petitioner conceded that news crews would be permitted in a unit, but  
23 argued that in a Common Space, it was inappropriate.

24           22. The preponderance of the evidence did not establish whether lights,  
25 drones, or noises were the fault of the news crew. Notably, the news crew were invited

1 to the Association's pool party, which was above a block party in the middle of  
2 downtown in the fifth largest city in the United States.

3 23. The preponderance evidence did not establish that the circumstances  
4 were unreasonable. Ordinary components of a party, such as lights and noise, were not  
5 inherently offensive or an annoyance just because one was unfamiliar with those  
6 individuals causing the noise and light.

7 24. The preponderance of the evidence did not establish that the news crews  
8 were not invited to the Property. The preponderance of the evidence did not establish  
9 that the news crews were left alone at any time.

10 25. The preponderance of the evidence did not establish that any resident  
11 was deprived of their rights provided with their easements or that any easement was  
12 conveyed, transferred, alienated, or encumbered.

13 26. Petitioner failed to meet her burden to demonstrate that the news crews  
14 infringed upon any resident's easement of enjoyment.

15 27. Petitioner failed to meet her burden to demonstrate that the news crews  
16 were "offensive" or an "annoyance" or that they infringed upon the right of quiet  
17 enjoyment.

18 **COMPLAINT NUMBER 4:**

19 Since 2023 and continuing to the present the HOA does not give the required notice for  
20 each and every occasion in which the a quorum of the board is present to discuss  
21 association business, nor does the HOA provide adequate information as to the agenda  
items that are noticed to allow any meaningful evaluation of the items for comments by  
interested homeowners, which is in violation of ARS 33-1248 E and F, and gives rise to  
this petition.

22 28. This claim and the arguments accompanying it appeared to allege multiple  
23 violations, including (1) failure to provide notice for every board meeting, (2) insufficient  
24 agendas to allow residents to meaningfully prepare, (3) elimination of remote access,  
25 and (4) refusal to provide documents necessary to meaningfully prepare for meetings.

29. Petitioner only paid for a single claim related to the stated issues.

30. Based on the citations, testimony, and documents, this Tribunal understood Petitioner's primary concern to be the contents of agendas.<sup>34</sup>

31. A.R.S. § 33-1248(E) required agendas to be available and community access to be provided when a quorum of the Board of Directors meet.

32. A.R.S. § 33-1248(F) set forth policy in favor of open meetings and reasonably informative agendas.

33. The Board of Directors were not required to provide all available information to participants in advance of meetings. The Board's obligation was to provide "the information that was reasonably necessary to inform the unit owners of the matters to be discussed or decided."

34. The preponderance of the evidence established that on at least one occasion, the Board failed to include a non-emergency topic on its agenda, leaving unit owners uninformed about what would be discussed or decided.<sup>35</sup>

### COMPLAINT NUMBER 5:

This petition seeks to enforce Section 5.1 of the Declaration of Condominium which mandates the Association shall maintain, repair and replace all Common Elements; specifically it requests repair of the structural damage evidenced by concrete cracks in the garage ceiling as set forth in the report of Rowley and Reynolds dated March 14, 2023 and the report of Gervasio & Assoc., Inc., Consulting Engineers dated April 12, 2024.

35. Declaration Section 5.1 required that the Association maintain, repair, and replace all Common Elements to ensure the Common Elements were “maintained in good condition and repair at all times.” The Board of Directors had sole discretion over the appropriate maintenance, repair, and replacement of all Common Elements.

<sup>34</sup> A.R.S. § 33-1248(C) addressed notice of closed meetings, and Petitioner did not include that citation.

<sup>35</sup> Additionally, the preponderance of the evidence supports that on at least one occasion, the Board discussed inappropriate topics in an executive session.

36. Good condition and repair was not a defined term, and arguments were not presented for a specific definition. Accordingly, this Tribunal will adopt structurally sound as the guidepost for this specific issue. No argument was made that mere unsightliness was sufficient to violate this provision.

37. For over a year after cracks were identified, the Board of Directors did not take any action. In 2022, 2023, and 2024, however, the Board of Directors engaged in monitoring and testing of the cracks. The Board of Directors, if slowly, followed the recommendations of the experts hired to evaluate the damage.

38. Petitioner's belief that the Board of Directors would not have acted without the Petition was not compelling to demonstrate that the Board of Directors failed to comply with the requirements set forth in the Declaration.

39. The preponderance of the evidence did not establish that the Board of Directors failed to fulfil its obligations even if Petitioner was dissatisfied with the pace of action by the Board of Directors.

## ORDER

**IT IS ORDERED** that Petitioners be deemed the prevailing party in this matter regarding Petition Issues 2 and 4.

**IT IS ORDERED** that Respondent be deemed the prevailing party in this matter regarding Petition Issues 1, 3 and 5.

**IT IS ORDERED** that Respondent pay Petitioners the filing fee of \$1,000, to be paid directly to Petitioners within thirty (30) days of this Order.

**IT IS ORDERED** Respondent is directed to comply with the requirements of A.R.S. § 33-1248 and its Community Documents going forward.

A Civil Penalty of \$500 is deemed appropriate in this matter for Issue 2.

NOTICE

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

Done this day, January 21, 2025.

/s/ Samuel Fox  
Administrative Law Judge

Transmitted by either mail, e-mail, or facsimile January 21, 2025 to:

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By: OAH Staff